6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2019-0303; FRL-10007-76-Region 4**]**

SIP Call Withdrawal and Air Plan Approval; NC: Large Internal Combustion Engines NOx Rule Changes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA), Region 4 is approving a portion of a State Implementation Plan (SIP) revision submitted by the state of North Carolina, through the North Carolina Division of Air Quality (NC DAQ), in a letter dated June 5, 2017, which changes North Carolina's SIP-approved rule regarding nitrogen oxides (NOx) emissions from large internal combustion engine sources. In so doing, Region 4 is first adopting an alternative policy regarding startup, shutdown, and malfunction (SSM) exemption provisions in the North Carolina SIP that departs from the national policy on this subject, as described in EPA's June 12, 2015 action (2015 SSM SIP Call Action). Accordingly, Region 4 is also withdrawing the SIP Call issued to North Carolina for exemptions contained in the State's existing SIP-approved provisions for SSM events. This action is limited to the SIP Call issued to North Carolina and

the associated evaluation of the North Carolina SIP and does not otherwise change or alter EPA's 2015 SSM SIP Call Action.

DATES: This rule is effective on [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R04-OAR-2019-0303. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., 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 www.regulations.gov or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Joel Huey, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Huey can be reached by phone at (404) 562-9104 or via electronic mail at huey.joel@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

The following topics are discussed in this preamble:

I. Background for This Action

On June 5, 2019, EPA Region 4 announced that it was considering adopting an alternative policy regarding startup, shutdown and malfunction (SSM) exemptions in state implementation plans (SIPs), and, if adopted, also proposed to withdraw the SIP Call issued to North Carolina in 2015 and to approve a SIP revision submitted by NC DAQ in 2017.[1] The 60-day comment period closed on August 5, 2019. Region 4 received public comments, all of which are included in the public docket for this action at www.regulations.gov. This notice includes summaries of the adverse comments received and responses to those comments. After

[1] SIP Call Withdrawal and Air Plan Approval; NC: Large Internal Combustion Engines NOx Rule Changes, Proposed Rule, 84 FR 26031 (June 5, 2019). Hereafter, the June 5, 2019, notice of proposed rulemaking will be referred to as the June 5, 2019, NPRM.

reviewing and carefully considering the comments received, as described more fully in this notice, today Region 4 is (1) adopting an alternative policy applicable to North Carolina for SSM exemption provisions in the North Carolina SIP and withdrawing the SIP Call issued to North Carolina, and (2) approving the SIP revision submitted by NC DAQ, through a letter dated June 5, 2017, which seeks to change North Carolina's SIP-approved rule regarding NOx emissions from large internal combustion engine sources at 15A N.C. Admin. Code (NCAC) 2D .1423.

Relevant to this action, in the 2015 SSM SIP Call Action EPA restated its national policy prohibiting the inclusion of provisions in SIPs that exempt excess emissions during periods of SSM. In that action, EPA also issued findings that certain SIP provisions in 36 states (applicable in 45 statewide and local jurisdictions) were substantially inadequate to meet the Clean Air Act (CAA or Act) requirements and thus issued "SIP Calls" pursuant to CAA section 110(k)(5) for all of those states and local jurisdictions.[2] That action includes a SIP Call for North Carolina to address two specific provisions in the State's implementation plan that provide discretion to the state agency to exempt emissions from being considered a violation of an otherwise applicable state rule, in certain circumstances.[3] Also relevant, the June 5, 2017, SIP submission Region 4 is approving in this action revises a different provision in the North Carolina code that was not included in the 2015 SSM SIP Call Action, but which includes a sub-provision that automatically

[2] *See* State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Final Rule, 80 FR 33839 (June 12, 2015).
[3] *Id.* at 33964. EPA issued a SIP Call to North Carolina regarding provisions 15A NCAC 2D .0535(c) and 15A NCAC 2D .0535(g).

exempts periods of SSM, not to exceed 36 consecutive hours, and scheduled maintenance activities from regulation.[4]

The rationale for the alternative policy on SSM exemptions that Region 4 is applying to the North Carolina SIP is articulated in Section III of this notice and in Sections III and IV of the June 5, 2019, NPRM.[5] Region 4's decision to withdraw the SIP Call previously issued to North Carolina is substantiated by the adoption of the alternative policy. Region 4's approval of the revision to North Carolina's SIP-approved rule regarding NOx emissions from large internal combustion engine sources at 15A NCAC 2D .1423 is described in Section IV of this notice and Section V of the June 5, 2019, NPRM.[6]

II. EPA's SSM SIP Policy and SIP Call Issued to North Carolina

In the final 2015 SSM SIP Call Action, EPA updated and restated its national policy regarding provisions in SIPs that exempt periods of SSM events from otherwise applicable emission limitations. Referencing previously issued guidance documents and regulatory actions, the Agency expressed its interpretation of the CAA that SIP provisions cannot include exemptions from emission limitations for emissions during SSM events.[7] EPA's position in the 2015 SSM SIP Call Action, based in part on D.C. Circuit precedent, was that the general definitions provision of the CAA providing that an emission limitation must apply to a source

[4] 15A NCAC 02D .1423 was not included in the 2015 SSM SIP Call Action because, in that action, EPA elected to first focus its review on the specific provisions that had already been identified by Sierra Club in its petition regarding the SSM SIP Call. *See* 80 FR at 33880.
[5] *See* 84 FR at 26033–39.
[6] *Id.* at 26039–040.
[7] *See* 80 FR at 33976.

"continuously" means that an approved SIP cannot include periods during which emissions from sources are legally or functionally exempt from regulation.

Also in the 2015 SSM SIP Call Action, the Agency defined the term "automatic exemption" as a generally applicable SIP provision that does not consider periods of excess emissions as violations of an applicable emission limitation if certain conditions existed during the exceedance period.[8] The Agency defined a "director's discretion provision" as a regulatory provision that authorizes a state regulatory official to grant exemptions or variances from otherwise applicable emission limitations or to otherwise excuse noncompliance with applicable emission limitations, where the regulatory official's determination would be binding on EPA and the public.[9] The Agency defined "emission limitation" in the SIP context, relying on the general definition set forth in CAA section 302 ("Definitions"), as a legally binding restriction on emissions from a source or source category, such as a numerical emission limitation, a numerical emission limitation with higher or lower levels applicable during specific modes of source operation, a specific technological control measure requirement, a work practice standard, or a combination of these things as components of a comprehensive and continuous emission limitation.[10] As stated in the 2015 SSM SIP Call Action, the Agency took the position that an emission limitation "must be applicable to the source continuously, *i.e.*, cannot include periods during which emissions from the source are legally or functionally exempt from regulation."[11]

[8] *Id.* at 33977.
[9] *Id.*
[10] *Id.*
[11] *Id.*

Relying substantially on its interpretation of the general definition of "emission limitation" in CAA section 302(k)—specifically, that that definition provides for the limitation of emissions of air pollutants "on a continuous basis"—the Agency explained its position that exemptions from emission limitations in SIPs, whether automatic or discretionary, are not permissible in SIPs.[12] EPA explained that even a brief exemption from an otherwise applicable limit would render the emission limitation non-continuous and therefore not consistent with the CAA section 302(k) definition of "emission limitation."[13]

With respect to discretionary exemptions, the Agency took the position that a regulatory official's grant of an exemption pursuant to a "director's discretion" exemption could result in air agency personnel modifying a SIP requirement without going through the CAA statutory process for SIP revisions.[14] In the 2015 SSM SIP Call Action, the Agency did allow that some director's discretion exemptions could be included in SIPs, if those exemptions were structured such that variances or deviations from the otherwise applicable emission limitation or SIP requirement were not valid as a matter of federal law unless and until EPA approved the exercise of the director's discretion as a SIP revision.[15]

As further support for the Agency's position on excluding SSM exemption provisions in SIPs, the 2015 SSM SIP Call Action relied on *Sierra Club v. Johnson.*[16] In that 2008 case, the

[12] *Id.*
[13] *Id.*
[14] *Id.* at 33918 (referencing CAA sections 110(k)(3), which establishes the framework for EPA to fully or partially approve SIP submittals, and 110(l) and 193, which specify that revisions to SIPs must be submitted to EPA and can be approved only if the Administrator determines that the revisions meet specific requirements, including non-interference with attainment and reasonable further progress and equivalent or greater emission reductions in nonattainment areas). *See also id.* at 33977–78.
[15] *Id.* at 33978.
[16] 551 F.3d 1019 (D.C. Cir. 2008).

D.C. Circuit evaluated the validity of an SSM exemption in the General Provisions[17] of EPA rules issued under CAA section 112 ("Hazardous Air Pollutants"). Reading CAA sections 112 and 302(k) together, the D.C. Circuit found that "the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously."[18] In the 2015 SSM SIP Call Action, EPA interpreted the *Sierra Club* decision regarding CAA section 112 requirements and applied the reasoning of that decision to the requirements of EPA's rules issued under CAA section 110 ("Implementation Plans"), specifically CAA section 110(a)(2)(A), which provides that SIPs shall include "enforceable *emission limitations* and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable requirements of this chapter."[19] EPA's application of the *Sierra Club* decision to CAA section 110 SIP requirements was based on an understanding that the D.C. Circuit was interpreting the definition of "emission limitation" in CAA section 302(k) that applies generally to the Act. Following this reasoning, EPA determined that *Sierra Club* was consistent with the Agency's position, as expressed in previously issued guidance documents and regulatory actions that prohibited exemption provisions for otherwise applicable emission limits in SIPs (such as automatic exemptions granted for SSM events).[20]

As part of the 2015 SSM SIP Call Action, EPA found that 15A NCAC 2D .0535(c) and 15A NCAC 2D .0535(g) were substantially inadequate to meet CAA requirements because they

[17] Subpart A of 40 CFR part 63 ("National Emission Standards for Hazardous Air Pollutants for Source Categories").
[18] *Sierra Club*, 551 F.3d at 1027–28.
[19] *See* 42 U.S.C. 7410(a)(2)(A) (emphasis added).
[20] *See, e.g.*, 80 FR at 33852, 33874, 33892–94.

allow exemptions from otherwise applicable emission limitations for excess emissions[21] that may occur during malfunctions and during periods of startup and shutdown, respectively, at the discretion of the state agency. [22] On that basis, EPA issued a SIP Call pursuant to CAA section 110(k)(5) to North Carolina with respect to these provisions.

III. Region 4's Alternative Policy on Automatic and Director's Discretion Exemption Provisions in the North Carolina SIP and Withdrawal of the North Carolina SIP Call

A. Automatic Exemption Provisions

As discussed in the June 5, 2019, NPRM, in reviewing the North Carolina SIP revision at issue, as well as the North Carolina SIP in its entirety, Region 4 has considered the national policy regarding SSM exemptions[23] in SIPs included in the 2015 SSM SIP Call Action, described above, and has determined that there is a reasonable alternative way for Region 4 to consider SSM provisions in the North Carolina SIP: after evaluating the SIP comprehensively and determining that the SIP, as a whole, is protective of the national ambient air quality standards (NAAQS or standards), Region 4 concludes that automatic SSM exemptions are allowable in that SIP.[24] Further, the alternative policy's interpretation of the relevant CAA

[21] The North Carolina SIP defines *excess emissions* as "an emission rate that exceeds any applicable emission limitation or standard allowed by any regulation in Sections .0500 or .0900 of this Subchapter or by a permit condition." In this final action, we clarify that exemptions allowed under rules 2D .0535(c) and 2D .0535(g) apply only to numerical emission limits of the North Carolina SIP and do apply to any of the SIP's requirements to utilize emission control devices or to employ work practice standards that reduce emissions.
[22] *See* 80 FR at 33964.
[23] Throughout this notice, we use the term "exemption" to refer to automatic exemptions for SSM events in general; specific references to director's discretion provisions are referred to as "director's discretion exemptions."
[24] The 2015 SSM SIP Call Action explained that while a SIP may contain provisions that apply during periods of SSM, the applicability of those provisions was not plain on the face of the SIP provision. *See generally* 80 FR at 33943. As explained in this notice, EPA Region 4 has determined that, for the North Carolina SIP, it is reasonable to take a broader perspective of evaluation of the SIP and its provisions that ensure attainment and maintenance of the NAAQS.

provisions, together with the specific automatic SSM provisions in the North Carolina SIP, make it reasonable for Region 4 to find that the SIP meets the applicable requirements of the CAA and therefore do not mandate a finding that the SIP is substantially inadequate.

The compilation of state and federal requirements in the North Carolina SIP result from the federal-state partnership that is the foundation of the CAA, as well as the various requirements of the Act. Although the North Carolina SIP contains SSM exemptions for limited periods applicable to discrete standards, the SIP is composed of numerous planning requirements that are collectively NAAQS-protective. The North Carolina SIP's overlapping requirements, described more fully later in this section, provide additional protection of the standards such that Region 4 concludes that the SIP adequately provides for attainment and maintenance of the NAAQS, even if the SIP allows exemptions to specific emission limits for discrete periods, such as SSM events. This redundancy helps to ensure attainment and maintenance of the NAAQS, one of the goals of Congress when it created the SIP adoption and approval process in the CAA.[25] The fact that North Carolina does not currently have any nonattainment areas for any NAAQS, even though the exemption provisions have been included in the State's implementation plan, supports the conclusion that the SSM exemptions do not interfere with attainment and maintenance of the NAAQS.[26] Region 4 appropriately considered all of these factors when evaluating the North Carolina SIP.

[25] *See*, *e.g.*, H.R. Rep. No. 91-1783 at 193–95 (1970).
[26] As of the effective date of this notice, no areas of North Carolina are designated nonattainment for any NAAQS. *See* https://www3.epa.gov/airquality/greenbook/ancl3.html.

At the outset, Region 4 notes that it maintains discretion and authority to change its CAA interpretation from a prior position. In *FCC v. Fox Television Stations, Inc.*, the U.S. Supreme Court plainly stated an agency's obligation with respect to changing a prior policy:

> We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The 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.[27]

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."[28] In so doing, the Court emphasized 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."[29] 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.[30]

As discussed above, the 2015 SSM SIP Call Action updated and restated EPA's SSM policy that SIPs containing any type of SSM exemptions were not approvable because

[27] *See* 556 U.S. 502, 514 (2009) (referencing *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).
[28] *Id.* at 515.
[29] *Id.*
[30] *Id.* at 515–16.

exemptions from emission limitations created the possibility that a state could not ensure attainment or maintenance of the NAAQS for one or more criteria pollutants. This policy is predicated on the idea that a requirement limiting emissions would not apply "on a continuous basis"— and thus would not itself constitute an "emission limitation"— if the SIP permitted exemptions for any period of time from that requirement.[31] Under this policy, the lack of a continuous standard was viewed as creating a substantial risk that exemptions could permit excess emissions that could ultimately result in a NAAQS violation. Region 4 acknowledges the policy position updated and restated in the 2015 SSM SIP Call Action, and the associated rationale. However, as will be discussed further in this section, Region 4 has determined that the general requirements in CAA section 110 to attain and maintain the NAAQS and the latitude provided to states through the SIP development process create a framework in which a state may be able to ensure attainment and maintenance of the NAAQS notwithstanding the presence of SSM exemptions in the SIP. Further, for the reasons articulated in this notice, Region 4 has concluded that the automatic SSM exemptions in the North Carolina SIP do not mandate a finding of substantial inadequacy pursuant to CAA section 110(k)(5) or preclude a finding under CAA section 110(k)(3) that the SIP meets all of the applicable requirements of the CAA. Additionally, as discussed in Section IV, and consistent with the policy rationale explained in this notice, Region 4 has determined that the SIP revision will not interfere with attainment, reasonable further progress, or any other applicable requirement of the CAA.

Consistent with the interpretation provided in the June 5, 2019, NPRM, this alternative policy is reasonable because the D.C. Circuit's decision in *Sierra Club* does not, on its face,

[31] *See* 42 U.S.C. 7602(k) (providing the general definition of "emission limitation" and "emission standard").

apply to SIPs and actions taken under CAA section 110. In the 2015 SSM SIP Call Action at 80 FR 33839, EPA extended the legal reasoning of the D.C. Circuit's *Sierra Club* decision regarding SSM exemptions from CAA section 112 rules to CAA section 110 SIP approved rules; that extension of the *Sierra Club* decision supported the Agency's existing position that SSM exemptions were inconsistent with CAA SIP requirements. At the time, the Agency interpreted CAA section 302(k) as applying uniformly and requiring that the "emission limitations" required under the CAA, whether under section 110 or section 112, be continuous as a general matter.[32] Further consideration of the issue has shown that an alternative reading of the application of the *Sierra Club* decision to CAA section 110 is reasonable, and consideration of the facts surrounding the SIP revision submitted by the state of North Carolina, and an evaluation of the North Carolina SIP as a whole, show that such an interpretation is appropriate in this instance. Simply stated, while the *Sierra Club* decision did not allow sources to be exempt from complying with CAA section 112 emission limitations during periods of SSM, that finding is not necessarily binding on CAA section 110 and EPA's consideration of SIPs under that section.

The interpretation offered today is informed by and consistent with the distinct structures and purposes of CAA sections 110 and 112. As explained in the June 5, 2019, NPRM, the D.C. Circuit in *Sierra Club* specifically referred to CAA section 112 when it framed Petitioners' argument and found that the Agency "constructively reopened consideration of the exemption from section 112 emission standards during SSM events."[33] The court's analysis reads the definition of emission limitation and standard at CAA section 302(k) in the context of CAA

[32] *See* 80 FR at 33874.
[33] *Sierra Club*, 551 F.3d at 1026.

section 112: "When sections 112 and 302(k) are read together then, Congress has required that there must be continuous section 112-compliant standards."[34] Further, specific to CAA section 112 rules, the court explained, "[i]n requiring that sources regulated under section 112 meet the strictest standards, Congress gave no indication that it intended the application of [maximum achievable control technology] standards to vary based on different time periods."[35] In *Sierra Club*, the court found that when EPA promulgates standards pursuant to CAA section 112, CAA section 112-compliant standards must apply continuously. The stringency of CAA section 112 was thus an important element of the court's decision,[36] and the court did not make any statement explicitly applying its CAA section 112-dependent holding beyond the emissions standards promulgated under CAA section 112.

While EPA chose to rely on the *Sierra Club* decision in the 2015 SSM SIP Call Action, such reliance was not required—the court's decision does not speak to whether the rationale articulated with respect to SSM exemptions in CAA section 112 standards necessarily applies to SIPs submitted and reviewed under CAA section 110. As discussed below, the *Sierra Club* decision, on its face, does not interpret section 110, and there are valid reasons for not extending the reasoning to the North Carolina SIP provisions at issue. CAA section 112 sets forth a prescriptive standard-setting framework; CAA section 110 does not. CAA sections 112 and 110 have different goals and establish different EPA roles in implementation. Given the *Sierra Club* decision's singular focus on CAA section 112 standards, and the vastly different purposes and

[34] *Id.* at 1027.
[35] *Id.* at 1028.
[36] *See id.* at 1027 ("Section 112(d) provides that '[e]missions standards' promulgated thereunder must require MACT standards."); *id.* at 1028 (explaining that Congress intended that "sources regulated under section 112 meet the strictest standards.").

implementation approaches between CAA sections 110 and 112, there is a reasonable basis for interpreting the *Sierra Club* decision as only applying to CAA section 112.

The purpose of CAA section 112 is fundamentally different than the purpose of CAA section 110. Importantly, the court in *Sierra Club* recognized that Congress intended "that sources regulated under section 112 meet the strictest standards."[37] As described in the June 5, 2019, NPRM, under CAA section 112, once a source category is listed for regulation pursuant to CAA section 112(c), the statute directs EPA to use a specific and exacting process to establish nationally applicable, category-wide, technology-based emissions standards under CAA section 112(d).[38] Under CAA section 112(d), EPA must establish emission standards for major sources that "*require the maximum degree of reduction in emissions* of the hazardous air pollutants subject to this section" that EPA determines is achievable taking into account certain statutory factors.[39] EPA refers to these rules as "maximum achievable control technology" or "MACT" standards. The MACT standards for existing sources must be at least as stringent as the average emission limitation achieved by the best performing 12 percent of existing sources in the category (for which the Administrator has emissions information) or the best performing five sources for source categories with less than 30 sources.[40] This level of minimum stringency is referred to as the MACT floor. For new sources, MACT standards must be at least as stringent as the control level achieved in practice by the best controlled existing similar source.[41] EPA

[37] *Id.* at 1028.
[38] EPA can also set work practices under CAA section 112(h).
[39] *See* 42 U.S.C. 7412(d)(2) (emphasis added).
[40] *See* 42 U.S.C. 7412(d)(3)(A), (B).
[41] *See* 42 U.S.C. 7412(d)(3).

also must analyze more stringent "beyond-the-floor" control options, for which consideration is given not only to the maximum degree of reduction in emissions of a hazardous air pollutant, but also to the costs, energy, and non-air quality health and environmental impacts.[42]

In contrast, the CAA sets out a fundamentally different regime with respect to CAA section 110 SIPs, reflecting the principle that SIP development and implementation is customizable for each state's circumstances and relies on the federal-state partnership.[43] CAA section 110(a)(2)(A) requires states to adopt, and include in their SIP submissions, "enforceable emission limitations and other control measures, means, or techniques (including incentives such as fees, marketable permits, and auctions of emissions rights) . . . *as may be necessary or appropriate* to meet the applicable requirements of this Act."[44] The CAA sets forth the minimum requirements to attain, maintain, and enforce air quality standards, while allowing each state to identify and effectuate an approach that is appropriate for the sources and air quality challenges specific to each state.[45] CAA section 109(a) directs the EPA Administrator to promulgate primary and secondary NAAQS for pollutants for which air quality criteria have been issued. For each criteria pollutant, CAA section 109(b)(1) directs the Administrator to establish a primary NAAQS based on the attainment and maintenance of which there is an adequate margin of safety as required to protect public health. Similarly, CAA section 109(b)(2) directs the Administrator to establish secondary standards based on the attainment and

[42] *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 857–58 (D.C. Cir. 2001).
[43] *See, e.g., Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997) ("EPA 'identifies the end to be achieved, while the states choose the particular means for realizing that end.'") (*quoting Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1074 (D.C. Cir. 1984)). *See also, e.g.*, H.R. Rep. No. 95-294, 95th Cong. 1st Sess. at 213 (explaining that for nonattainment areas, Congress intended to "give the States more flexibility in determining how to protect public health while still permitting reasonable new growth") (May 12, 1977).
[44] *See* 42 U.S.C. 7410(a)(2)(A) (emphasis added).
[45] *See Virginia v. EPA*, 108 F.3d at 1408.

maintenance of which there is an adequate margin of safety as required to protect the public welfare from known or anticipated adverse effects associated with the presence of such pollutants in ambient air. Based on the scientific and technical information available at the time of issuing a standard, EPA identifies the level of the NAAQS for each criteria pollutant as a means of setting a target for state and regional air quality planning. The standard-setting process related to the regulation of pollutants in ambient air, as directed by section 109 and as implemented by section 110 of the CAA, is therefore fundamentally different in nature than the process for setting stringent source-specific standards that EPA is required to issue under CAA section 112. The D.C. Circuit's concern that CAA section 112-compliant standards must apply "continuously" to regulate emissions from a particular source does not translate directly to the context of CAA section 110, where a state's plan may contain a broad range of measures, including limits on multiple sources' and source categories' emissions of multiple pollutants—all working together to ensure attainment and maintenance of an ambient standard that is not itself an applicable requirement for individual sources. Importantly, regardless of the measures a state seeks to include in its SIP, those measures must collectively work toward compliance with the nationally uniform NAAQS.

The Fourth Circuit has acknowledged that "[s]tates are accorded flexibility in determining how their SIPs are structured" to ensure that the state meets the NAAQS.[46] Further, the U.S. Supreme Court has recognized that the CAA gives a state "wide discretion" to formulate its plan pursuant to CAA section 110 and went so far as to say that "the State has virtually

[46] *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 299 (4th Cir. 2010).

absolute power in allocating emission limitations so long as the national standards are met."[47] The U.S. Supreme Court has also explained, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."[48] State and federal government divide this responsibility, which results in a balance of state and federal rights and responsibilities. States typically have primary responsibility for determining how and to what extent to regulate sources within the state to comply with NAAQS.[49] In fact, EPA has implemented guidance addressing a number of requirements in CAA section 110 and explained that SIPs could satisfy the requirements of CAA section 110(a)(2)(A) by simply "identify[ing] existing EPA-approved SIP provisions or new SIP provisions . . . that limit emissions of pollutants relevant to the subject NAAQS."[50] Given their understanding of emission sources and air quality within their jurisdictions, states are uniquely suited and well-equipped to determine how best to implement the NAAQS in light of their particular local needs. Comments from NC DAQ emphasize that the State "has a long and

[47] *See, e.g., Union Elec. Co. v. EPA*, 427 U.S. 246, 250 & 267 (1976). *See also id.* at 269 ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent."). Commenters challenged the proposal's reliance on the *Union Electric* and *Train* decisions, but do not disagree with Region 4's basis for relying on the decisions, specifically that they establish that states are afforded discretion regarding how to develop SIPs. The alternative policy's explanation, detailed below, that North Carolina may provide exemptions from numerical emission limits because its SIP contains a set of emission limitations, control means, or other means or techniques, which, taken as a whole, meet the requirements of attaining and maintaining the NAAQS negates commenters' assertion that the Agency is authorizing North Carolina to adopt emission limitations or standards that violate the CAA.

[48] *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

[49] *See, e.g., Mirant Potomac River, LLC v. EPA*, 577 F.3d 223, 227 (4th Cir. 2009) ("Under Title I, states have the primary responsibility for assuring that air quality within their borders meets the NAAQS. Title I requires each state to create a State Implementation Plan . . . to meet the NAAQS.").

[50] *See* September 13, 2013, Memorandum from Stephen D. Page, "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)" at page 18.

successful history of implementing [the NAAQS attainment and maintenance] framework in North Carolina" and notes that "all NAAQS are being met in the state."[51] NC DAQ lauds federal, state and local partnerships for the successful implementation.[52]

Region 4 received comments challenging the reliance on *Train* and the associated line of cases because in the 2015 SSM SIP Call Action the Agency viewed *Train* as not authorizing exemptions in SIPs. However, acknowledging the prior interpretation, in this action, Region 4 has evaluated the North Carolina SIP and is adopting an alternative approach, consistent with the Region's interpretation of the flexibility afforded pursuant to CAA section 110(a)(2)(A) and the *Train* decision. Incorporating the explanation provided in the NPRM, Region 4 maintains that because the North Carolina SIP includes numerous protective provisions and evidence shows that the SIP is ensuring attainment and maintenance of the NAAQS, it is appropriate to rely on the flexibility afforded to states by *Train* in this circumstance.

The statutory text of CAA section 110(a)(2)(A) reflects this EPA-state cooperative relationship, providing state flexibility that simply does not exist in the text of CAA section 112, as outlined earlier in this section. CAA section 110(a)(2)(A) generally requires that each SIP shall include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter."[53] EPA has never interpreted this provision to require the type of exacting analysis set forth in CAA section 112, and the flexibility Congress

[51] Comment Letter submitted by NC DAQ, EPA-R04-OAR-2019-0303-0020.
[52] *Id.*
[53] *See* 42 U.S.C. 7410(a)(2)(A).

gave states in section 110 warrants a differing interpretation. The presumption of consistent usage—that a word or phrase is presumed to bear the same meaning throughout a text—only "makes sense when applied . . . pragmatically."[54] It is appropriate, and pragmatic, for Region 4 to consider the distinct frameworks and purposes of CAA sections 110 and 112 when implementing the term "emission limitation" in evaluating the North Carolina SIP.

The U.S. Supreme Court has recognized that principles of statutory construction are not so rigid as to necessarily require that the same terminology has the exact same meaning in different parts of the same statute.[55] Terms can have "different shades of meaning," reflecting "different implementation strategies" even when used in the same statute.[56] Emphasizing that "[c]ontext counts," the Court explained that "[t]here is . . . no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically."[57] Contrary to assertions by commenters, the distinct purposes of CAA sections 110 and 112 provide the relevant context that justifies Region 4's decision to interpret the definition of emission limitation or standard differently in the two provisions. As opposed to assertions from commenters who disagreed with the June 5, 2019, NPRM's discussion of the *Duke Energy* decision, the interpretation of CAA sections 302(k) and 110(a)(2)(A) advanced in this notice does not disregard the concept of continuity from CAA section 302(k), nor does it nullify the provision's meaning. Rather, the concept of continuity is acknowledged and afforded significance through the fact that the North Carolina SIP in which such emission limitations

[54] Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 171 (Thompson/West) (2012).
[55] *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).
[56] *Id.* at 574 (citations omitted).
[57] *Id.* at 575–76.

exist, as a whole, applies continuously. The concept of continuous "emission limitations" in a SIP need not be focused on continuous implementation of each individual limit, but rather on the approved SIP as a whole and whether the SIP operates continuously to ensure attainment and maintenance of the NAAQS.

Region 4's interpretation is consistent with the concept that the CAA requires that some section 110 standard apply continuously. Specifically, CAA 110(a)(2)(A) requires the SIP to include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act." The phrase "as may be necessary or appropriate to meet the applicable requirements of [the] Act" explicitly allows the State some flexibility to develop SIP provisions that are best suited for their purposes. In this context, Region 4 finds that a reasonable interpretation of the section 302(k) definition of the terms "emission limitation" and "emission standard" does not preclude North Carolina from adopting provisions that apply continuously while also allowing that unavoidable excess emissions that occur during certain discrete, time-limited periods of operation may not be considered a violation of the rule. This is consistent with Region 4's determination that the North Carolina SIP, considered as a whole, meets the requirements of the Act. But even if commenters are correct that "enforceable emission limitations" must be interpreted as a single limit that applies continuously and without exempt periods, Region 4 finds that North Carolina's SIP provisions that include periods of exemptions are not inconsistent with the CAA under the latter part of

provision 110(a)(2)(A) as "other control measures, means or techniques . . . *as may be necessary or appropriate* to meet the applicable requirements of [the] Act" [58] (emphasis added).

Region 4 interprets CAA section 110(a)(2)(A) to mean a state may provide exemptions from numerical emission limits so long as the SIP contains a set of emission limitations, control means, or other means or techniques, which, taken as a whole, meet the requirements of attaining and maintaining the NAAQS under Subpart A. As supported by NC DAQ's comment letter[59] on the NPRM and as this section further elaborates, our evaluation of the North Carolina SIP shows this to be the case. The state has a combination of emission limits that apply "as may be necessary or appropriate" during normal operations but with exemptions during SSM periods and "other control measures, means, or techniques" that remain applicable during periods of SSM in which the exemptions apply—such as general duty provisions in the SIP, work practice standards, best management practices, or alternative emission limits—and are protective of the NAAQS. Additionally, SIPs are required to include entirely separate provisions, such as minor source review and major source new source review provisions regulating construction or modification of stationary sources, that also effectively limit emissions of NAAQS pollutants within the state. North Carolina regulates the construction and modification of sources to prevent significant deterioration of air quality in areas already attaining the NAAQS, or to allow

[58] Region 4 also notes that this interpretation is consistent with language in the CAA definition of "Federal Implementation Plan" (FIP) (i.e., a plan, or portion thereof, promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a SIP). The definition, at section 302(y), states that a FIP "includes enforceable emission limitations *or* other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard" (emphasis added). This language clarifies that "other control measures, means or techniques" is an approach that is separate from "enforceable emission limitations" and thus does not invoke the 302(k) definition of "emission limitation."

[59] Letter from Michael A. Abraczinskas, Director, NC DAQ, to EPA, August 5, 2019, Docket ID No. EPA-R04-OAR-2019-0303-0001 for this rulemaking.

improvement of air quality while still providing for growth in areas not meeting the NAAQS, through 15A NCAC 2D .0530 and 2D .0531. Thus, as the U.S. Supreme Court explained in *Duke Energy* that a term may be interpreted differently when justified by different contexts (in this case different parts of the same statute), the CAA definition of an emission limitation in section 302(k), when read in the context of section 110, could mean states may, at their discretion, provide exemptions from specific numerical emission limits during periods when it is not practicable or necessary for such limits to apply, so long as the SIP contains other provisions that remain in effect and ensure the NAAQS are protected. Region 4 evaluated the North Carolina SIP and determined it is not inconsistent with CAA requirements for the SIP to contain such exemption provisions because the state's overlapping protective requirements sufficiently ensure overall attainment and maintenance of the NAAQS.

Consistent with this interpretation, Region 4 has evaluated the North Carolina SIP as a whole and has determined that the SIP contains numerous provisions intended to assure that air quality standards will be achieved, as explained below. Any provisions allowing exemptions for periods of SSM do not alter the applicability of these general SIP requirements. In analyzing the air quality protections provided by the entirety of the North Carolina SIP, Region 4 concludes that the SIP contains overlapping planning requirements that are protective of each individual criteria pollutant NAAQS. In fact, both provisions that were included in the 2015 SSM SIP Call Action for North Carolina include substantial protection of air quality standards within the SIP-called provision itself.

First, as Region 4 outlined in the June 5, 2019, NPRM, the exemption provided at NCAC 2D .0535(g) requires that owners or operators use best available control practices when operating equipment to minimize emissions during startup and shutdown periods. Specifically, it states:

> Start-up and shut-down. Excess emissions during start-up and shut-down shall be considered a violation of the appropriate rule if the owner or operator cannot demonstrate that the excess emissions are unavoidable when requested to do so by the Director. The Director may specify for a particular source the amount, time, and duration of emissions that are allowed during start-up or shut- down. *The owner or operator shall, to the extent practicable, operate the source and any associated air pollution control equipment or monitoring equipment in a manner consistent with best practicable air pollution control practices to minimize emissions during start-up and shut-down.* (Emphasis added.)

Even though this provision includes an exemption, it also provides a backstop that requires sources to use the best practicable air pollution control practices to minimize emissions during startup or shutdown periods.

Second, the exemption provided at NCAC 2D .0535(c) outlines seven criteria that the director will consider when evaluating whether the source qualifies for an emissions limit exemption during a malfunction. Specifically, it states:

> Any excess emissions that do not occur during start-up or shut down shall be considered a violation of the appropriate rule unless the owner or operator of the source of the excess emissions demonstrates to the director, that the excess emissions are the result of a

malfunction. To determine if the excess emissions are the result of a malfunction, the director shall consider, along with any other pertinent information, the following:

(1) The air cleaning device, process equipment, or process has been maintained and operated, to the maximum extent practicable, in a manner consistent with good practice for minimizing emissions;

(2) Repairs have been made in an expeditious manner when the emission limits have been exceeded;

(3) The amount and duration of the excess emissions, including any bypass have been minimized to the maximum extent practicable;

(4) All practical steps have been taken to minimize the impact of the excess emissions on ambient air quality;

(5) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(6) The requirements of Paragraph (f) of the Regulation have been met; and

(7) If the source is required to have a malfunction abatement plan, it has followed that plan.

All malfunctions shall be repaired as expeditiously as practicable. However, the director shall not excuse excess emissions caused by malfunctions from a source for more than 15 percent of the operating time during each calendar year.

The existence of these specific criteria themselves provide additional protections of the NAAQS because factors considered by the director include whether sources minimize emissions and limit

the extent of emissions which could occur to the greatest extent practicable. Additionally, the provision itself establishes bounds on a source's ability to employ this exemption by prohibiting the Director from excusing excess emissions from a source due to malfunctions for more than 15 percent of the operating time. This limitation reasonably minimizes the risk that excess emissions from malfunctions would contribute to a NAAQS exceedance or violation.

Apart from the SIP-called provisions discussed above, as discussed in the June 5, 2019, NPRM, the North Carolina SIP also contains numerous overlapping requirements providing for protection of air quality and the NAAQS, requirements that generally control emissions of NAAQS pollutants. Each of these provisions ensures that emissions are minimized to protect air quality, independent of an SSM exemption that may also apply. Described as follows, these generally applicable requirements collectively support Region 4's alternative policy for the North Carolina SIP.

First, 15A NCAC 2D .0502, which is included in the North Carolina SIP and addresses emission control standards generally, provides: "The purpose of the emission control standards set out in this Section is to establish maximum limits on the rate of emission air contaminants into the atmosphere. All sources shall be provided with the maximum feasible control."[60] The requirement for "maximum feasible control" on all sources applies at all times, including periods of startup and shutdown. Thus, by requiring sources to be subject to emission control standards established at the maximum feasible level of control, the SIP ensures that air quality in the State will be protected to the highest degree possible. This guiding purpose broadly applies to the emission control standards in Section .0500 of the North Carolina SIP. North Carolina

[60] *See* 40 CFR 52.1770(c)(1).

confirmed as much in their comment letter on EPA's 2015 SSM policy, explaining that the State's requirement that sources implement "maximum feasible control" is one of the provisions of the SIP that "provide assurances that air quality and emission standards will be achieved."[61] In light of the flexibility in CAA section 110(a)(2)(A) and SIP development generally, North Carolina has developed a reasonable overall emissions control approach that requires all sources to implement maximum feasible emission control efforts at all times, even though the State may exempt sources from numerical emission limits during some SSM periods.

Second, the North Carolina SIP includes general provisions that require sources not to operate in such a way as to cause NAAQS violations. 15A NCAC 2D .0501(e) directs all sources to operate in a manner that does not cause any ambient air quality standard to be exceeded at any point beyond the premises on which the source is located, despite the SIP containing SSM exemptions for emission limitations. 15A NCAC 2D .0501(e) states:

> In addition to any control or manner of operation necessary to meet emission standards in this Section, any source of air pollution shall be operated with such control or in such manner that the source shall not cause the ambient air quality standards of Section .0400 of this Subchapter to be exceeded at any point beyond the premises on which the source is located. When controls more stringent than named in the applicable emission standards in this Section are required to prevent violation of the ambient air quality standards or are required to create an offset, the permit shall contain a condition requiring these controls.

[61] Letter from Sheila C. Holman, Director, NC DAQ, to EPA, May 13, 2013, page 2, Docket ID No. EPA-HQ-OAR-2012-0322-0619, available at www.regulations.gov.

Accordingly, even if the SIP contains exemptions from numerical emission limits during SSM events, this provision ensures that the source at issue must ensure that none of its emissions cause a NAAQS exceedance or violation, consistent with the primary purpose of CAA section 110.

Third, the North Carolina SIP provides additional assurances that sources will prevent and correct equipment failures that could result in excess emissions by requiring utility boilers (and any source with a history of excess emissions, as determined by the Director) to have a malfunction abatement plan approved by the Director. Utility boilers in North Carolina contribute a significant portion of the point source pollutant emissions in the State.[62] 15A NCAC 2D .0535(d) states:

> All electric utility boiler units subject to a rule in this section shall have a malfunction abatement plan approved by the director. In addition, the director may require any source that he has determined to have a history of excess emissions to have a malfunction abatement plan approved by the director. The malfunction plans of electric utility boiler units and of other sources required to have them shall be implemented when a malfunction or other breakdown occurs. The purpose of the malfunction abatement plan is to prevent, detect, and correct malfunctions or equipment failures that could result in excess emissions. . . .

This provision goes on to describe the minimum requirements for a malfunction abatement plan, including: (1) a complete preventive maintenance program (including identification of the

[62] For example, utility boilers in North Carolina contribute approximately 24 percent of PM_{10} emissions, 66 percent of SO_2 emissions, and 47 percent of NOx emissions from total point sources in the State. *See* spreadsheet titled "NC 2014 NEI Summary" in the docket for this action.

individual responsible for inspecting, maintaining and repairing air cleaning devices; description of the items or conditions that will be inspected and maintained; the frequency of the inspection, maintenance services, and repairs; and identification and quantities of the replacement parts that shall be maintained in inventory for quick replacement); (2) the procedures for detecting a malfunction or failure (including identification of the source and air cleaning operating variables and outlet variables; the normal operating range of those variables; and a description of the monitoring method or surveillance procedures and of the system for alerting operating personnel of any malfunctions); and (3) a description of the corrective procedures that will be taken to achieve compliance with the applicable rule as expeditiously as practicable in case of a malfunction or failure.[63] Although specific to electric utility boilers (and other sources as required by the Director), this SIP provision ensures that subject units are taking steps to prevent, detect, and correct malfunctions, even if an SSM exemption applies. This provision serves to limit any excess emissions that could result from such events, thus reducing the possibility that any excess emissions would result in a NAAQS exceedance or violation.

Fourth, the North Carolina SIP provides general provisions to reduce airborne pollutants and to prevent NAAQS exceedances beyond facility property lines, despite the SIP containing SSM exemptions for numerical emission limits, for particulates from sand, gravel, or crushed stone operations and from lightweight aggregate operations (at 15A NCAC 2D .0510(a) and 0511(a), respectively):

> The owner or operator of a [. . .] operation shall not cause, allow, or permit any material to be produced, handled, transported or stockpiled without taking measures to reduce to a

[63] *See* 15A NCAC 2D .0535(d)(1)–(3).

> minimum any particulate matter from becoming airborne to prevent exceeding the ambient air quality standards beyond the property line for particulate matter, both PM10 and total suspended particulates.

And in a similar manner, the North Carolina SIP includes general provisions to reduce airborne pollutants and to prevent NAAQS exceedances beyond facility property lines for particulates from wood products finishing plants (at 15A NCAC 2D .0512):

> A person shall not cause, allow, or permit particulate matter caused by the working, sanding, or finishing of wood to be discharged from any stack, vent, or building into the atmosphere without providing, as a minimum for its collection, adequate duct work and properly designed collectors, or such other devices as approved by the commission, and in no case shall the ambient air quality standards be exceeded beyond the property line.

Accordingly, even if the SIP contains exemptions from numerical emission limits during SSM events, these provisions ensure that the source at issue must ensure that none of its emissions cause a NAAQS exceedance or violation.

Fifth, the North Carolina SIP provides a general requirement at 15A NCAC 2D .0521(g) for sources that operate continuous opacity monitoring systems (COMS) that "[i]n no instance shall excess [opacity] emissions exempted under this Paragraph cause or contribute to a violation of any emission standard in this Subchapter or 40 CFR Part 60, 61, or 63 or any ambient air quality standard in Section 15A NCAC 2D .0400 or 40 CFR Part 50." As recognized by this provision, federal standards in 40 CFR parts 60, 61, and 63, as applicable to a source, regulate source emissions and operation, regardless of any SSM exemption in the SIP.

Finally, Region 4 notes that the SIP includes an overall strategy for bringing all areas into compliance with the NAAQS for all pollutants regulated by the CAA. On September 26, 2011, Region 4 approved into the SIP significant NOx and sulfur dioxide (SO_2) emission limitations from the North Carolina Clean Smokestacks Act (NCCSA).[64] This state law became effective in 2007 and set caps on NOx and SO_2 emissions from public utilities operating coal-fired power plants in the State that cannot be met by purchasing emissions credits.[65] The NCCSA resulted in permanent emission reductions that helped nonattainment areas in the State achieve attainment of the 1997 Annual $PM_{2.5}$ NAAQS.[66] Thus, even if a source could avail itself of an SSM exemption for certain excess emissions, its total emissions must fit within the utility-wide cap for the State provided under a law adopted as part of a comprehensive plan for improving air quality in North Carolina.

Region 4 also notes that the exemption provisions in the North Carolina SIP are limited in scope and do not apply to sources to which Rules .0524, .1110 or .1111 of subchapter 2D apply. *See* 15A NCAC 2D .0535(b). These SIP provisions require that sources that are subject to EPA's New Source Performance Standards (NSPS) at 40 CFR part 60 or National Emission Standards for Hazardous Air Pollutants (NESHAP) at 40 CFR part 61 or 63 must comply with those federal standards rather than with any otherwise-applicable rule of the SIP (except where the SIP rule is more stringent than the federal standards).

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[64] *See* 76 FR 59250 (September 26, 2011).
[65] *See* 40 CFR 52.1781(h).
[66] *See Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; North Carolina: Redesignation of the Hickory-Morganton-Lenoir 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment; Proposed Rule*, 76 FR 58210,58217 (Sept. 20, 2011), and *Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; North Carolina: Redesignation of the Greensboro-Winston Salem-High Point 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment; Proposed Rule*, 76 FR 59345, 59352 (Sept. 26, 2011).

Region 4 received comments challenging the June 5, 2019, NPRM's reliance on the generally applicable provisions, which commenters characterized as "general duty" provisions. Commenters raised concerns about Region 4 relying on these provisions, asserting they "fail to meet the level of control required by the applicable stringency requirements" and that these provisions are not legally or practically enforceable. As discussed in Section V of this notice, Region 4 disagrees with commenters' concerns regarding generally applicable provisions. Region 4 has not asserted that the numerous protective provisions serve to replace the applicable stringency requirements. Instead, these provisions provide additional assurances that the applicable stringency requirements will effectively ensure attainment and maintenance of the NAAQS, despite the fact that there are provisions allowing for narrow exemptions during certain periods of SSM. In terms of enforcing the protective provisions, many of the provisions identified in this notice are, in fact, mandatory. For example, 15A NCAC 2D .0502 states: "All sources *shall* be provided with the maximum feasible control" (emphasis added). And 15A NCAC Code 2D .0501(e) instructs: ". . . any source of air pollution *shall* be operated with such control or in such manner that the source *shall* not cause the ambient air quality standards of Section .0400 of this Subchapter to be exceeded at any point beyond the premises on which the source is located" (emphasis added). Further, when warranted by a situation, EPA can bring an action to enforce these types of provisions.

EPA has a statutory duty pursuant to CAA section 110(k)(3) to approve SIP submissions that meet all applicable CAA requirements. For North Carolina, Region 4 has concluded that the SIP's approach to exemptions is consistent with the CAA requirement to protect attainment and maintenance of the NAAQS. Region 4 recognizes that the exemptions from emission limitations

in the North Carolina SIP provide the State with flexibility as it develops robust approaches to air quality protection through a set of planning requirements. The numerous protective provisions are a significant justification for Region 4 adopting an alternative policy for the North Carolina SIP. Further, these provisions reflect North Carolina's reasoned judgment for how to best assure attainment and maintenance of the NAAQS in the State.

B. Director's Discretion Exemption Provisions

In addition to the general SSM exemption issues discussed above, in the 2015 SSM SIP Call Action EPA also raised concerns that North Carolina's 15A NCAC 2D .0535(c) and 15A NCAC 2D .0535(g) are examples of what EPA referred to as "director's discretion" exemptions. Rule 15A NCAC 2D .0535(c) lists seven criteria that the Director of NC DAQ will evaluate to determine whether excess emissions resulting from a malfunction are a violation of the given standard. In addition, rule 15A NCAC 2D .0535(g) directs facilities, during startup and shutdown, to operate all equipment in a manner consistent with best practicable air pollution control practices to minimize emissions and to demonstrate that excess emissions were unavoidable when requested to do so by the Director. In the 2015 SSM SIP Call Action, EPA took the position that these director's discretion provisions were also problematic because they allow air agency personnel to modify existing SIP requirements under certain conditions, which essentially constituted a variance from an otherwise applicable emission limitation. EPA considered director's discretion provisions to effectively provide for impermissible SIP revisions by allowing air agency personnel to make unilateral decisions on an *ad hoc* basis regarding

excess emissions during SSM events and, thus, as not in compliance with the necessary process required for SIP revisions.[67]

While acknowledging those concerns, consistent with the June 5, 2019, NPRM, Region 4 is finalizing a finding that SSM exemptions may not necessarily make a SIP substantially inadequate to meet CAA requirements[68] and is making a finding that the director's discretion SSM exemptions in the North Carolina SIP are not inconsistent with CAA requirements. In this action, Region 4 is adopting an alternative policy for North Carolina that automatic exemptions during periods of SSM are not inherently inconsistent with CAA section 110(a)(2)(A). The rationale provided above for finding that automatic exemptions in the North Carolina SIP do not preclude the SIP from meeting the CAA requirements of attainment and maintenance of the NAAQS under Subpart A as long as the SIP, when evaluated comprehensively, contains a set of emission limitations, control means, or other means or techniques, also applies to Region 4's evaluation of director's discretion exemptions in the North Carolina SIP. As explained below, because automatic SSM exemptions are broader than director's discretion provisions but do not render the North Carolina SIP inadequate, Region 4 also finds that director's discretion exemptions do not render the SIP inadequate.

Further, consistent with the perspective that the North Carolina SIP, considered as a whole, generally protects against NAAQS violations and that SIP provisions containing SSM exemptions may not be inconsistent with CAA requirements, Region 4 has determined that use of the director's discretion provisions in the North Carolina SIP also does not constitute an

[67] *See* 80 FR at 33977–78.
[68] *See Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012); *Luminant Generation Co. v. EPA*, 675 F.3d 917 (5th Cir. 2012) (vacating and remanding EPA's disapproval of discretionary SIP provisions).

improper SIP revision. Given the specific criteria contained within them, North Carolina's director's discretion provisions excuse excess emissions in more limited circumstances than provided for by automatic exemptions. Accordingly, the same reasoning that supports our position that automatic exemptions in the North Carolina SIP may not be inconsistent with the CAA also informs our position that the narrower director's discretion exemption provisions in the North Carolina SIP that were SIP-called in the 2015 SSM SIP Call Action are not inconsistent with the CAA. This finding is predicated on a holistic view that includes consideration of all provisions in the North Carolina SIP. Relevant to this evaluation, as discussed above, the North Carolina SIP includes provisions that provide for sources to be operated in a manner that does not cause an exceedance or violation of the NAAQS, and that requirement is not displaced by the director's discretion exemptions. The North Carolina director's discretion provisions outline the specific conditions under which air agency personnel can make a factual decision that SSM emissions do not constitute a violation of the NAAQS, and that limitation is part of Region 4's holistic consideration of the SIP. The SIP, as federally approved, provides air agency personnel with the framework and authority to exempt certain excess emission events from being a violation. Because that allowance is provided for in the approved SIP, and the SIP provisions went through a public comment period prior to Region 4's final action today to approve them, an action made in accordance with these approved provisions would not constitute an unlawful SIP revision.

CAA section 113 authorizes the United States to enforce, among other things, the requirements or prohibitions of an applicable implementation plan or permit. CAA section 304 authorizes citizens to enforce, among other things, any emission standard or limitation under the

CAA, including applicable state implementation plan and permit requirements. The framework and authority contained in 15A NCAC 2D .0535 requires sources to make specific demonstrations and the Director to make specific determinations before exempting sources from compliance with an otherwise applicable emission limitation. Accordingly, and consistent with statements made by EPA when the Agency approved 15 NCAC 2D .0535(c) into the North Carolina SIP in 1986,[69] the exercise of authority under the director's discretion provisions of 15A NCAC 2D .0535 shall not be construed to bar, preclude, or otherwise impair the right of action by the United States or citizens to enforce a violation of an emission limitation or emission standard in the SIP or a permit where the demonstration by a source or a determination by the Director does not comply with the framework and authority under 15 NCAC 2D .0535. Failure to comply with such framework and authority would invalidate the Director's determination.

C. Withdrawal of the SIP Call for North Carolina

As part of the 2015 SSM SIP Call Action, EPA issued CAA section 110(k)(5) SIP calls to a number of states, including North Carolina regarding provisions 15A NCAC 2D .0535(c) and 15A NCAC 2D .0535(g).[70] In the 2015 SSM SIP Call Action, the Agency explained that it would evaluate any pending SIP submission or previously approved submission through notice-and-comment rulemaking and, as part of that action, determine whether a given SIP provision is

[69] *See* 51 FR 32073, 32074 (September 9, 1986) (EPA stated: "it should be noted that EPA is not approving in advance any determination made by the State under paragraph (c) of the rule, that a source's excess emissions during a malfunction were avoidable and excusable, but rather s approving the procedures and criteria set out in paragraph (c). Thus, EPA retains its authority to independently determine whether an enforcement action is appropriate in any particular case.")
[70] *See* 80 FR at 33964.

consistent with CAA requirements and applicable regulations.[71] In this context, Region 4 re-evaluated the two subject provisions in the June 5, 2019, proposed notice-and-comment action that Region 4 is finalizing today.

As discussed above, the North Carolina SIP contains numerous provisions that work in concert and provide redundancy to protect against a NAAQS exceedance or violation, even if an SSM exemption provision also applies. Therefore, based on an analysis of the multiple provisions contained in the North Carolina SIP that are designed to be protective of the NAAQS, Region 4 concludes that it is reasonable for the NC DAQ Director to be able to exclude qualifying periods of excess emissions during periods of SSM while ensuring attainment or maintenance of the NAAQS. A holistic review of the North Carolina SIP shows that there are protective provisions that ensure attainment and maintenance of the NAAQS even though a SIP includes SSM exemptions, and Region 4 believes that this result is not precluded by the D.C. Circuit decision in *Sierra Club v. Johnson*. Consistent with the alternative policy being adopted, as set forth above, Region 4 has reviewed the applicability of the SIP Call previously issued to North Carolina, including Region 4's specific evaluation of the State's subject SIP, and finds that the subject SIP provisions are not inconsistent with CAA requirements. Accordingly, Region 4 is changing the finding from the 2015 SSM SIP Call Action at 80 FR 33840 that certain SIP provisions included in the North Carolina SIP are substantially inadequate to meet CAA requirements and withdraws the SIP Call that was issued in the 2015 SSM SIP action with respect to 15A NCAC 2D .0535(c) and 15A NCAC 2D .0535(g).

[71] *Id.* at 33976.

The alternative SSM policy is a policy statement and, thus, constitutes guidance within Region 4 with respect to the North Carolina SIP. As guidance, this does not bind states, EPA, or other parties, but it reflects Region 4's interpretation of the CAA requirements with respect to the North Carolina SIP. The evaluation of any other state's implementation plan provision, and that SIP provision's interaction with the SIP as a whole, must be done through notice-and-comment rulemaking.

EPA's regulations allow EPA Regions to take actions that interpret the CAA in a manner inconsistent with national policy when a Region seeks and obtains concurrence from the relevant EPA Headquarters office. Pursuant to EPA's regional consistency regulations at 40 CFR 56.5(b), the Region 4 Administrator sought and obtained concurrence from EPA's Office of Air and Radiation to propose an action that outlines an alternative policy that is inconsistent with the national EPA policy, most recently articulated in the 2015 SSM SIP Call Action, on provisions exempting emissions exceeding otherwise applicable SIP limitations during periods of unit startup, shutdown and malfunction at the discretion of the state agency and to propose action consistent with that alternative policy. Likewise, the Region 4 Administrator sought and obtained concurrence to finalize the alternative policy in this action. The concurrence request memorandum, signed March 19, 2020, is included in the public docket for this action.

IV. Region 4's Action on North Carolina's June 5, 2017, SIP Revision

As discussed in the June 5, 2019, NPRM, on September 18, 2001, North Carolina submitted a new rule section regarding the control of NOx emissions from large stationary combustion sources to Region 4 for approval into its SIP.[72] The rule section—15A NCAC 2D

[72] See Rule .1402 - "Applicability" and the definition of "source" in Rule .1401 for the scope of this rule section.

.1400 ("Nitrogen Oxides Emissions")—contains 15A NCAC 2D .1423 ("Large Internal Combustion Engines") as well as other rules not related to today's final action. On August 14, 2002, North Carolina submitted to Region 4 a SIP revision with changes to its Section .1400 NOx rules, including several changes to 15A NCAC 2D .1423. Region 4 did not act on the August 14, 2002, submittal. However, on December 27, 2002, Region 4 approved the portion of North Carolina's September 18, 2001, SIP revision incorporating 15A NCAC 2D .1423.[73]

On June 5, 2017, North Carolina withdrew its August 14, 2002, SIP revision and resubmitted identical changes to 15A NCAC 2D .1423 as a SIP revision as well as the changes to the other rules contained in the original 2002 SIP revision.[74, 75] The State provided this resubmission in response to a Region 4 request for a version of the rule that highlights, using redline-strikethrough text, the State's proposed revisions to the federally approved rule. The June 5, 2017, SIP revision relies on the hearing record associated with the August 14, 2002, SIP revision[76] because the revised rule text is the same.

Region 4 is approving the changes to subparagraphs (a)–(f) of 15A NCAC 2D .1423 provided in North Carolina's June 5, 2017, SIP revision for the reasons explained in the notice of proposed rulemaking. Regarding 15A NCAC 2D .1423(d)(1), as noted in the June 5, 2019, NPRM, the rule revision inserted the phrase "and .1404 of this Section" at the end so that it now provides that the owner or operator of a subject internal combustion engine shall determine

[73] *See* 67 FR 78987 (December 27, 2002).
[74] Region 4 is considering the other rule changes through a separate rulemaking.
[75] On June 28, 2018, North Carolina supplemented its June 5, 2017, submittal to acknowledge that Rules .1413 and .1414 are not in the SIP. This supplement is not relevant to this action.
[76] North Carolina held public hearings on May 21, 2001, and June 5, 2001, to accept comments on the rule changes contained in the August 14, 2002, SIP revision.

compliance using "a continuous emissions monitoring systems (CEMS) which meets the applicable requirements of Appendices B and F of 40 CFR part 60, excluding data obtained during periods specified in Paragraph (g) of this Rule *and .1404 of this Section*." This change ensures that the CEMS used to obtain compliance data must meet the applicable requirements specified in 15A NCAC 2D .1404 (in particular, Paragraphs (d)(2) and (f)(2) of 15A NCAC 2D .1404) as well as the applicable part 60 requirements since those provisions specify additional federal requirements for obtaining CEMS data. In addition, although the reference to "Paragraph (g) in this Rule" is existing federally approved language, Region 4 has considered its approvability in light of the 2015 SSM policy because paragraph (g) provides that the emission standards of 15A NCAC 2D .1423 (regulating large internal combustion engines) do not apply during periods of "(1) start-up and shut-down periods and periods of malfunction, not to exceed 36 consecutive hours; (2) regularly scheduled maintenance activities." As discussed in Section III above, Region 4 has determined that the provisions of 15A NCAC 2D .1423(g), when considered in conjunction with other elements in the North Carolina SIP, are sufficient to provide adequate protection of the NAAQS. North Carolina has bounded the time during which a source can employ this exemption, minimizing the potential that any excess emissions during these periods would cause or contribute to a NAAQS exceedance or violation. Therefore, the exemption, which allows for emission standards of the rule to not apply during periods of startup, shutdown, and malfunction of up to 36 consecutive hours, or maintenance, is not inconsistent with the requirements of CAA section 110, including CAA section 110(l). Consequently, Region 4 has determined, consistent with the policy outlined *supra* in Section III, that these changes to the North Carolina SIP are consistent with CAA requirements.

V. Responses to Comments

Region 4 received ten supporting comments and three adverse comments on the proposed action. In this section, Region 4 describes in detail the adverse comments received and provides responses to them.

1. Comments that the action constitutes a nationally-applicable rulemaking and should be reviewed in the D.C. Circuit.

Comment 1: Commenters state that EPA Headquarters was the driving force behind the preparation of the June 5, 2019, NPRM and that the notice is an attempt to revise EPA's 2015 national policy on SSM in SIPs in a fashion that is not reviewable by the D.C. Circuit. Other commenters state that the June 5, 2019, NPRM does not adequately justify the exception to the national policy on SSM, asserting that the June 5, 2019, NPRM is a "backdoor attempt to change national policy through a Regional action" with the aim of review in an individual Circuit Court rather than the D.C. Circuit. Commenters also assert that the proposed withdrawal of the North Carolina SIP Call departs from EPA's 2015 action and that "this reversal effectively amends EPA's national SSM policy."

Commenters argue that if EPA were to withdraw its SSM SIP Call for North Carolina, review of its action should occur in the D.C. Circuit because such action would reverse a nationally applicable policy. Commenters add that any EPA refusal to find that the D.C. Circuit is the appropriate venue for review of EPA's SSM SIP Call is likely to result in different standards and methodologies applying in different areas of the country, thereby unlawfully and arbitrarily defeating the CAA's goal of ensuring uniformity of national issues, which is Congress's clear intent. Other commenters state that EPA recognized in the 2015 SSM SIP Call

Action that the Agency's "legal interpretation of the [CAA] concerning permissible SIP provisions to address emissions during SSM events" was a "nationally applicable" rule and, thus, any petitions for review challenging aspects of EPA's nationally applicable SSM SIP Call or its SSM policy were required to be filed in the D.C. Circuit, which is where those petitions are still pending.

Commenters also state that the June 5, 2019, NPRM is based on several determinations of nationwide scope or effect, and therefore EPA must find that any challenge to the rule is appropriate only in the D.C. Circuit. Commenters add that because the "scope or effect" of the Region 4 June 5, 2019, NPRM for North Carolina and the Region 6 NPRM for Texas extends across six judicial circuits (covering Regions 4 and 6), the NPRMs must be reviewed only in the D.C. Circuit. Commenters also state that EPA's treatment of its June 5, 2019, NPRM as Region-specific rather than of nationwide scope or effect is arbitrary and capricious and reviewable because it departs from how EPA has treated other, similar past actions. Commenters also state that precedent supports the conclusion that EPA's proposed amendment to the SSM SIP Call is "nationally applicable."

Commenters state that although EPA is now proposing to exempt North Carolina from the nationally applicable SIP Call (and exempt states in Region 4 from the SSM SIP policy established in the final SIP Call rule) in a separate Federal Register notice, the Agency must acknowledge that the SSM SIP Call and the June 5, 2019, NPRM at issue are part of the same overarching and "nationally applicable regulation" under 42 U.S.C. 7607(b)(1). Commenters state that the proposed withdrawal of North Carolina from the national SSM SIP Call explicitly "departs from EPA's 2015 national policy" and announces a substantive change to determining

whether exemptions for SSM events in SIPs are approvable. Commenters also state that although the June 5, 2019, NPRM ostensibly applies to the states in Region 4, EPA is using it to announce a substantial change to the CAA's SIP requirements.

Response 1: Comments received regarding Region 6's April 29, 2019, notice of proposed rulemaking concerning affirmative defense provisions in the Texas SIP are not within the scope of this rulemaking, and Region 4 is not providing a response to comments regarding that action. Comments regarding any subsequent and separate actions by Region 4 are also speculative and not within the scope of this rulemaking.

This is a regional action to approve a SIP submission from a single state in Region 4 and to withdraw the SSM SIP Call that was issued for North Carolina based on an alternative SSM policy that is being adopted and applied by Region 4 only with regard to the North Carolina SIP; the commenter provides no factual basis for the claim that Region 4 is speaking on behalf of EPA Headquarters in this action. EPA Headquarters and Regional Offices routinely collaborate on rulemaking activities, and the nature of the collaborative relationship varies depending on the circumstances of the specific action involved. EPA Headquarters staff may be involved in drafting complex regional actions, including proposed and final rulemakings where EPA acts on SIP submissions under CAA section 110(k), as appropriate. However, as explained below in this response, the level of involvement by different EPA offices is not an appropriate inquiry for determining which court would review a final action. As described in Section III, the alternative policy on SSM adopted in this action applies only to Region 4's evaluation of the North Carolina SIP and does not change or alter EPA's national policy on SSM from the June 12, 2015, action at 80 FR 33840.

Recognizing that Congress intended the federal-state partnership to serve as a cornerstone of the SIP development process under the CAA, the latitude typically afforded to state air agencies as they develop SIPs to address air pollution prevention in their states is one of the bases for this action. Section III of both the proposed action and this final action provides a comprehensive explanation for Region's 4 bases for adopting the alternative policy for North Carolina. Section III of this final action then applies that alternative policy to the specific facts of the North Carolina SIP.

The comments stating that this action is a "backdoor attempt to change national policy through Regional action" or that this action establishes a new *de facto* national policy overstate and misunderstand the scope of the present action. Region 4 is not establishing a new national policy; rather Region 4 is taking action on a specific provision submitted to EPA as a revision of the North Carolina SIP and evaluating the adequacy of specific North Carolina SIP provisions to meet CAA requirements.

Region 4 does not agree with commenters' assertion that this action is a reversal of EPA's national SSM policy because the alternative policy adopted by Region 4 on SSM exemptions is specific to Region 4's evaluation of the North Carolina SIP – the policy is not adopted or applied to any other SIP in Region 4 and does not change or alter the national policy on SSM established in the 2015 SSM SIP Action. This action is limited to the North Carolina SIP. Region 4 is simply reexamining the 2015 SSM SIP Action as it applies to the North Carolina SIP, including the North Carolina SIP provisions that were the subject of EPA's finding of substantial inadequacy in that prior action. Region 4 is also reevaluating the interpretation of

the *Sierra Club* decision and determining that it is not necessary to extend the reach of the *Sierra Club* decision to the particular North Carolina SIP provisions at issue in this action.

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."[77] On its face, this action is locally applicable because it applies to only a single state, North Carolina (withdrawing the SIP Call issued to North Carolina in 2015 and approving the specific North Carolina SIP provisions in the revision submitted by the State on June 5, 2017). This action has immediate or legal effect only for and within North Carolina. If 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.

Moreover, EPA's regulations at 40 CFR part 56 contemplate and establish a process for regional deviation from national policy. Region 4 followed that process and received concurrence from the appropriate EPA headquarters office for both the proposed action and today's final action. The memoranda documenting this process are available in the docket for this action. We disagree with commenters' contention that this action undermines a goal of ensuring uniformity of national issues of the CAA. We assume that the commenter is referencing section 301(a)(2), which requires EPA to promulgate regulations establishing general applicable procedures and policies for regions that are designed, among other things, to "assure fairness and uniformity in the criteria, procedures, and policies applied." Region 4 followed the

[77] *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)).

process to deviate from national policy set forth in 40 CFR part 56, the regulations that EPA promulgated in accordance with CAA section 301(a)(2). Commenters' concern regarding the Agency's general process for regional deviation from national policy is beyond the scope of this action.

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.[78] The only exception to this mandate is where the Administrator expressly finds that the locally or regionally applicable action is based on a determination of nationwide scope or effect and publishes such a finding. The requirement that the Administrator find and publish that an otherwise locally or regionally applicable action is based on a determination of nationwide scope or effect is an express statutory requirement for application of this venue exception; this exception has not been and is not being invoked by EPA in this action. 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.[79] CAA section 307 expressly provides the Agency full discretion to make its own determination of whether to exercise an exception to a Congressionally-dictated venue rule.[80] Even assuming that a court could review the lack of such a finding, and lack of publication of such a finding, in this final action under the Administrative

[78] *See* 42 U.S.C. 7607(b)(1) (emphasis added).
[79] *See, e.g.*, *Lion Oil v. EPA*, 792 F.3d 978, 984 n.1 (8th Cir. 2015) (even where 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 v. EPA*, 808 F.3d 875 (D.C. Cir. 2015).
[80] *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 or effect.") (emphasis added).

Procedure Act's arbitrary and capricious standard, the absence of invocation of the exception is not unreasonable in this case. Commenters assert that numerous aspects of Region 4's action, including its 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 or effect. Commenters are not clear on how or why taking the step necessary to deviate from nationwide policy somehow transforms that deviation into nationwide policy. Region 4 lacks the authority to issue a policy beyond the states included in the Region. In any case, Region 4 states throughout this notice that this action, and the CAA interpretation it is based upon, only applies in North Carolina and does not alter EPA's national policy.[81]

The commenters argue that it is appropriate for EPA to find and publish a finding that an action is based on a determination of nationwide scope or effect where a regionally applicable action encompasses multiple judicial circuits. Region 4 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 North Carolina, and thus only a single judicial circuit. Although at proposal Region 4 was contemplating a regionwide policy on SSM exemption provisions in SIPs, the Region has decided to limit the deviation from national policy to North Carolina. The final action being taken herein is limited in scope to approval of a North Carolina SIP revision and withdrawal of the SIP Call issued to North Carolina.

Region 4 does not agree with commenters' assertion that EPA has previously directed review of SIP Calls to the D.C. Circuit. We note that EPA consolidated a single announcement

[81] *See Am. Road & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (holding that venue for review of 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).

of national policy and issued 36 individual SIP Calls through a single notice in the 2015 SSM SIP Action. However, at other times, individual regions have issued SIP Calls, which were subsequently reviewed in regional circuits. In 2011, for example, EPA Region 8 made a finding that the Utah SIP was substantially inadequate to meet CAA requirements. On that basis, EPA Region 8 issued a SIP Call for Utah, requiring the state to revise its SIP to change an unavoidable breakdown rule, which exempted emissions during unavoidable breakdowns from compliance with emission limitations.[82] This SIP Call was subsequently reviewed in and upheld by the U.S. Court of Appeals for the Tenth Circuit.[83] Similarly, EPA Region 8 made a finding that the Montana SIP was substantially inadequate to attain and maintain the SO_2 NAAQS and issued a call for Montana to submit a SIP revision.[84] That SIP Call and related actions were subsequently reviewed in and upheld by the U.S. Court of Appeals for the Ninth Circuit.[85]

2. Comments that EPA lacks the statutory authority to undertake the action.

Comment 2: Commenters state that, faced with plain statutory language in section 302(k) and a statutory structure and cross-references in section 110, EPA may not invent statutory authority where none exists, nor adopt regulations lacking statutory authority, merely because EPA believes its approach to be better policy. Commenters state that agencies need especially clear congressional delegations of authority to create regulatory exemptions and that the Region 4 (and Region 6) "alternative interpretations" amount to contradictory, unlawful statutory readings that advance policy preferences. Commenters add that those policy

[82] *See* 76 FR 21639 (April 18, 2011).
[83] *US Magnesium v. EPA*, 690 F.3d 1157 (10th Cir. 2012).
[84] *See* 58 FR 41430 (Aug. 4, 1993).
[85] *Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012).

preferences furnish EPA with no statutory authority to withdraw the 2015 SSM SIP Call or to approve SIPs or submissions inconsistent with the SIP Call, plain statutory language, and the *Sierra Club* SSM decision.

Commenters state that EPA must reject at least a portion of this submittal as substantially inadequate because it includes a prohibited automatic exemption for SSM events at 15A NCAC 2D .1423(g) ("The emission standards of this Rule shall not apply to . . . start-up and shut-down periods and periods of malfunction . . . .").

Commenters state that by proposing to find North Carolina provisions 15A NCAC 2D .0535(c) and .0535(g) are not substantially inadequate to meet CAA requirements, EPA proposes an unlawful act that is beyond the scope of the SIP revision submitted to Region 4. Commenters allege that because North Carolina's June 5, 2017, submission to Region 4 makes no revision to its SSM exemptions or any mention of 15A NCAC 2D .0535, this action would amount to an EPA-initiated revision of the SIP, which, in addition to EPA's self-initiated change in regional policy, is not among the actions EPA may take when presented with a SIP revision. Commenters add that even if EPA could initiate such an action, EPA would still proceed unlawfully by purporting to act on a submittal that does meet applicable completeness requirements because the Agency has received no submittal or requested revision on to act on 15A NCAC 2D .0535(c) and .0535(g) and that the submission received does not include 15A NCAC 2D .1423(g) among the revised subsections of 15A NCAC 2D .1423 submitted for review. Commenters also contend that part 51 requires that the record for a SIP revision submittal contain a letter "from the Governor or his designee, requesting EPA approval of the plan or revision"[86] but that North

[86] *See* 40 CFR 51, App. V 2.1(a).

Carolina's submission is not signed by the governor, and its signatory, Michael Abraczinskas, gives no indication of acting at the Governor's request.

Response 2: Rather than inventing statutory authority as contemplated by the comment, after conducting a searching and thorough evaluation of the North Carolina SIP and relevant statutory and regulatory framework, Region 4 is offering an alternative interpretation to the national policy on SSM outlined in the 2015 action. The U.S. Supreme Court has expressly provided that administrative agencies may change an interpretation.[87] Consistent with the U.S. Supreme Court's decision, in its June 5, 2019, NPRM Region 4 acknowledged the Agency's prior position, provided statutory authority for the new interpretation, explained its rationale for the change and explained why the action taken today is the better policy in this circumstance.[88] Commenters' disagreement with the interpretation does not preclude Region 4 from having authority to change its policy when it has met the required conditions.

Region 4 disagrees with commenters' contention that the plain statutory language of CAA section 302(k) and a statutory structure and cross-references in section 110 preclude the alternative policy adopted. Acknowledging that the Agency took a different approach in the 2015 SSM SIP Call Action, for the reasons articulated in Section III of this final notice Region 4 has adopted an alternative policy for the North Carolina SIP. It is reasonable to interpret the 302(k) definition of "emission limitation" and "emission standard" as meaning "a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis" and account for the fact that there are numerous source types for which a single limitation

[87] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).
[88] *Id.* at 515.

cannot apply at all times for technical reasons. In *Sierra Club*, the Court agreed that the Act does not require a single limitation apply at all times but that some section 112-compliant standard must be applicable at all times.[89] In response to the *Sierra Club* decision's directive that a single standard need not apply continuously, for many of the NESHAP, EPA has established numerical emission limits that apply during full operation but that would be either impractical or impossible to meet during periods of startup and shutdown and therefore also established other emission limitations, such as work practice standards, to apply during periods of startup and shutdown.

Under CAA section 110(a)(2)(A), states are tasked with adopting "emission limitations and other control measures, means, or techniques . . . *as may be necessary or appropriate* to meet the applicable requirements of this Act" (emphasis added). States have generally adopted numerical emission limits that apply to sources during full operational mode. However, since some source types may not be capable of complying with such limits during periods of startup and shutdown, North Carolina has provided for exclusions from the numerical limits during those events and adopted other mechanisms for minimizing source emissions instead. As discussed in Section III of this final notice, the North Carolina SIP contains myriad provisions that generally provide for attainment and maintenance of the NAAQS. Region 4's evaluation of the North Carolina SIP contributed to determining that it is appropriate to adopt an alternative policy for North Carolina for SSM exemption provisions in SIPs. As stated in the June 5, 2019, NPRM and in this final notice, these other mechanisms may include a combination of general duty provisions, work practice standards, best management practices, or alternative emission limits, as well as entirely separate provisions, such as minor source and major source new source

[89] *See* 551 F.3d at 1021.

review provisions regulating construction or modification of stationary sources, that also effectively limit emissions of NAAQS pollutants at all times, including during any SSM events. For the reasons articulated in Section III of this notice, Region 4 disagrees that the automatic exemption for SSM events at 15A NCAC 2D .1423(g) impacts approvability of the SIP revisions in light of the protections afforded by the North Carolina SIP as a whole.

The withdrawal of the SIP Call cannot be an unlawful revision to the North Carolina SIP because this withdrawal does not revise the SIP. In this action, Region 4 is not taking action to approve 15A NCAC 2D .0535(c) and .0535(g) into the North Carolina SIP. These provisions were previously approved by EPA into the North Carolina SIP[90] and have not been removed from the North Carolina SIP. In this action, Region 4 is making a finding that these two provisions are not substantially inadequate to meet CAA requirements and thus withdrawing the SIP Call previously issued to North Carolina that directed the state to provide a SIP revision to address the substantial inadequacy caused by these provisions. We acknowledge that Region 4's finding with respect to the adequacy of 15A NCAC 2D .0535(c) and .0535(g) has changed, but this change, in and of itself, does not constitute a revision of the SIP. On the basis of this change in interpretation for the North Carolina SIP, Region 4 is approving a revision to 15A NCAC 2D .1423 submitted by the state of North Carolina on June 5, 2017, under CAA 110(k)(3). The SIP revision was initiated by the North Carolina Division of Air Quality, and therefore this action cannot be construed as an "EPA-initiated revision of the SIP."

As stated in NC DAQ's June 5, 2017, letter, the State provided redline/strikeout versions of six rules for the purpose of administrative review at EPA's request. The letter stated that it

[90] *See* 51 FR 32073 (September 9, 1986) and 62 FR 41277 (August 1, 1997), respectively.

had enclosed "the revised text for rules .1401, .1403, .1406, .1413, .1414, and .1423 that we are requesting your review and approval." Region 4 agrees with the commenter that, while the submittal includes the entire text of 15A NCAC 2D .1423, paragraph (g) is not among the *revised* subsections of 15A NCAC 2D .1423. However, as indicated in the NPRM, 15A NCAC 2D .1423(d), which is being revised, includes a meaningful reference to .1423(g).[91] Therefore, because paragraph (d) is, in part, dependent on paragraph (g), it was appropriate for Region 4 to assess the adequacy of paragraph (g) in order to assess whether the revisions to paragraph (d) were approvable under the CAA. Region 4's resultant review of North Carolina's SIP, including the SIP-called provisions, 2D .0535(c) and .0535(g), led to the proposal of an SSM policy for North Carolina that is an alternative to the national SSM policy but that is still consistent with the requirements of the CAA.

In addition, Region 4 disagrees with the comment that NC DAQ's June 5, 2017, submittal fails to meet the applicable completeness requirements prescribed under Appendix V. Paragraph 1.2 of Appendix V to part 51 provides that if a completeness determination is not made by six months from receipt of a submittal (which EPA did not for NC DAQ's June 5, 2017, submittal), the submittal shall be deemed complete by operation of law on the date six months from receipt. Thus, NC DAQ's June 5, 2017, has been deemed complete, and EPA must act upon it in accordance with CAA section 110(k)(2).

[91] *See* 84 FR at 26040 ("Rule .1423(d)(1) of the State's current federally approved SIP provides that the owner or operator of a subject internal combustion engine shall determine compliance using 'a [CEMS] which meets the applicable requirements of Appendices B and F of 40 CFR part 60, *excluding data obtained during periods specified in Paragraph (g) of this Rule*.' . . . Paragraph (g) of Rule .1423 provides that the emission standards therein do not apply during periods of '(1) start-up and shut-down periods and periods of malfunction, not to exceed 36 consecutive hours; (2) regularly scheduled maintenance activities.'") (emphasis added).

Commenters also misinterpret part 51, Appendix V. 2.1(a) to require the signatory on the submittal to be acting at the Governor's request. This provision requires that a SIP revision submittal include a letter "from the Governor or his designee, requesting EPA approval of the plan or revision thereof . . . ." Thus, the cover letter on a SIP revision request submitted to EPA must be signed by either the Governor or the Governor's designee, and a designee is not required to be acting at the Governor's request on a particular submittal. In this case, the Director of NC DAQ has been delegated authority to administer the regulatory provisions of state law relating to air pollution control.[92]

3. Comments that EPA has not sufficiently explained why the interpretation of "emission limitation" under Section 110 might be different from the interpretation under Section 112.

Comment 3: Commenters assert that EPA should articulate what meaning it gives "emission limitation" under CAA section 110 versus CAA section 112 and why that alternative interpretation is reasonable. Commenters suggest that EPA could explain relevant terminology such as "other control measures, means, or techniques" in lieu of referring to the rules at issue as "emission limitations," and point out that the CAA does not require those other measures to apply continuously as it does emission limitations.

Commenters state that EPA does not explain how continuous emission limits are not applicable to CAA section 110 or, therefore, why the decision related to CAA section 112 in *Sierra Club* is not applicable to SIPs. The commenters add that EPA's analysis regarding CAA

[92] *See* letter from the Secretary of the North Carolina Department of Environment and Natural Resources to the Director, NC DAQ, June 28, 2010, included in the docket for this rulemaking.

section 110 versus CAA section 112 and the *Sierra Club* decision in the June 5, 2019, NPRM restates arguments that were discussed and rejected in the 2015 SSM SIP Call Action.

Other commenters state that EPA is wrong to propose that it may be reasonable to interpret the concept of continuous "emission limitations" in a SIP to not be focused on implementation of each, individual limit, but rather whether the approved SIP, as a whole, operates continuously to ensure attainment and maintenance of the NAAQS. Commenters argue that the CAA section 302(k)'s definition of "emission limitation" and "emission standard" applies to those terms in section 110 SIPs and that the definitions in 42 U.S.C. 7602 are preceded by statutory language noting that the ensuing definitions apply "[w]hen used in this chapter," that is, across the CAA. Commenters add that EPA may not construe a statute in a way that completely nullifies textually applicable provisions meant to limit its discretion and that the June 5, 2019, NPRM completely ignores statutory language and the limit on EPA's discretion. Commenters also state that while EPA correctly notes that "the court did not make any statement explicitly applying its holding beyond CAA section 112," it did not need to because, as relevant here, *Sierra Club* focused on section 302(k), not section 112.

Response 3: Region 4 acknowledges that commenters disagree with the interpretation offered in the June 5, 2019, NPRM and finalized in the current action, but the proposed action and this final action contain extensive explanation supporting the alternative interpretation regarding the interplay of CAA section 302(k) and CAA section 110 and why this alternative interpretation is reasonable for the North Carolina SIP. Region 4 directs commenters to Section III of the June 5, 2019, NPRM and this final action for a thorough explanation of its

interpretation of CAA section 302(k) in the contexts of CAA section 110 compared to CAA section 112.

As discussed in Section III of the proposed action and of this final action, Region 4 focused on the flexibility given under section 110, i.e., 110(a)(2)(A), in contrast to section 112. Region 4 noted that the definition of "emission limitation" at CAA section 302(k), when read in the 110 context, could provide flexibility to states for providing exemptions at times "when it is not practicable or necessary for such limits to apply, so long as the SIP contains other provisions that remain in effect and ensure the NAAQS are protected."[93] In the context of CAA section 110, it is reasonable to interpret the term "emission limitation" differently from how that term is interpreted in CAA section 112 because of the distinct purposes and requirements of the two provisions. CAA section 110 focuses on the attainment and the maintenance of the NAAQS, which is achieved through numerous provisions, adopted by the state and applied to sources throughout the state (or relevant jurisdiction), working together to meet the statutory requirements. CAA section 112, however, requires an exacting analysis to establish requirements for the regulation of hazardous air pollutants (HAP) from specific source categories. CAA section 112 standards only address the regulation of HAP emissions from each respective source category; they do not address attainment or maintenance of the NAAQS, nor do they have the benefit of backstops and overlapping, generally applicable provisions. Further, Region 4 evaluates the SIP comprehensively to determine whether the SIP as a whole meets the requirement of attaining or maintaining the NAAQS under Subpart A.[94]

[93] *See* 84 FR at 26035.
[94] *See* 84 FR at 26035.

The North Carolina SIP includes general SIP provisions and overlapping planning requirements. In Section IV of the June 5, 2019, NPRM, as reiterated in Section III of this final action, Region 4 has identified generally protective provisions (at 15A NCAC 2D .0501(e), 2D .0510(a), 2D .0511(a), and 2D .0512) as well as specific emission limitations of the North Carolina SIP where appropriate.

Commenters incorrectly assert that the June 5, 2019, NPRM fails to explain why continuous emission limitations are not applicable to CAA section 110 and the rationale for distinguishing the *Sierra Club* decision. A thorough explanation of Region 4's interpretation of CAA section 302(k) in the context of evaluating the North Carolina SIP pursuant to CAA section 110(a)(2)(A), including a discussion of why the *Sierra Club* decision is not applicable in the Section 110 context, is provided in the June 5, 2019, NPRM at 84 FR at 26034–36, and Region 4 refers the commenter to that explanation, together with the discussion of this issue included in Section III of this notice of final action.

Regarding commenters' statement that the arguments made in support of the alternative policy were explicitly discussed and rejected in the final 2015 SSM SIP Call Action, Region 4 is unable to respond because commenters did not specifically identify which arguments they are referencing. In the 2015 SSM SIP Call Action, EPA stated that *Sierra Club* supported the policy position outlined in that notice, but EPA did not say that the *Sierra Club* decision compelled that policy position. In fact, the 2015 SSM SIP Call Action acknowledged that the "decision turned, in part, on the specific provisions of section 112."[95] As explained above in the response to

[95] *See* 80 FR at 33893.

Comment 2, the U.S. Supreme Court has expressly provided that administrative agencies may change an interpretation.[96] Consistent with the U.S. Supreme Court's decision, in its June 5, 2019, NPRM Region 4 acknowledged the Agency's prior position, provided statutory authority for the new interpretation, explained its rationale for the change, and explained why it believes the new interpretation is the better policy in this circumstance.[97] Commenters' disagreement with the interpretation does not preclude Region 4 from having authority to change its policy when it has met the required conditions.

Region 4 acknowledges that CAA section 110(a)(2)(A) uses the term "emission limitation," however given how EPA and state agencies have worked cooperatively to implement CAA section 110, Region 4 does not concede that the term must be interpreted exactly the same in the context of CAA section 110 as it was interpreted by the D.C. Circuit in the context of CAA section 112. A thorough rationale for the alternative interpretation is included in Section III of the proposed action and this final action.

Although CAA section 302(k) instructs that an emission limitation limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, emission limitations are merely one of numerous measures that can be used by a state to limit emissions pursuant to CAA section 110(a)(2)(A). While a director may exempt excess emissions which occurred during a period of startup, shutdown and malfunction, assuming an appropriate showing has been made by the source, other "control measures, means and techniques," and potentially other emission limitations, will continue to apply to the source.

[96] *See Fox*, 556 U.S. 502.
[97] *Id.* at 515.

Region 4 acknowledges the comment that the presumption of consistent usage dictates that a word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning. Importantly, however, the presumption should be applied pragmatically, and relevant texts indicate that "this canon is particularly defeasible by context."[98] It is appropriate to rely on the *Duke Energy* decision for the proposition that the rule of statutory interpretation calling for words to be defined consistently can be overcome, depending on context.[99] Here, that context is particularly relevant given the different structure and purpose between CAA sections 110 and 112, as described in more detail in Section III of the proposed action and of this final action.

Contrary to commenters' assertion, neither CAA section 110(a)(2)(A) or 302(k) is "nullif[ied]" by Region 4's interpretation in the context of this SIP action. Rather, Region 4 offers an alternative interpretation of both provisions, which focuses on the purpose of SIPs, consistent with CAA section 110, and the concept proffered by CAA section 302(k), as interpreted by the D.C. Circuit that some standard, but not necessarily the same standard, apply at all times.[100]

Commenters acknowledge that in the *Sierra Club* decision, "the court did not make any statement explicitly applying its holding beyond CAA section 112." However, Region 4 disagrees with the commenters' characterization that *Sierra Club* must apply beyond CAA

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[98] Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 171 (Thompson/West) (2012).
[99] *See* Valerie C. Brannon, Cong. Research Serv., R45153, Statutory Interpretation: Theories, Tools, and Trends 23 (April 5, 2018) (quoting *Envtl. Def. v. Duke Energy Corp*., 549 U.S. 561, 574 (2007)) ("A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies").
[100] *See Sierra Club*, 551 F.3d at 1021.

section 112, since the court consistently referred to "112-compliant standards"[101] and the requirements that "sources regulated under section 112 meet the strictest standards."[102] It is fair for Region 4 to give weight to the language used by the court and to not expand the decision in this context.

4. Comments that the 302(k) definition of "emission limits" and "emission standards" requires continuous emission limits and that the North Carolina SIP does not provide protections that are equally stringent to continuously applicable emission limits.

Comment 4: Commenters generally argue that EPA's June 5, 2019, NPRM contradicts CAA section 302(k) by allowing "emission limitations" to include automatic and discretionary exemptions for SSM events, violating the Act's requirement that emission limitations be "continuous." Commenters note that EPA has read CAA section 302(k) to exclude SSM exemptions from SIPs "since at least 1982."[103] Commenters, citing *Sierra Club*, also state that the D.C. Circuit has held, in a case interpreting the section 302(k) definition of "emission limitations" as it appears in the Act's section 112 MACT standards, that an emission limitation does not apply on a "continuous basis" when it includes SSM exemptions.

Commenters claim that by using a singular, indefinite article—"*a* requirement"—Congress also makes clear that "emissions limitation" must be a discrete, ongoing requirement, not a "broad range of measures . . . targeted toward attainment and maintenance" of NAAQS and that CAA 302(k)'s terms apply just as much to emission standards or limitations a state establishes as part of its SIP as to those EPA establishes.

[101] *Id.* at 1027.
[102] *Id.* at 1028.
[103] *See* 80 FR 33941/1.

Commenters state that automatic and discretionary exemptions violate the bedrock principles of the Act that SIPs must contain "enforceable emission limitations" (CAA section 110(a)(2)(A)), which must apply on a "continuous basis" (CAA section 302(k)). Commenters add that Congress gave states no authority to relax emission standards on a temporal basis. Commenters also quote the Court in *U.S. Sugar Corp. v. EPA* as stating, "exempt[ing] periods of malfunction entirely from the application of the emissions standards . . . is [not] consistent with the Agency's enabling statutes,"[104] and "EPA had no option to exclude these unpredictable periods."[105]

Commenters state that even if there are instances where automatic exemptions from emission limits for SSM events in a SIP do not preclude attainment and maintenance of the NAAQS, EPA must issue a SIP call if a state's SIP is substantially inadequate to maintain the NAAQS or otherwise comply with CAA requirements. Commenters also state that EPA's broader point about states' discretion is also flawed because the cases it selectively relies upon hold that SIPs must not only provide for timely attainment and maintenance of NAAQS but also satisfy CAA section 110's other general requirements.

Commenters state that in the final SIP call, EPA noted several cases, including *Mich. Dep't of Envtl. Quality v. Browner*, 230 F.3d 181 (6th Cir. 2000), and *US Magnesium, LLC v. EPA*, 690 F.3d 1157 (10th Cir. 2012), where courts upheld EPA action finding that SSM exemptions in SIPs are inappropriate and point to EPA's prior statement characterizing these

[104] No. 11-1108, 2016 WL 4056404, at *14 (D.C. Cir. July 29, 2016).
[105] *Id.* at *15.

decisions as confirming the requirement for continuous compliance and prohibiting exemptions for excess emissions during SSM events.

Commenters state that none of the June 5, 2019, NPRM's policy or structural arguments about a "fundamentally different regime" in section 110 SIPs grapples with the plain language of CAA section 302(k). Commenters believe Congress expressly requires both emission standards and emission limitations to apply "on a continuous basis," citing the definition at CAA 302(k), and that EPA is not entitled to substitute its judgment for the plain intent of Congress. Commenters state that EPA itself understands that the section 302(k) definition of "emission limitation" extends to section 110 SIPs and cite to an action[106] in which EPA references that definition to support the position that an emission limitation is not required to be in numerical form to qualify as a reasonably available control technology (RACT) requirement in the Pennsylvania SIP. Commenters add that the relevant statutory definition is not "general enough" to allow EPA to depart from what Congress has specifically stated that the terms "emission limitation" and "emission standard" mean and that the interpretation EPA proposes has not been made available by the statute. Commenters also state the requirement for "continuous" emission limitations means that "temporary, periodic, or limited systems of control" do not comply with the Act, citing *Sierra Club*, 551 F.3d at 1027 (quoting H.R. Rep. No. 95-294, at 92 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1170).

Response 4: Commenters cite both to *Mich. Dep't of Envtl. Quality v. Browner*[107] and *US Magnesium, LLC v. EPA*[108] and question why the June 5, 2019, NPRM does not discuss the

[106] *See* 84 FR 20,274, 20,280 (May 9, 2019).
[107] *See* 230 F.3d 181 (6th Cir. 2000).
[108] *See* 690 F.3d 1157 (10th Cir. 2012).

cases. At the outset, Region 4 acknowledges the prior policy position cited by the commenters, and for the reasons discussed thoroughly in the June 5, 2019, NPRM and this final notice, Region 4 is adopting an alternative interpretation with respect to the North Carolina SIP.

In *MDEQ v. Browner*, the Sixth Circuit Court of Appeals deferred to EPA and found EPA Region 5's disapproval of certain Michigan SIP provisions which exempted excess SSM emissions in specified circumstances for the otherwise applicable regulations to be reasonable.[109] While the court did find that EPA's action was reasonable in light of the Agency's existing SSM guidance, the decision did not squarely speak to the legality of SSM exemptions in SIPs as a general matter. The court was merely reviewing a challenge to a locally applicable SIP action undertaken by one EPA regional office and found that the regional office acted reasonably in disapproving certain provisions.

In *US Magnesium*, the petitioner challenged a SIP call issued to Utah by EPA Region 8 due to an unavoidable breakdown rule included in the Utah SIP. In its analysis, the Tenth Circuit Court of Appeals determined that CAA 110(k)(5) is ambiguous, and then evaluated whether the Region's disapproval action was reasonable.[110] The court found it allowable for an EPA regional office to make a determination regarding the SIP's adequacy based on the Agency's "understanding of the CAA."[111] Similarly, this action is consistent with the understanding of the CAA set forth herein. Further, the Tenth Circuit did not fault the Agency for relying on a policy that had not gone through notice and comment.[112] In fact, the alternative policy being adopted

[109] *See* 230 F.3d at 185.
[110] *See* 690 F.3d at 1167.
[111] *Id.*
[112] *Id.*

by Region 4 and announced in this action went through a public comment process and the Agency carefully considered all comments received. The Tenth Circuit deferred to EPA's SIP call as being reasonable because it was consistent with the Agency's interpretation of the CAA at that time, as articulated in the notice that accompanied that action.[113] While the court acknowledged that EPA's interpretation of the CAA and application of that interpretation to the Utah SIP were reasonable, like the Sixth Circuit, the Tenth Circuit did not squarely rule on the legality of exemption provisions in SIPs. The commenter also cites to the D.C. Circuit's 2008 *Sierra Club* decision, however Region 4 has provided a thorough discussion of that decision in Section III of the proposed action and this final action.

As discussed in Section III of the June 5, 2019, NPRM and of this final action, Region 4 is adopting an alternative interpretation of the interplay between CAA sections 302(k) and 110 which is supported by our consideration of the generally protective terms and provisions of the North Carolina SIP. As explained above in the response to Comment 2, the U.S. Supreme Court has expressly provided that administrative agencies may change an interpretation.[114] Commenters' disagreement with the interpretation does not preclude Region 4 from having authority to change its policy if it is reasonable to do so.

As discussed in Section III of the June 5, 2019, NPRM and of this final action, Region 4 disagrees with commenters' interpretation of the scope of the *Sierra Club* decision and its application to SIP provisions. The commenters read CAA section 302(k) too narrowly. Further, the decision did not speak to the need for a SIP emission limitation to apply on a "continuous

[113] *Id.* at 1170.
[114] *See Fox*, 556 U.S. 502.

basis." Rather, the Court spoke only regarding CAA section 112-compliant standards: "When sections 112 and 302(k) are read together, then, Congress has required that there must be continuous section 112-compliant standards. The general duty is not a section 112-compliant standard. . . . Because the general duty is the only standard that applies during SSM events—and accordingly no section 112 standard governs these events—the SSM exemption violates the CAA's requirement that some *section 112 standard* apply continuously."[115] Additionally, in *Sierra Club,* the D.C. Circuit acknowledged that 302(k) did not necessarily require applying a single standard continuously.[116] Commenters' assertion that CAA 302(k) mandates that SIP must contain emission limits composed of a single standard that applies continuously is misplaced, impractically narrow, and inconsistent with the plain words of the *Sierra Club* decision.

Contrary to the commenter's allegation, Region 4 is not "invent[ing]" statutory authority. Rather, guided by the intent of the provisions at issue, Region 4 has re-examined existing statutory authority and considered the merits of an alternative interpretation. As discussed in Section III of the June 5, 2019, NPRM and this final rule preamble, the U.S. Supreme Court has instructed that states have flexibility to "adopt whatever mix of emission limitations it deems best suited to its particular situation," and the alternative interpretation adopted in this action reflects that flexibility.[117]

[115] *See* 551 F.3d at 1027–28 (emphasis added).
[116] *See id.* (interpreting CAA sections 302(k) and 112 together to mean "that *some* section 112 standard apply continuously") (emphasis added).
[117] *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

Legislative history cited by the commenters (and cited by the D.C. Circuit) specifically says that provisions of section 106 of the committee bill are intended "to overcome the basic objections to intermittent controls and other dispersion techniques which were discussed in the background section."[118] The comment mischaracterizes relevant legislative history. Rather than indicating that a single emission limitation must apply to a source continuously, the legislative history indicates that the definition of emission limitation be implemented through having some constant or continuous emission reduction measures, but notably does not indicate an intent for a single discrete measure.[119]

Comments regarding the decision in *U.S. Sugar Corp. v. EPA* are inapposite because the case was interpreting the *Sierra Club* decision and both decisions deal with standards set pursuant to CAA section 112's strict requirements (and *U.S. Sugar Corp.* also addressed a CAA section 129 rule which has a standard setting structure more similar to CAA section 112 than section 110). As discussed in depth in section III of the June 5, 2019, NPRM and of this final notice, in this instance, it is appropriate to distinguish those decisions from application to SIPs under CAA section 110.

Further, Region 4 disagrees that the definition in CAA section 302(k) is not general enough to have different meanings in different contexts, as is explained in the discussion of the *Duke Energy* decision in Section III of the June 5, 2019, NPRM and this final action.

As explained in Section III.A., the automatic exemption provisions in the North Carolina SIP do not relax an existing emission standard during specified time periods. Rather, Region 4

[118] H.R. Rep. No. 95-294, at 94 (1977).
[119] *Id.* at 92.

interprets CAA section 110(a)(2)(A) to mean that a state may provide exemptions from emission limits, during which times a source may be exempt from the emission limit, because the SIP contains a set of emission limitations, control means, or other means or techniques, which apply continuously and, taken as a whole, meet the requirements of attaining and maintaining the NAAQS.

Region 4 disagrees that the alternative policy articulated in Section III of the proposed action and this final action does not engage with the terms in the definition of emission limitations in CAA section 302(k). Rather, as explained in the NPRM and this notice, the alternative policy focuses on the purpose and context on the statutory terms and provisions. Region 4 disagrees with commenters' contention that the alternative interpretation adopted is contrary to the plain language of CAA section 302(k). Depending upon context, the concept of continuity may be applied differently in different situations. For example, CAA section 402(7) defines the term "continuous emission monitoring system" (CEMS) to mean equipment that provides a permanent record of emissions and flow "on a continuous basis." Yet CEMS methods are required to provide such data at periodic intervals, not for every moment of a unit's operation.[120]

Regarding rules 15A NCAC 2D .0535(c) and .0535(g), Region 4 disagrees with the commenters' assertion that a potential exemption for SSM events means the emission limitations themselves are not continuous. In fact, except for the exemption provided at 15A NCAC 2D .1423(g) (as discussed elsewhere in this notice), the SIP emission limitations do apply at all

[120] *See* 40 CFR 60.13(e)(1)–(2), 63.8(c)(4)(i)–(ii) (requiring the minimum data collection frequency under the NSPS and NESHAP to be once every 10 seconds for systems measuring opacity and once every 15 minutes for systems measuring other types of emissions).

times. Although the SIP provides, under 15A NCAC 2D .0535(c) and .0535(g), that the Director may determine that a particular instance of excess emissions is not a violation because it was unavoidable, as demonstrated by the source, this does not mean that the emission limit in question ceased to apply during the event. Furthermore, the fact that the NC DAQ Director might determine, after an instance of excess emissions has occurred, that the event was unavoidable and thus not a violation of a rule is unlikely to lessen a source's efforts to comply with the standard in the first place. This argument is supported by the facts that (1) 15A NCAC 2D .0502 requires all sources to be provided with the "maximum feasible control," which applies at all times, including periods of startup and shutdown; (2) excess emissions are generally emission limit violations, and facilities do not know in advance whether any particular instance will be deemed by the State not to be a violation, so the prudent course of action would be for sources to try to avoid or limit any excess emission events; (3) 15A NCAC 2D .0535(c) requires the Director, in making a malfunction determination, to consider, among other things, whether all equipment has been maintained and operated, to the maximum extent practicable, in a manner consistent with good practice for minimizing emissions; and (4) 15A NCAC .0535(g) directs facilities, during startup and shutdown, to operate all equipment in a manner consistent with best practicable air pollution control practices to minimize emissions and to demonstrate that excess emissions were unavoidable when requested to do so by the Director.

Region 4 also disagrees with commenters that the interpretation Region 4 proposed is not available under the statute. The House Report language referenced by commenters comes from a section headed as "2B. Committee Proposal-*Intermittent Controls and Tall Stacks*."[121] The need

[121] H.R. Rep. No. 95–294, at 91 (1977) (emphasis added).

for "continuous controls" is discussed in several places in the report, but always in the context of intermittent controls, tall stacks, and other dispersion enhancement techniques.[122] Thus, it is reasonable to interpret the phrase "on a continuous basis" in 302(k) as intending to prevent intermittent controls,[123] tall stacks, and other dispersion techniques from being used as a means of emissions control because those techniques do not actually reduce pollutant emissions. As discussed above, the SSM exemption provisions in the North Carolina SIP do not actually prevent the applicable limits from applying continuously, and Region 4's interpretation is consistent with the intent and language of CAA section 302(k).

The comment regarding the Pennsylvania RACT SIP is beyond the scope of this action. Region 4's announcement of its alternative policy with respect to SSM provisions in the North Carolina SIP is limited in scope to North Carolina and does not impact or govern Region 3's evaluation of SIPs within that Region's jurisdiction.

5. Comments that the action is not an appropriate use of EPA's regional consistency process.

Comment 5: Commenters state that Region 4's process for the June 5, 2019, NPRM, including the memo for regional consistency and EPA's accompanying FAQ document, do not

[122] *See, e.g.*, H.R. Rep. No. 95-294, at 6 (1977) ("Continuous Controls. – The amendments would also affirm the decisions of four U.S. court of appeals cases that the act requires continuous emission reduction measures to be applied. Thus, intermittent control measures (to be applied only in case of adverse weather conditions), increasing stack heights, or other pollution dispersion techniques would not be permitted as final compliance strategies.") and 190 ("Continuous Reduction – To make clear the committee's intent that intermittent or supplemental control measures are not appropriate technological systems for new sources . . . , the committee adopted language clearly stating that continuous emission reduction technology would be required to meet the requirements of this section.").

[123] "Intermittent control" is a concept in which emissions are tailored to avoid violating ambient air quality standards under meteorological conditions that inhibit pollutant dispersion but without significantly reducing total pollutant emissions. Power plants could accomplish this, at least in theory, by practices such as shifting the electrical load to another power plant or using a temporary supply of low sulfur fuel. *See, e.g.*, EPA, National Strategy for Control of Sulfur Oxides from Electric Power Plants at 11, (July 10, 1974), included in the docket for this rulemaking.

support the ability to apply the alternative policy to the North Carolina SIP or other Region 4 SIPs and that EPA's action sets a dangerous precedent for approving exceptions to national consistency. Commenters point out that EPA's national action disapproved the same SIP provision that Region 4 proposed to approve using regional guidance. Commenters state that the Region 4 memo request for concurrence and other materials in the rulemaking docket do not contain any explanation for the basis for the alternative interpretation and how such an alternative policy could apply in Region 4 while a contrary interpretation would apply to the rest of the country. Commenters assert that EPA obviously wants to revise its national policy, and should have to do so at the national level and address the detailed explanations for the existing policy in so doing. Commenters also assert that the Regional SIP action implicitly establishes a new national policy on SSM in SIPs and, "on the heels" of the April 29, 2019, Region 6 proposed action in Texas, shows a clear strategy by EPA to reverse a national policy by using Regional decisions. Commenters state that it would be nearly impossible to justify the Regional action overruling the national 2015 SSM SIP call with respect to regional consistency and that Region 4's alternative interpretation, combined with the alternative interpretation used in the Region 6 NPRM, effectively deteriorates national consistency.

Commenters state that the June 5, 2019, NPRM fails to meet the high bar to justify alternative treatment from other Regions with respect to SSM. One commenter asks how many states have made changes to SIPs in response to the SSM SIP call, how many of those revised SIPs EPA has approved, and what communications EPA has had with states about its intent to act on pending SIP revisions or entertain further changes from those states.

Commenters state that Congress has granted EPA no authority to authorize inconsistent interpretations of the Clean Air Act among regions based on a signed concurrence memo from Headquarters. Commenters state that the June 5, 2019, NPRM, and EPA Region 4's pretense to be acting pursuant to EPA's "consistency" regulations, in fact contradict 40 CFR 56.5(a) by proposing actions that are flatly inconsistent with the Act and Agency policy. Commenters conclude that Region 4 cannot use regulations addressing inconsistency with "national policy" to license violating the CAA. Commenters state that the action would open the door to virtually any exception from national policy on SSM and could therefore lead to increased emissions as well as unnecessary legal proceedings when exceptions are challenged.

Commenters state that EPA's proposed use of its regional consistency regulations is both inconsistent with the plain meaning of those regulations and not entitled to judicial deference under the *Auer-Kisor* line of cases and that no deference would prevent a court from applying the plain meaning of EPA regulations to overturn the Agency's contrary interpretation. Commenters state that EPA misinterprets section 56.5(b) as allowing EPA Regions to take actions that interpret the CAA in a manner inconsistent with national policy when the Region seeks and obtains concurrence from the relevant EPA Headquarters office. Commenters state that Region 4 cannot use regulations addressing inconsistency with "national policy" to license violating the Clean Air Act, contradicting and reversing a national EPA rulemaking, and contravening the controlling D.C. Circuit court decision. Commenters state that section 56.5(b) is not ambiguous for the purposes of this action and does not permit EPA to concur with interpretations that explicitly diverge from the Clean Air Act, a national EPA rulemaking, and controlling court decision. Commenters state that section 56.5(b) does not allow regional offices

to create inconsistency of their own accord by approving a SIP that otherwise violates EPA's 2015 SSM SIP Call. Commenters state that EPA may not simply issue a section 56.5(b) concurrence for any region that requests it—to contradict plain statutory language, a national EPA rule, and controlling D.C. Circuit court decision—as Regions 4 and 6 both have proposed. Commenters also reference section 56.3(b) as obligating EPA to "correct[] inconsistencies by standardizing" the nationally-applicable policies that must be employed by the EPA regional offices implementing and enforcing the Act. Commenters conclude that EPA proposes a contrived application of the regional consistency regulations it hopes will allow it to undo the 2015 SSM SIP Call and circumvent both national rulemaking to reverse the SIP Call and national review of this unlawful action in the D.C. Circuit.

Commenters add that, assuming for the sake of argument that the June 5, 2019, NPRM could be approved under EPA's consistency regulations, it would have to proceed under an additional provision, 40 CFR 56.5(c), which EPA has neither invoked nor fulfilled. Commenters state that "where proposed regulatory actions involve inconsistent application of the requirements of the act, the Regional Offices *shall* classify such actions as special actions," and "*shall* follow" the Agency's guidelines for processing state implementation plans, including EPA's guidance document State Implementation Plans—Procedures for Approval/Disapproval Actions, OAQPS No. 1.2-005A or revisions.[124] Commenters add that compliance with EPA's consistency regulations and guidance is required to give meaning and effect to Congress's "mandate to assure greater consistency among the Regional Offices in implementing the Act."[125]

[124] *See* 40 CFR 56.5(c) (emphasis added).
[125] *See* 44 FR 13043, 13045 (March 9, 1979).

Commenters also state that, despite an April 29, 2019, letter captioned "Regional Consistency Concurrence Request" and a "concurrence" signed by the Director of Air Quality Planning and Standards, there is no record evidence that EPA has, in fact, complied with its consistency regulations and mandatory guidance documents in proposing to exempt North Carolina and the rest of Region 4 from the national SSM policy and, therefore, EPA cannot lawfully withdraw its SSM SIP Call for North Carolina or approve the State's previously submitted plan.

***Response 5*:** Comments challenging EPA's general authority to authorize inconsistent interpretations of the Clean Air Act among regions are outside the scope of this action. To the extent commenters are raising concerns with the action taken by EPA Region 6 concerning SSM SIP provisions in Texas, that is outside the scope of this action and Region 4 provides no response.

With respect to the concerns raised regarding this Region 4 action, which is limited in scope to North Carolina, Region 4 did follow the procedures outlined in the regional consistency regulations at 40 CFR 56.5(b), both at proposal as explained in the June 5, 2019, NPRM and acknowledged by commenters, and at final. Specifically, before proposing this action, the Region 4 Acting Regional Administrator at the time, Mary S. Walker, sought and received EPA headquarters concurrence to deviate from the national policy announced in the 2015 SSM SIP Call Action.[126] Also, before finalizing of this action, the Region 4 Regional Administrator sought and received EPA headquarters concurrence to deviate from national policy in this final

[126] *See* Document ID No. EPA-R04-OAR-2019-0303-0011, available at www.regulations.gov.

action.[127] The commenters allege that Region 4 failed 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). 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; EPA has updated its procedures for approving and disapproving SIPs many times since then. Region 4 did follow the most recent iteration of EPA's internal SIP review process for ensuring national consistency, which is EPA's 2018 SIP Consistency Issues Guide (included in the docket for this rulemaking).

The commenters also argue that Region 4 failed to provide justification for deviating from the national policy outlined in the 2015 SSM SIP Action. Nothing in EPA's regional consistency regulations or CAA section 301(a)(2) require a justification to underpin regional deviation from national policy. All that is required by the applicable regulations 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. However, EPA's Office of Air and Radiation did review a draft of this final action and determined that the circumstances and rationale set forth in this action provide a reasonable basis to concur on Region 4's deviation from the national policy outlined in the 2015 SSM SIP Call Action.

Region 4 disagrees with commenters' position that this action is inconsistent with the regional consistency regulations at 40 CFR 56.5 and with the implication that the Agency has run afoul of 40 CFR 56.3. The regulations in 40 CFR part 56 promote consistency but also clearly

[127] The concurrence request memorandum, signed March 19, 2020, is included in the public docket for this action.

contemplate that a regional office may seek to deviate from Agency policy and provides a process and framework for doing so, which Region 4 has followed.[128] Commenters assertion that Region 4's interpretation of these regulations is not entitled to deference under *Auer* or *Kisor* is similarly misplaced since Region 4 followed the process set forth in the regulations. Commenters are reiterating their concerns regarding the substance of Region 4's alternative policy for the North Carolina SIP and couching it in a challenge to Region 4's application of the regulatory provisions at 40 CFR 56.5.

Region 4 acknowledges that the 2015 SSM SIP Call Action articulated a different interpretation of the relevant statutory provisions. However, as explained in Sections III and IV of the June 5, 2019, NPRM and Section III of this final action, Region 4 has determined that an alternative interpretation is warranted for the North Carolina SIP. This action only outlines an alternative policy that applies to North Carolina, based on the Agency's evaluation of air quality in North Carolina and the North Carolina SIP. Region 4 is not, in this action, establishing an alternative policy for any other states within its jurisdiction. Application of an alternative policy in any other state other than North Carolina would require a separate rulemaking action subject to APA public comment requirements. To the extent the comments discuss potential Agency actions beyond this action relating to the North Carolina SIP, or precedent for future Agency approaches to actions, such comments are out of scope for this rulemaking.

The comments that this action reverses a national policy or establishes a new national policy overstates the scope of this action, which only announces an alternative policy for analysis

[128] *See, e.g.*, 80 FR 56418, 56420 n.4 (September 18, 2015), 82 FR 3234, 3239 n.10 (January 11, 2017), and 82 FR 24621, 24624 n.7 (May 30, 2017) (citing 40 CFR 56.5(b) consistency requirements in proposing actions inconsistent with Agency interpretation).

of the North Carolina SIP and does not revise or otherwise alter the national policy on SSM. Region 4 lacks authority to issue a policy beyond the states included in the Region. Both the June 5, 2019, NPRM and this action provide a detailed explanation for the basis for the alternative policy and this action.

In response to comments that refer to a controlling D.C. Circuit court decision, Region 4 notes that there is no controlling D.C. Circuit decision because, as discussed in the June 5, 2019, NPRM and in Section III of this final action, *Sierra Club* does not, on its face, apply to SIPs and actions taken under CAA section 110. Region 4 acknowledges that, if there were a directly controlling decision of the U.S. Court of Appeals for the D.C. Circuit, Region 4 would be bound by such a decision pursuant to 40 CFR 56.3(d).

In response to the numerous questions posed by the commenters regarding actions taken by other states with respect to SSM provisions and actions taken by EPA with respect to any such state actions, the present action is a state-specific action and any actions EPA has or has not taken with respect to SIP submittals from other states in other regions are not relevant to this action, and Region 4 provides no response.

6. Comments that EPA has not sufficiently explained the rationale behind the action.

Comment 6: Commenters generally assert that EPA's explanation for the proposed action is inadequate and conclusory and fails to meet Agency standards for decision-making. The commenters claim that EPA has not explained why the alternative interpretation of SSM policy is warranted and that EPA's analysis regarding other provisions in the North Carolina SIP, such as control requirements, maintenance, limitations on the duration of SSM emissions, and general obligations to comply with the NAAQS, only restates arguments that were discussed and

dismissed in the 2015 SSM SIP Call. Commenters state that EPA has not supplied a reasoned analysis of why this change in course is necessary, why it is especially necessary in Region 4 (and Region 6) but nowhere else, or even why it might be good policy and that EPA is therefore acting well outside the zone of deference *State Farm* and later cases afford to agencies reversing course in this manner.

Commenters state that EPA has not attempted to show that its prior conclusions were flawed and that it is arbitrary and capricious for the Agency to now rely on legal arguments it had exposed as faulty without explaining why it was wrong to reject those arguments in the first place. Commenters claim that EPA does not now disavow the policy arguments it advanced in support of its plain-text reading of the CAA in the 2015 SSM SIP Call and that EPA has advanced no policy rationale beyond passing mentions of "flexibility" to address why allowing SIPs to exempt SSM pollution would advance the goals of the CAA, much less do so better than the status quo. Commenters state that "[t]he Act's purpose and policy is to protect air quality and the public welfare, not to give states or polluters 'flexibility' embodied, as here, by exemptions that do not hold polluters directly accountable for excess emissions." Commenters state that EPA's SSM SIP Call disapproval of automatic exemptions rested, in part, on the correct conclusion that even a single emission event could cause a NAAQS violation and that EPA's reversal of that position is not accompanied by a reasoned explanation for it.

Commenters add that EPA's new vision of how the Act operates ignores the history of failures that led to multiple amendments and the plain statutory requirements of the Act as presently constructed, stating that Congress's unwillingness to rely on the "old ends-driven approach that had proven unsuccessful" is reflected in the specific minimum requirements added

throughout the 1990 CAA Amendments. Commenters add that, while EPA is not precluded from adopting a different approach to venue under the CAA, the Agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy."[129]

Response 6: Region 4 disagrees that it has not adequately explained its rationale for this action. Section III of the proposed action and this final action, as well as Section IV of the June 5, 2019, NPRM extensively explain the rationale for this action and why Region 4 believes it is warranted and is the appropriate approach in this circumstance. Specifically, Section III of the June 5, 2019, NPRM and this final rule preamble explain that the U.S. Supreme Court has instructed that states have flexibility to "adopt whatever mix of emission limitations it deems best suited to its particular situation"[130] and the alternative interpretation adopted in this action reflects that flexibility. Region 4 does not disagree with the Commenters' assertion that the purpose of the CAA is to protect air quality and public welfare.[131] However, this action does not run afoul of this purpose for numerous reasons, including that the North Carolina SIP contains overlapping protective provisions and, as discussed further in response to Comment 8, the fact that air quality in North Carolina has continued to improve over the years even though exemption provisions have been included in the SIP. No areas of North Carolina are currently designated nonattainment for any NAAQS.[132]

[129] *Fox*, 556 U.S. at 515.
[130] *Train*, 421 U.S. at 79.
[131] *See* 42 U.S.C. 7401(b)(1).
[132] *See* https://www3.epa.gov/airquality/greenbook/ancl3.html.

EPA has a statutory obligation to approve SIPs that meet all applicable CAA requirements. Region 4 has evaluated the North Carolina SIP in light of the alternative SSM policy interpretation set forth in the proposed and final notices – a policy which as explained above is consistent with the CAA – and has determined that the submitted SIP revision meets all applicable CAA requirements. Due, in part, to Region 4's adoption of an alternative policy for the North Carolina SIP, Region 4 has approved the June 5, 2017, SIP revision before EPA.

Commenters challenge Region 4's deviation from the national policy without explaining why that national policy is wrong, but commenters fail to recognize that no such explanation is required. The appropriate standard for evaluating an agency change in position was set forth in *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co*.[133] and clarified in *FCC v. Fox Television Stations, Inc.*[134] The *Fox* Court explained that a change in position does not require a heightened showing and that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one."[135] Rather, "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, which the conscious change of course adequately indicates."[136]

Region 4's June 5, 2019, NPRM acknowledged this change in position by explaining the Agency's historical approach with respect to SSM exemption provisions in SIPs. As articulated in the June 5, 2019, NPRM and reiterated and expanded on in this final action, Region 4 explains

[133] *See* 463 U.S. 29 (1983).
[134] *See* 556 U.S. 502 (2009).
[135] *Id.* at 515 (emphasis original).
[136] *Id.* (emphasis original).

how this alternative interpretation is consistent with the statutory text. North Carolina's exemption provisions are reasonably bounded and provide backstop protections of instructing sources to limit excess emissions and maintain pollution control equipment in good working order, among other things. For example, as discussed in more detail in the June 5, 2019, NPRM, the exemption at 15A NCAC 2D .0535(g) requires that owners or operators use best available control practices when operating equipment to minimize emissions during startup and shutdown periods, and the exemption provided at 15A NCAC 2D .0535(c) outlines seven criteria that provide additional protections of the NAAQS during a malfunction by requiring consideration of, among other things, whether sources have minimized emissions and have limited the extent of emissions which could occur to the greatest extent practicable and by prohibiting the Director from excusing excess emissions from a source due to malfunctions for more than 15 percent of a source's operating time.

Moreover, North Carolina's SIP includes numerous additional provisions protecting against NAAQS exceedances or otherwise causing excess emissions. As discussed in more detail in the proposal, 15A NCAC 2D .0502 requires "maximum feasible control" on all sources at all times, including periods of startup and shutdown; 15A NCAC 2D .0501(e) directs all sources to operate in a manner that does not cause any ambient air quality standard to be exceeded at any point beyond the premises on which the source is located; 15A NCAC 2D .0535(d) requires utility boilers (and any source with a history of excess emissions, as determined by the Director) to have a malfunction abatement plan approved by the Director and identifies the minimum requirements for such a plan; 15A NCAC 2D .0510(a), 15A NCAC 2D .0511(a), and 15A NCAC 2D .0512 prohibit emissions from sand, gravel, or crushed stone

operations, lightweight aggregate operations and wood products finishing plants from causing exceedance of ambient air quality standards beyond facility property lines; 15A NCAC 2D .0521(g), for sources that operate COMS, prohibits any exempted excess opacity emissions from causing or contributing to a violation of any emission state or federal standard; and the North Carolina Clean Smokestacks Act (NCCSA), codified at 40 CFR 52.1781(h), limits NOx and SO_2 emissions from coal-fired power plants to utility-wide caps designed as part of North Carolina's comprehensive plan for improving air quality in the State. Region 4 also notes that 15A NCAC 2D .0535 (Excess Emissions Reporting and Malfunctions), including the exemption provisions at 2D .0535(c) and .0535(g), does not apply where sources are subject to federal standards.[137]

Finally, as previously mentioned, North Carolina currently does not have any areas designated non-attainment under any NAAQS. Together with the goal of providing states with adequate flexibility to address air quality issues, Region 4 has good reason to change the policy position for North Carolina. Region 4 believes this is the better course of action in this case and is thus pursuing this change in policy for North Carolina.

7. Comments that the notice of proposed rulemaking fails to demonstrate compliance with CAA section 110(l).

Comment 7: Commenters state that, in the event of a SIP element's substantial inadequacy, CAA section 110(*l*) provides that EPA must not approve a SIP containing that element. Commenters state that EPA has failed to show compliance with CAA 110(*l*) and that

[137] See 15A NCAC 2D .0535(b), which provides that 15A NCAC 2D .0535 does not apply to sources subject to North Carolina regulations adopting EPA's NSPS or NESHAP at 40 CFR parts 60, 61 and 63, except where such sources are subject to a SIP provision that is more stringent than federal requirements.

the June 5, 2019, NPRM failed to address or even mention it. Commenters also state that EPA is wrong to point to "redundancies" in the North Carolina SIP to justify its proposed approach because overlapping protections are deliberately implemented to ensure air quality and public welfare are robustly protected, not to provide wiggle room for later deregulatory actions.

Commenters also state that demonstrating compliance with the national standards is not the sole measure for approval of a SIP revision. SIPs in nonattainment areas must also "meet the applicable requirements of part D." In addition, commenters note that CAA section 107(d)(3)(E) provides that EPA cannot redesignate a nonattainment area as an attainment area unless it finds not only that the area has attained the NAAQS, but also that "the State containing such area has met all [the] requirements applicable to the area under section 7410 of this title and part D of this subchapter."

Response 7: Region 4 disagrees that it failed to address or to show compliance with CAA section 110(*l*), which provides that "[t]he Administrator shall not approve a revision of a plan if the revision would interfere with an applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of this chapter."[138] The decision to withdraw the SIP Call for the exemption provisions at 15A NCAC 2D .0535(c) and 15A NCAC 2D .0535(g) does not implicate CAA section 110(*l*) because it does not constitute a revision to an implementation plan; the provisions were approved into the North Carolina SIP in 1986[139] and 1997,[140] and have been in the North Carolina SIP ever since. Additionally, although Region 4 did not directly cite CAA section 110(*l*) in the June 5, 2019, NPRM, we proposed to

[138] *See* 42 U.S.C. 7410(*l*).
[139] EPA approved 15A NCAC 2D .0535(c) into the North Carolina SIP on September 9, 1986 (51 FR 32073).
[140] EPA approved 15A NCAC 2D .0535(g) into the North Carolina SIP on August 1, 1997 (62 FR 41277).

find that the exemption included in the revised SIP provision, "when considered in conjunction with other elements in the North Carolina SIP, [is] sufficient to provide adequate protection of the NAAQS" and to determine that the SIP changes "are consistent with CAA requirements."[141] As explained in Section IV of the June 5, 2019, NPRM, that proposed determination was explicitly conditioned upon adoption of, as well as based upon, the alternative policy outlined in Section III of the proposed action. The alternative policy was supported by a number of considerations explained in the proposal, including that the North Carolina SIP, as a whole, is protective of the NAAQS. Furthermore, the exemption included in the revised SIP provision is already in the current North Carolina SIP, and no changes are being made to that exemption through this action.

The comment that EPA cannot redesignate a nonattainment area under CAA section 107(d)(3)(E) is not within scope for this rulemaking because EPA is not redesignating any areas previously classified as nonattainment areas in this action; in addition, we note that North Carolina does not currently have any nonattainment areas for any NAAQS.

8. Comments that Region 4 has not shown that the North Carolina SIP is protective of the NAAQS.

Comment 8: Commenters state that if EPA believes each SIP should be evaluated to determine whether automatic or discretionary SSM exemptions are compatible with the NAAQS, the risk analysis must be more direct. EPA must acknowledge the uncertainty around NAAQS protection given how discretion with subjective terms might be applied. Commenters claim that EPA should have done an analysis of the sources in North Carolina and how these exemptions

[141] *See* 84 FR at 26040.

would not impact the State's ability to attain and maintain the NAAQS and that EPA in fact tried to obscure an accurate characterization of the risk in the June 5, 2019, NPRM. Commenters assert that EPA did not provide adequate legal or technical justification that the SIP is adequate to protect public health or that it is consistent with the CAA as interpreted in EPA's national rulemakings (such as the 2015 SSM SIP Call). Commenters state that the June 5, 2019, NPRM and accompanying supporting documents fail to provide sufficient analysis on how the North Carolina SIP, even with the SSM exemptions, ensures protection of the NAAQS or increment or any other substantive requirement. Commenters also state that EPA's proposal is not clear on whether there is little risk or no risk that the NAAQS and Prevention of Significant Deterioration (PSD) increments will be exceeded in North Carolina as a result of the SIP approval and withdrawal of the SSM SIP Call.

Commenters also disagree that limiting malfunctions to 15 percent of a source's operating time, as required by 15A NCAC 2D .0535(f), will reasonably minimize the risk that excess emissions during these periods will contribute to NAAQS exceedances or violations. In addition, regarding an example SIP provision highlighted in the June 5, 2019, NPRM, commenters assert that annual emissions budgets for electricity generating units (EGUs) in North Carolina are insufficient constraints for short-term periods of exempted excess emissions, which could cause NAAQS exceedances and contribute to violations.

Response 8: The commenters' statements imply that the discretionary criteria of the North Carolina SSM provisions do not meet the requirements of the CAA or protect against violations of the NAAQS. To the extent that commenters may be suggesting that this action must be supported by a risk analysis, Region 4 notes that risk analysis is a requirement of CAA

section 112, not CAA section 110. For example, CAA section 112(o) requires the EPA Administrator to conduct a review of risk assessment methodology used to determine the carcinogenic risk associated with exposure to hazardous air pollutants. CAA section 112(f) requires EPA to investigate and report on the risks to public health from sources of hazardous air pollutants that remain, or are likely to remain, after application of the emission standards promulgated by EPA under CAA section 112(d). CAA section 110 requires states to adopt, and EPA to approve, plans for achieving and maintaining compliance with the NAAQS, but "risk analysis" is not a required element for SIP submissions (under section 110(A)(2) or any other SIP-related sections). This highlights another difference in purpose and approach between CAA section 110 and CAA section 112.

Regarding the Commenter's concern about uncertainty around NAAQS protection given how discretion with subjective terms might be applied, Region 4 notes that a SIP does not provide complete certainty around NAAQS protection, regardless of whether it contains SSM exemptions. For this reason, the Act requires that remedial measures be taken in any area designated as nonattainment with respect to a NAAQS (CAA section 172(b)) and, if such area fails to make reasonable further progress or to attain the NAAQS by the date required, the Act requires that specific contingency measures will take effect automatically (CAA section 172(c)(9)). Further, given the limitations on the NC DAQ Director's discretion, as discussed in Section III of this final notice, and the State's responsibility to implement a program that achieves and maintains compliance with the NAAQS, Region 4 believes the Director would exercise that discretion in a manner that supports protection of air quality.

Region 4 assumes the commenter's reference to North Carolina SIP "provisions that apply to EGUs that are more protective than the provisions applying to other types of sources" is to the NCCSA, a state law which, as noted above and in the proposal, imposes limits on NOx and SO_2 emissions from public utilities operating coal-fired power plants that may not be met by purchasing emissions credits.[142] Those NOx and SO_2 limits were incorporated into the North Carolina SIP[143] and resulted in permanent emission reductions that helped nonattainment areas in the State achieve attainment of the 1997 Annual $PM_{2.5}$ NAAQS.[144] Region 4 did not suggest in the June 5, 2019, NPRM that the NCCSA limits are, per se, totally protective of the short-term NAAQS, but rather that they serve as some of the several overlapping requirements that, together, are sufficient to ensure attainment and maintenance of the NAAQS.[145]

As Region 4 has thoroughly explained above in section 6 of the response to comments, the alternative policy being adopted for North Carolina conforms with *FCC v. Fox Television Stations, Inc.*, as the policy "is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be better, which the conscious change of course adequately indicates."[146] Based on Region 4's analysis of the North Carolina SIP, and for the reasons articulated in the June 5, 2019, NPRM and this final action, Region 4 is deviating from the policy outlined in the 2015 SSM SIP Action in this action limited to North Carolina.

Region 4 believes that the withdrawal of the SSM SIP call will not affect North Carolina's ability to attain or maintain the NAAQS, nor will it affect North Carolina's PSD

[142] *See* 84 FR at 26038.
[143] *See* 76 FR 59250 (September 26, 2011).
[144] *See* 76 FR 58210, 58217 (September 20, 2011); 76 FR 59345, 59352 (September 26, 2011).
[145] *See* 84 FR at 26037–38.
[146] *See* 556 U.S. 502, 515 (2009) (emphasis original).

increments. This is because the SSM exemption provisions of the SIP, 15A NCAC 2D .0535(c) and 15A NCAC 2D .0535(g), have been in the approved SIP for many years and are not being revised by this action and because, as discussed in response to Comment 10 below, any excess emissions from large internal combustion engines exempted by 15A NCAC 2D .1423(g) are expected to be a small fraction of those units' overall emissions. In fact, even with the SSM exemptions included in the North Carolina SIP, the State currently has no areas designated nonattainment for any NAAQS.[147] Moreover, historic ambient air quality monitoring data collected in the State show decreasing overall trends in NAAQS pollutant concentrations over time, as demonstrated in the graphics included in the docket for this rulemaking.[148]

Likewise, Region 4 does not have evidence indicating PSD increments[149] will be exceeded in North Carolina as a result of the withdrawal of the SIP Call. PSD increments are protected in the State in the same way that the NAAQS are. Further, Region 4 notes that in 2002 EPA revised the PSD program and clarified that for purposes of determining emissions from an emissions unit, "a unit is considered operational not only during periods of normal operation, but also during periods of startup, shutdown, maintenance, and malfunction, even if compliance with a non-PAL emission limitation is excused during these latter periods."[150] The rulemaking added

[147] *See* https://www3.epa.gov/airquality/greenbook/ancl3.html.
[148] *See* document titled "NC NAAQS Trends Figures" prepared by Region 4 and included in the docket for this rulemaking.
[149] PSD is the federally required pre-construction permitting program that applies to new major sources or major modifications at existing sources for pollutants in areas that are not designated as nonattainment with the NAAQS. The PSD increment is the amount that the ambient pollutant concentration is allowed to increase in an area to allow for economic growth but also prevent the air quality from deteriorating to the level set by the NAAQS.
[150] *See* 67 FR 80186, 80213 (December 31, 2002).

new provisions that specifically require consideration of emissions during SSM events in PSD construction projects.[151]

Region 4 disagrees with the commenter's criticism of the Agency's recognition of the restriction on the amount of time a source may be deemed to have experienced a malfunction and believes that limiting malfunctions to 15 percent of a source's operating time per year establishes a reasonable constraint on the Director's exercise of discretion pursuant to 15A NCAC 2D .0535. Further, evidence that North Carolina is not currently designated nonattainment for any NAAQS indicates that the SIP, as a whole, is ensuring attainment and maintenance of the NAAQS and that the SSM exemption provisions are appropriately bounded and are not a source of nonattainment issues in the State.

9. Comments that the provisions relied upon are not practicably or legally enforceable.

Comment 9: Commenters state that in the pending D.C. Circuit litigation in *Walter Coke Inc. v. EPA*, No. 15-1166, Petitioners have argued that exempting SSM events from numerical limits is appropriate and lawful because "general duty" SIP provisions provide continuous control during all modes of source operation. Commenters argue that not only do such generic provisions fail to meet the level of control required by the applicable stringency requirements, such as reasonably available control technology in nonattainment areas, best available control technology for certain sources in attainment areas, and best available retrofit technology for sources impacting regional haze, but also that general duty provisions are not legally or

[151] For example, the definitions of "baseline actual emissions" (the average annual rate that a unit actually emitted a relevant pollutant in recent years) and "projected actual emissions" (the maximum annual rate at which an existing emission unit is projected to emit the relevant pollutant after modification) require the inclusion of "emissions associated with startups, shutdowns, and malfunctions." *See* 40 CFR 51.166(b)(40)(ii)(b), 51.166(b)(47)(i)(a), and 51.166(b)(47)(ii)(a).

practically enforceable, as required by the Act. Commenters state that EPA is also wrong to claim that SIP provisions are approvable so long as they do not preclude attainment of the NAAQS and a "general duty" provision remains in effect.

Commenters state that, as part of the enforcement scheme, the CAA provides for citizens to have easy access to courts to improve the efficacy of the protections established under it, but that Congress carefully cabined citizen suits to violations of clear standards, requiring plaintiffs to allege a violation of "a specific strategy or commitment in the SIP." Commenters argue that since general duty provisions are not quantifiable or objective, they run afoul of these limitations and thus conflict with congressional intent that citizens be able to enforce emission limitations contained in SIPs. Commenters state that because courts refuse to enforce unquantifiable CAA standards, attempts to enforce general duty and other work practice provisions in SIPs have been unsuccessful, thus concluding that vague and unenforceable general duty provisions are no substitute for continuous emission limitations that apply during all phases of operation.

Commenters state that *Sierra Club* broadly rejects EPA's proposal that SSM exemptions are allowable because a continuous "general duty" would satisfy section 302(k)'s continuity requirement that some section 112 standard apply continuously. Commenters also state that *Sierra Club*'s holding relied on a determination that the general duty provision (or other general guarantees) may not satisfy 302(k)'s continuity requirement, which is the argument EPA made in proposal.

Response 9: Commenters' references to the *Sierra Club* court's interpretation of general duty provisions is inapposite. As discussed in Section III of both the proposal and this final action, the court in *Sierra Club* was explicitly evaluating whether a general duty provision met

the strict framework of CAA section 112. As quoted by the commenters, the court specifically stated that "[t]he general duty is not a section 112-compliant standard."[152] As discussed in the proposal notice and above, on its face, the *Sierra Club* decision is limited to CAA section 112 and does not extend to CAA section 110. Therefore, commenters' citation to the *Sierra Club* decision with respect to general duty provisions does not govern this action taken pursuant to CAA section 110.

Region 4 disagrees with commenters' contention that general duty provisions are, writ large, not legally or practicably enforceable. Region 4 acknowledges that in some instances general duty provisions may present unique enforcement challenges; that alone does not mandate a conclusion that such provisions are wholesale unenforceable. The interpretation advanced in this notice does not preclude citizens or the United States from enforcing SIP provisions, as appropriate. Region 4 disagrees with commenters' narrow characterization of its position being that a SIP provision is approvable provided a general duty provision serves as a backstop. This interpretation oversimplifies the alternative policy. As articulated in Sections III and IV of the proposal and Section III of this final action, the alternative policy is predicated on a holistic evaluation of the North Carolina SIP. While the notice identifies numerous general duty provisions that serve as backstops ensuring NAAQS attainment and maintenance, those are not necessarily the only considerations contributing to our determination that it is appropriate to withdraw the SIP call previously issued to North Carolina.

Contrary to commenters' assertion, Region 4 does not advocate general duty provisions "substituting" for continuous emission limitations. Rather, the alternative policy provides that

[152] *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008).

the North Carolina SIP may contain SSM exemption provisions because the SIP, as a whole, is protective of the NAAQS. One component of protection is that the SIP includes general duty provisions. However, as discussed in the proposal notice and above, the analysis does not end there. North Carolina's SIP includes numerous additional provisions protecting against NAAQS exceedances or otherwise causing excess emissions.

10. Comments on environmental and health impacts.

Comment 10: Commenters state that reinstating North Carolina's automatic exemptions for SSM emission events would be a "free pass to pollute with impunity." Commenters state that so long as excess emissions from SSM events escape regulation, polluters have little incentive to invest in fixing known plant issues or improving the equipment necessary to avoid breakdowns and reduce the need for "unscheduled maintenance" because they know they will not face consequences for illegal pollution released during these events, which is a problem because emission events and pollution released during "unauthorized maintenance" is a major threat to public health and the environment. Commenters also state that allowing excess emissions from SSM events to escape regulation would undermine North Carolina's obligations to protect and maintain safe air quality, both within the state and for downwind neighbors.

Commenters state that approval of the North Carolina SIP revision would "sanction emissions of potentially substantial amounts of unhealthy air pollution" which would be emitted during periods of SSM in amounts that cannot be determined in advance and therefore cannot assure protection of the NAAQS. Commenters claim that SSM events release "huge amounts" of pollution that can cause exceedances and violations of the NAAQS and cite to an example in which "one known event released 165,000 pounds of sulfur dioxide."

Commenters claim that reviving SSM exemptions in North Carolina and in Region 4 would frustrate the attainment efforts of nearby states and regions along the east coast, particularly in the ozone and SO_2 nonattainment zones around Washington, D.C., and Baltimore and surrounding counties in Virginia and Maryland. Commenters also state that Sullivan County, Tennessee, near the North Carolina border, is currently also a nonattainment area for SO_2 and that North Carolina itself has consistently faced pollution from neighboring states, and that Mecklenburg County, North Carolina, is close to violation of the 2015 ozone standard.

Commenters state that EPA's approval of attainment and maintenance plans for certain NAAQS did not consider excess emissions that may occur and that, for some pollutants, approval of the plan relied on a monitoring network that did not cover the land area of the state. Commenters also state that, because of the limited air quality monitoring network, violations of the NAAQS may escape official notice, but the harmful effects of SSM events nonetheless burden the neighboring communities.

Commenters note that a study, provided as an attachment to the comments,[153] provides information about the frequency and magnitude of excess emissions in the State of Texas and claim that SSM emissions can undermine CAA protections if state rules exclude them from regulation. Commenters state that neither EPA nor North Carolina has done any analysis to evaluate the extent of excess emissions that could be authorized by the SIP revision. Commenters state that exempting SSM events from regulation threatens not only maintenance of those standards (as discussed above) but also human lives by allowing high concentrations of

[153] The study, titled "The health consequences of weak regulation: Evidence from excess emissions in Texas," appears to be an unpublished document downloaded from the Internet at https://www.ssrn.com/index.cfm/en/.

deadly fine particulate matter to form. Commenters also state that the Act's requirement for continuously enforceable emission limitations is vitally important for protecting public health. In support of this statement commenters quote a 2016 EPA brief in litigation regarding the 2015 SSM SIP Call,[154] which quotes the 2015 action,[155] which quotes the House Report on the 1977 CAA Amendments as stating, "Without an enforceable emission limitation which will be complied with at all times, there can be no assurance that ambient standards will be attained and maintained."[156]

Commenters also note that in EPA's 2015 action, it acknowledged it was particularly concerned about the potential for serious adverse consequences for public health in the interim period during which states, EPA and sources were to make adjustments to rectify deficient SIP provisions and take steps to improve source compliance. Commenters state that EPA has not explained in this rulemaking why those concerns are no longer justified or relevant to this action and that EPA has not addressed or even mentioned the health effects of the action in qualitative or quantitative terms.

Response 10: Region 4 clarifies that no provisions are being reinstated into the North Carolina SIP. In this action, Region 4 is approving changes to existing rule 15A NCAC 2D .1423, as requested by North Carolina. The State's provisions that were subject to the SSM SIP Call, 15A NCAC 2D .0535(c) and .0535(g), were approved by EPA on September 9, 1986,[157] and on August 1, 1997,[158] respectively, and have never been removed from the SIP. Withdrawal

[154] *Walter Coke Inc. v. EPA*, No. 15-1166 (and consolidated cases) (D.C. Cir.).
[155] *See* 80 FR at 33901.
[156] H.R. Rep. No. 95-294, at 92 (1977).
[157] *See* 51 FR 32073.
[158] *See* 62 FR 41277.

of the SSM SIP Call for North Carolina only means that the State is not required to provide a SIP revision responsive to the SIP Call for 15A NCAC 2D .0535(c) and .0535(g).

Region 4 disagrees with the comment that these rules provide sources throughout Region 4 a "free pass to pollute with impunity." As an initial matter, this action is limited in scope to the North Carolina SIP and does not cover sources throughout Region 4. Additionally, as discussed in the June 5, 2019, NPRM, 15A NCAC 2D .0535(c) and .0535(g) themselves (and other provisions of the SIP) direct sources, to the extent practicable, to minimize emissions at all times, including periods of SSM. These rules also provide that only excess emissions that were *unavoidable* by the source may be considered not to be violations of applicable rules. Under 15A NCAC 2D .0535(c), excess emissions that occur at any time other than a period of startup or shutdown are violations of the applicable SIP limit unless the owner or operator demonstrates, to the degree required by the Director's judgment, that the emissions are the result of a malfunction (i.e., *unavoidable* failure of air pollution control equipment, process equipment, or process, as defined at 15A NCAC 2D .0535(a)(2)). To determine whether excess emissions are the result of a malfunction, the Director shall consider, among other factors listed in the rule, whether the air cleaning device, process equipment, or process have been maintained and operated, to the maximum extent practicable, in a manner consistent with good practice for minimizing emissions. Thus, a determination by the Director that these criteria have not been met would mean that excess emissions are not the result of a malfunction and, therefore, are a violation of the appropriate rule.

Likewise, 15A NCAC 2D .0535(g) requires that excess emissions that occur during periods of startup and shutdown are violations of the appropriate rule if the owner or operator

cannot demonstrate that the emissions were *unavoidable*, when requested by the Director to do so. Any determination by the Director that the owner or operator has not, to the extent practicable, operated the source and any associated air pollution control equipment or monitoring equipment in a manner consistent with best practicable air pollution control practices to minimize emissions during startup or shutdown would mean that any excess emissions are a violation of the appropriate rule.

Commenters' statements are unclear as to what is meant by the terms "unscheduled maintenance" and "unauthorized maintenance." "Maintenance" may be defined as the work of keeping something in a suitable condition[159] and therefore consists of normal, periodic equipment upkeep activities that help to prevent equipment failures. Region 4 understands the commenters' intent to be that if SSM events are unregulated, sources lack incentive to maintain their equipment or improve emission controls. The comment seems to presume, without evidence, that source owners and operators conduct their processes and operate their facilities with reckless disregard for the environment and without regard for other SIP provisions requiring control of emissions and protection of the NAAQS, as discussed above. Region 4 is not aware of reasons to suspect this to be the case. Region 4 disagrees with the commenters' conclusion that sources will not face consequences for illegal pollution released during SSM events. As described above, SSM events that result from a failure to address known plant issues or conduct routine maintenance would likely not meet the criteria outlined for the Director's consideration regarding when excess emissions are not considered a violation.

[159] *See Webster's II New Riverside University Dictionary* 717 (Anne H. Soukhanov, Senior Editor, The Riverside Publishing Company, 1984) (defining "maintenance").

Region 4 also notes that the action approving 15A NCAC 2D .0535(c) into the North Carolina SIP specifically stated that EPA retains authority to pursue enforcement of any particular case: "it should be noted that EPA is not approving in advance any determination made by the State under paragraph (c) of the rule, that a source's excess emissions during a malfunction were avoidable and excusable, but rather is approving the procedures and criteria set out in paragraph (c). Thus, EPA retains its authority to independently determine whether an enforcement action is appropriate in any particular case."[160] Moreover, North Carolina has already stated its position that "[n]othing in the existing SIP provisions prohibits or restricts in any way the ability of the EPA and/or a citizen to file an action in federal court seeking enforcement of the SIP provisions."[161]

As described in the preceding paragraphs, Region 4 disagrees that 15A NCAC 2D .0535(c) and .0535(g) allow pollutant emissions to escape regulation and that the State's implementation plan lacks regulatory incentive for sources to maintain their equipment and upgrade emission controls when possible. Further, regular source maintenance activities are essential to avoiding excess emision events and are incentivized by the regulatory requirements to submit excess emission reports under 15A NCAC 2D .0535(f), which provides that all instances of excess emissions which last for more than four hours, regardless of whether due to malfunction or any other abnormal condition, must be communicated to the Director or designee within 24 hours of the occurrence. The SIP does not automatically require such reports for excess emission events lasting less than four hours; however, 15A NCAC 2D .0605 requires that

[160] *See* 51 FR 32073, 32074 (September 9, 1986.)
[161] Letter from Sheila C. Holman, Director, NC DAQ, to EPA, May 13, 2013, page 3, Docket ID No. EPA-HQ-OAR-2012-0322-0619, available at www.regulations.gov.

all monitoring records be retained by the owner or operator and made available for inspection for a period of two years. In addition, all sources subject to the title V permitting program, including all major sources of pollutants subject to regulation, must submit to the State semiannual monitoring reports and annual compliance certifications that clearly identify all instances of deviations from permit requirements.[162]

The SIP revision being approved through this action is limited to 15A NCAC 2D .1423, the State's rule regulating emissions of NOx from "large internal combustion engines." North Carolina's June 5, 2017, SIP revision includes several changes to this rule. Among the provisions being revised is 15A NCAC.1423(d)(1), "Compliance determination and monitoring." North Carolina modified 15A NCAC.1423(d)(1) to ensure that CEMS data used for determination of compliance with this rule meet applicable SIP requirements as well as Federal requirements. Section 2D .1423(d)(1) of the State's current federally-approved SIP provides that the owner or operator of a subject internal combustion engine shall determine compliance using "a [CEMS] which meets the applicable requirements of Appendices B and F of 40 CFR part 60, excluding data obtained during periods specified in Paragraph (g) of this Rule."[163] Paragraph (g) of Section 2D .1423, which is already included in the current federally approved SIP, provides that the emission standards therein do not apply during periods of "(1) start-up and shut-down periods and periods of malfunction, not to exceed 36 consecutive hours; (2) regularly scheduled

[162] *See* 15A NCAC 2Q .0508(f), .0508(n); 40 CFR 70.6(a)(3)(iii), 70.6(c)(5)(iii)(C).
[163] The rule revision inserts "and .1404 of this Section" following the word "Rule" in this text to ensure that the CEMS used to obtain compliance data must meet the applicable requirements specified in Rule .1404 (in particular, Paragraphs (d)(2) and (f)(2) of Rule .1404) as well as the applicable part 60 requirements since those provisions specify additional federal requirements for obtaining CEMS data.

maintenance activities." As proposed in Section IV of the NPRM, Region 4 finds that the provisions of 15A NCAC 2D .1423(g), when considered in conjunction with other elements in the North Carolina SIP, are sufficient to provide adequate protection of the NAAQS[164] and that the exclusion of emission standards during periods of SSM and regularly scheduled maintenance activities will not have any adverse impact on air quality. Indeed, 15A NCAC 2D .1423, including paragraph (g) thereof, has been in the federally-approved North Carolina SIP for seventeen years,[165] and there is no evidence that it has caused or contributed to any interference with attainment or maintenance of the NAAQS. Certainly, North Carolina's adoption of 15A NCAC 2D .1423, which required significant reductions in NOx emissions from large internal combustion engines, was a SIP strengthening measure even though the State chose not to apply its limits during SSM events and scheduled maintenance activities. In fact, Region 4 notes that much of the text of 15A NCAC 2D .1423, including paragraph (g), is the same as the text of part of a FIP that EPA proposed but did not need to finalize in order to meet NO_X SIP call emission budgets.[166] In other words, EPA itself proposed the same SSM and maintenance exemptions for NO_X emissions from stationary reciprocating internal combustion engines in 1998 that North Carolina adopted in 2002.

Furthermore, Region 4 observes that numerical emission limits generally cannot be enforced during internal combustion engine startup because measurement of emissions from this

[164] North Carolina has bounded the time during which a source can employ this exemption, minimizing the potential that any excess emissions during these periods would cause or contribute to a NAAQS exceedance or violation. Therefore, the exemption, which allows for emission standards of the rule to not apply during periods of startup, shutdown, and malfunction of up to 36 consecutive hours, or maintenance, is not inconsistent with the requirements of the CAA section 110.
[165] *See* 67 FR 78987 (December 27, 2002).
[166] *See* 63 FR 56394, 56427 (October 21, 1998).

type of unit during startup is technically infeasible using currently available field testing procedures.[167] In addition, internal combustion engines start up rapidly, typically requiring about 15 minutes to 30 minutes of operation for the emission control systems to reach an effective operating temperature.[168] Likewise, because internal combustion engines are typically shut down in a matter of minutes,[169] emissions during shutdown are also a minor contribution to overall emissions. Regarding malfunctions, Region 4's understanding is that any malfunctions by internal combustion engines generally will not cause violations of applicable emission standards because in most cases these units shut down immediately or with very little delay.[170] Maintenance activities are required to ensure units operate at peak efficiency during normal operation and that the potential for equipment failure is minimized. Region 4 is aware of no reason to expect that regular maintenance activities might cause increased pollutant emission rates. In conclusion, far from sanctioning unhealthy air emissions as claimed by commenters, North Carolina's exclusion of periods of SSM and regularly scheduled maintenance from the emissions standards of 15A NCAC 2D .1423 is appropriate because internal combustion engine emissions cannot be accurately measured during such events and because such events comprise a small fraction of overall unit operating time. The existing rule, as revised, illustrates a practice on the part of North Carolina of making informed, reasonable choices, based on knowledge of the sources they regulate, when developing SIP requirements and is consistent with the State's overall plan for improving air quality. Consistent with the U.S. Supreme Court's direction in

[167] *See, e.g.*, 75 FR 9648, 9665–66 (March 3, 2010) and 75 FR 51570, 51576–77 (August 20, 2010).
[168] *See, e.g.*, 74 FR 9698, 9710 (March 5, 2009).
[169] *Id.*
[170] *Id.*

Train, Region 4 finds that North Carolina can determine whatever mix of emission limitations it deems best suited for a situation, and Region 4 is approving the SIP revision after finding it complies with the CAA.[171]

Region 4 also disagrees with the comment that SSM exemptions in the North Carolina SIP would frustrate the ozone and SO_2 attainment efforts of nearby states. First, as discussed in the proposal and elsewhere in this final notice, the North Carolina SIP contains numerous provisions that work in concert and provide redundancy to protect against a NAAQS exceedance or violation, even if an SSM exemption provision also applies. Therefore, Region 4 has concluded that it is reasonable for the NC DAQ Director to be able to exclude qualifying periods of excess emissions during periods of SSM without posing a significant risk to attainment or maintenance of the NAAQS. Based on the same rationale, these same provisions of the State's implementation plan help protect against contribution to air quality issues outside the State as well. Second, as discussed below, commenters provide no support for their assertions regarding the significance of pollutant emissions during any SSM events in North Carolina and the contribution of those emissions to downwind air quality issues.

Regarding the specific concerns raised by the commenter regarding ozone nonattainment in neighboring states, EPA's recent transport analyses have demonstrated that emissions from North Carolina do not significantly contribute to nonattainment or interfere with maintenance of the ozone NAAQS in downwind states. In the 2011 Cross-State Air Pollution Rule (CSAPR), EPA determined that emissions from North Carolina were not linked, and therefore did not contribute, to any downwind nonattainment receptors (i.e., ambient air quality monitoring sites)

[171] *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

and were linked to two downwind maintenance receptors for the 1997 8-hour ozone NAAQS in its 2012 analytic year.[172] However, EPA's analysis in a subsequent action on remand from the D.C. Circuit demonstrated that those air quality problems would be resolved in 2017 and thus that North Carolina would no longer interfere with maintenance of the 1997 ozone NAAQS at these receptors.[173] Moreover, in the 2016 CSAPR Update, EPA determined that North Carolina does not contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to the 2008 ozone NAAQS because the State's impact on downwind receptors was well below the threshold used to identify contributing states.[174]

Regarding the concerns raised by the commenter regarding SO_2 nonattainment in neighboring states, North Carolina does not currently have any nonattainment areas, as noted earlier in this notice, and commenters provide no specific support for their assertion that SO_2 emissions from North Carolina have an impact on SO_2 attainment issues in downwind states that would be impacted by the provisions being approved into the SIP. Because emissions of this pollutant are transformed in the atmosphere into fine particles (i.e., $PM_{2.5}$) relatively quickly,[175] violations of the SO_2 NAAQS are generally found in areas having sources that emit SO_2 in quantities large enough, prior to transformation into fine particles, to cause issues in the local area.

[172] *See* 76 FR 48208, Tables V.D-8 and V.D-9 (August 8, 2011).
[173] *See* 81 FR 74504, 74523-524 (October 26, 2016).
[174] *See* 81 FR 74504, 74506, 74537, Table V.E-1 (October 26, 2016).
[175] For example, in SO_2 transport analyses, EPA focuses on a 50 km-wide zone because the physical properties of SO_2 result in relatively localized pollutant impacts near an emissions source that drop off with distance. *See, e.g.*, 84 FR 72278, 72280 (December 31, 2019).

Regarding commenters' statement that Sullivan County, Tennessee, near the North Carolina border, is a nonattainment area for SO_2, the commenters have not explained how this action may lead to relevant emissions increases in North Carolina likely to affect this area. The primary SO_2-emitting point source located within the Sullivan County SO_2 nonattainment area (Sullivan County Area) is the Eastman Chemical Company.[176] The Sullivan County Area consists of that portion of Sullivan County encompassing a circle having its center at this facility's B-253 power house and having a 3-kilometer radius.[177] North Carolina, on the other hand, has no large sources of SO_2 emissions within 50 km of the Sullivan County Area. Accordingly, the commenters have not identified any sources of emissions in North Carolina likely to increase as a result of this action which would impact the Sullivan County Area.

In response to commenters' concern that Mecklenburg County, North Carolina, is close to violation of the 2015 ozone NAAQS, Region 4 notes that Mecklenburg County has not violated the 2015 ozone NAAQS. For North Carolina, in 2012 only the Charlotte-Rock Hill Area (which includes Mecklenburg County) was designated nonattainment for the 2008 ozone standard of 75 parts per billion (ppb). In 2015, this Area was redesignated to attainment for that standard. In 2017, the entire State was designated attainment/unclassifiable for the more protective 2015 ozone standard of 70 ppb.[178] Region 4 has recently reviewed preliminary data which indicates the Charlotte-Rock Hill Area will likely still be attaining the 2015 ozone

[176] *See* Technical Support Document (TSD), Tennessee Area Designations For the 2010 SO_2 Primary National Ambient Air Quality Standard, at 8–10, available at https://www.epa.gov/sites/production/files/2016-03/documents/tn-tsd.pdf and in EPA's docket for the Round 1 Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard, 78 FR 47191 (August 5, 2013).
[177] *See* 40 CFR 81.343.
[178] In 2015 EPA revised the primary and secondary levels of the ozone standard to 0.070 parts per million to provide increased public health and welfare protection for the reasons described in the final published action. *See* 80 FR 65292 (October 26, 2015).

NAAQS when the 2019 data are certified. While commenters are correct that ozone concentrations in the Area are near the 2015 ozone standard, this is expected to be due primarily to meteorological conditions (hotter summers) over the past two years and other factors, such as increasing mobile emissions. Any increases in ozone design values in North Carolina cannot reasonably be attributed to SSM exemptions in 15A NCAC 2D .0535(c) and .0535(g) because those provisions have been in the SIP for many years and thus have not been a source of change since that time.

In response to comments that EPA's approval of attainment and maintenance plans for certain NAAQS did not consider excess emissions that may occur, Region 4 agrees that it had no reason to suspect that excess emissions exempted under Rules 2D .0535(c), 2D .0535(g) and 2D .1423(g) would be frequent enough or of great enough magnitude to prevent approval of those plans, and commenters have provided no such evidence either in this action or in our prior actions approving those attainment and maintenance plans. North Carolina has an ambient monitoring network plan that meets or exceeds the requirements of 40 CFR part 58 and is subject to public comment, with the objective of long-term assessment of air quality. To operate monitors that measure air pollutant concentrations over the entire State would not be feasible.

The State evaluates whether excess emissions qualify for the exemptions outlined in 15A NCAC 2D .0535(c). For example, over the 5-year period 2015–2019, Region 4 has received information from North Carolina indicating 26 malfunction determinations were made by the State.[179] Six of those determinations were made on demonstrations that facilities were required

[179] *See* email and attached spreadsheet from Steve Hall, NC DAQ, to Joel Huey, EPA, January 9, 2020, included in the docket for this rulemaking.

to submit, in accordance with 15A NCAC 2D .0535(f), because malfunction events resulted in excess emission that lasted for more than four hours. While North Carolina evaluated all of the malfunction determinations submitted, NC DAQ determined that twenty of those submissions were not required to be submitted either because the excess emission event lasted less than four hours or because no applicable emission rate limit was exceeded. Also relevant, the State issued an average of about 300 notices of violation per year for various operating permit deviations during the same time period.[180] In addition, as discussed above, the SIP requires that all monitoring records be retained by the owner or operator and made available for inspection for a period of two years but does not require automatic reports to the State for excess emission events that last less than four hours. In accordance with 15A NCAC 2D .0535(c), no exemption from violation status is provided for any excess emission event unless the owner or operator of the source demonstrates to the Director's satisfaction that the excess emissions are the result of a malfunction. Such determinations appear to be an infrequent occurrence, having been made an average of only about five times per year over the past five years in the State, which has about 300 sources holding title V operating permits[181] and over 1,600 sources holding non-title V operating permits.[182]

Region 4 acknowledges the study cited by commenters regarding excess emissions in Texas. However, the study is specific to emissions in Texas and does not speak to this action, which is focused on and limited to an evaluation of the North Carolina SIP, and, as a corollary,

[180] Obtained from "NC Air Quality Update," Mike Abraczinskas, Director, NC DAQ, April 11, 2019, slides 25 and 27, included in the docket for this rulemaking.
[181] *Id.*, slide 22.
[182] *Id.*

emissions in North Carolina. Region 4 points out that the referenced study is not from a peer-reviewed journal article and does not attempt to show a relationship between the occurrence of excess emissions in Texas and that State's treatment of SSM events. Region 4 also observes that a cursory review of the air emission event reports[183] which the study is based upon shows that most of the excess emissions resulted from industrial flaring events at crude oil and natural gas production facilities.[184] This is a circumstance of particular significance to Texas, which leads the nation in the production and refining of crude oil and the production and processing of natural gas.[185] North Carolina, however, has none of these types of operations,[186] and therefore the study is of little relevance the State's air quality control program. Commenters have provided no information suggesting that excess emission events exempted under the North Carolina SIP have been associated with significant adverse impacts on air quality or human health, and Region 4 is aware of none.

Commenters state that neither EPA nor North Carolina has done any analysis to evaluate the extent of excess emissions that could be authorized by the SIP revision, but the SIP revision at issue does not add or otherwise alter the SSM exemption provisions which are already in the North Carolina SIP. Further, excess emission events are difficult to quantify, but Region 4 has evaluated the air quality in North Carolina and the actual occurrence of such excess emission

[183] According to the researchers, only Texas, Oklahoma, and Louisiana maintain systematic data on excess emissions events that is usable for research, and Texas publicly posts details regarding emissions events on its website at https://www2.tceq.texas.gov/oce/eer/.
[184] For example, a search on emissions events in all areas during the period January 1, 2020–January 10, 2020, results in 48 reports filed, at least 75 percent of which were flaring events at facilities in the crude refining and gas production industries.
[185] U.S. Energy Information Administration (EIA), Texas Profile Data, Reserves, and Supply & Distribution, https://www.eia.gov/state/analysis.php?sid=TX (accessed January 14, 2020).
[186] U.S. EIA, North Carolina Profile Data, Reserves, and Supply & Distribution, https://www.eia.gov/state/analysis.php?sid=NC (accessed January 14, 2020).

events, as explained above. Even though the North Carolina SIP contains the SSM exemption provisions discussed in this action, air quality in the State has steadily improved over the years, as discussed in response to Comment 8, and North Carolina does not currently have any non-attainment areas.

Commenter's quote from page 92 of H.R. Rep. No. 95-294 excludes the context that adds clarity to the intended meaning of the passage. The statement "Without an enforceable emission limitation which will be complied with at all times, there can be no assurance that ambient standards will be attained and maintained" is immediately followed by four more sentences explaining that any emission limitation under the Act "must be met on a constant basis, not an 'averaging' basis such as, for example, would be the case if averaging sulfur content of coal was allowed"[187] (as might happen when coals of low-sulfur and high-sulfur content are combusted at different times). The paragraph explains that the "averaging" method is not allowable because it cannot provide assurances that an emission limitation will be met at all times (since inherent to the averaging method is the fact that the emission limitation would sometimes be exceeded). In other words, Congress was explaining that an effective emission limitation is one that reduces emissions continually and is not one that simply calculates a long-term average of emissions. The SSM exemptions of the North Carolina SIP provide sources no relief from their obligation to utilize emission control devices and work practices to the extent practicable, and they are not an emission averaging scheme.

[187] H.R. Rep. No. 95-294, at 92 (1977).

Regarding the commenters' statement that "one known event released 165,000 pounds of sulfur dioxide," Region 4 observes that the referenced event occurred in Louisiana in October 2011.[188] A report about this specific event, completed by the Louisiana Department of Environmental Quality Inspection Division, states the incident was preventable and "will be referred as an AOC on LAC 33:111.905.A" (i.e., an Administrative Order on Consent for violating Louisiana Administrative Code 33:111.905.A, which requires proper use of emission controls). Thus, the referenced event, which occurred almost nine years ago in a state other than North Carolina, was not exempted by that state but instead was identified as requiring an administrative order to correct the problem that caused the exceedance. While Region 4 acknowledges that air pollutant emissions can be higher than normal during SSM events, commenters have provided no viable evidence supporting their contention that excess emissions which are exempted from violation status release "huge amounts" of pollution or that they have a significant impact on attainment and maintenance of the NAAQS, particularly not from the State of North Carolina, and Region 4 is aware of none.

Region 4 also disagrees that this action exempts excess emission events from regulation. The SIP-called provisions do not automatically exempt emissions during SSM; they provide for use of Director's discretion, which Region 4 expects would exempt fewer excess emission events than an automatic exemption. This action will not cause an increase in emissions because the SIP-called provisions were approved by EPA in 1986 and 1997 and have been in effect, without interruption, since those approvals. Similarly, as referenced above, the automatic exemption in

[188] *See* "Louisiana Department of Environmental Quality Intra-Agency Routing Form" (December 8, 2011) included in the docket for this rulemaking.

15A NCAC 2D .1423 has been in the North Carolina SIP since 2002, and that approval is also not impacted by this action. Therefore, this action is not expected to have any adverse impact on air quality. While EPA stated in the 2015 SSM SIP Action that the Agency was concerned about the potential for serious adverse consequences for public health during the interim period in which states, EPA and sources took measures necessary to respond to the SSM SIP call, the Agency made no finding of actual harm, in qualitative or quantitative terms, from the provisions called for revision. Rather, EPA discussed at length the assertion that "EPA does not interpret section 110(k)(5) to require proof that a given SIP provision caused a specific environmental harm or undermined a specific enforcement action in order to find the provision substantially inadequate."[189] EPA did not make a specific factual finding regarding actual harm in North Carolina when it issued the SIP call in 2015, and no factual finding is required for Region 4 to adopt an alternative interpretation of the statutory provisions at issue. The proposal notice and this final action provide a comprehensive rationale for Region 4's alternative policy and its change in interpretation.

As explained in the June 5, 2019, NPRM, the NAAQS have been set to provide requisite protection, including an adequate margin of safety, for human health.[190] The purpose of the SIP is to ensure compliance with the NAAQS, e.g., attainment and maintenance. EPA has an obligation to approve SIP revisions if the Agency does not determine it will negatively impact a state's ability to attain or maintain the NAAQS. Region 4 views the various overlapping planning requirements of the North Carolina SIP as sufficient to meet the requirements of CAA

[189] *See* 80 FR at 33932–34.
[190] *See* 84 FR at 26034.

section 110. Commenters have not provided sufficient evidence to suggest that the SIP revisions approved in this action would prevent North Carolina from attaining or maintaining the NAAQS.

11. Comments on director's discretion provisions.

Comment 11: Commenters state that EPA cannot reasonably conclude the NAAQS will be protected if NC DAQ's Director can exempt SSM emissions from being violations. Commenters argue that SIP-called provisions list seven criteria for the Director to consider, but does not limit consideration to those criteria and notes that the terms are open to subjective interpretation and that the Director may abuse discretionary authority, which can lead to NAAQS violations. Commenters claim that even if all of the conditions required to qualify as a malfunction under the North Carolina SIP have occurred, the criteria rely on subjective terms. The one mandatory provision, commenters state, relies on the subjective term "as practicable." Commenters also state that even if applied stringently, start up and shut down emissions could be "minimized" but still be high enough to cause a NAAQS exceedance and that such events could occur often enough to cause a violation of the NAAQS.

Response 11: Based on review of the information Region 4 has regarding malfunction determinations made by the Director of the NC DAQ from 2015 through 2019, as discussed above in Response 10, we believe that the Director has employed the discretionary authority provided by North Carolina's 15A NCAC 2D .0535(c) in circumstances that are narrower than an exemption that would apply automatically during such events. Also, Region 4 anticipates that, going forward, emissions exempted by the Director pursuant to 15A NCAC 2D .0535(c) will continue to apply to a narrower scope of emissions than would be exempt through an automatic exemption. Additionally, as discussed above, 15A NCAC 2D .0535(g) directs

facilities, during startup and shutdown, to operate all equipment in a manner consistent with best practicable air pollution control practices to minimize emissions and to demonstrate that excess emissions were unavoidable when requested to do so by the Director. Therefore, based on the evaluation of the North Carolina SIP in Section III of this final action and Sections III and IV of the notice for the proposal, Region 4 reasonably concludes that the Director's discretion provisions in the North Carolina SIP are not inconsistent with CAA requirements because the North Carolina SIP, when evaluated as a whole, provides for attainment and maintenance of the NAAQS.

Further, the federally-approved North Carolina SIP has contained a provision providing Director's discretion for malfunction exemptions for over 30 years;[191] the commenter has not provided any evidence to demonstrate that the existence of such provisions interfered with North Carolina's attainment or maintenance of any NAAQS. In fact, as discussed in response to Comment 8, air quality in North Carolina has continued to improve over time and there are not currently any nonattainment areas in the state. Commenters have not pointed to evidence of abuse of Director's discretion in North Carolina. Region 4 cannot respond to unsubstantiated claims regarding abuses of discretionary authority by the Director of the State air agency. Region 4 is not aware of any evidence of such abuses since the introduction of the Director's discretion provision into the North Carolina SIP.

[191] 15A NCAC 2D .0535(c) was approved on September 9, 1986 (51 FR 32073), and 15A NCAC 2D .0535(g) was approved on August 1, 1997 (62 FR 41277).

Region 4 acknowledges that a Director's determination of whether emissions are excusable pursuant to 15A NCAC 2D .0535(c) or .0535(g) may be somewhat subjective[192] but maintains that the Director will be acting in accordance with approved SIP provisions. Further, as discussed in Section III of this final action, the provisions do not prevent the United States or citizens from enforcing the underlying provisions. The exercise of authority under the Director's discretion provisions of 15A NCAC 2D .0535 shall not be construed to bar, preclude, or otherwise impair the right of action by the United States or citizens to enforce a violation of an emission limitation or emission standard in the SIP or a permit where the demonstration by a source or a determination by the Director does not comply with the framework and authority under 15A NCAC 2D .0535. Failure to comply with such framework and authority would invalidate the Director's determination. EPA and citizens' ability to enforce the underlying provisions is another element contributing to Region 4's conclusion that the SSM exemption provisions do not interfere with NAAQS attainment and that the SIP is consistent with the CAA.

12. Comments on enforcement.

Comment 12: Commenters state that the North Carolina SIP provisions relied upon in the notice are mere platitudes and have very little probability of being effective in practice. Commenters state that the cited SIP provisions that prohibit violations of the NAAQS are not practicably enforceable. Commenters identify gaps in information for malfunction events and

[192]. Pursuant to various other North Carolina SIP provisions, the Director has authority to exercise his or her judgment with respect to several other types of determinations. *See, e.g.*, 15A NCAC 2D .0501(f)(2) (requiring demonstration "to the satisfaction of the Director"); 15A NCAC 2D .0530(t)(3) and .0531(m)(4) (requiring demonstrations "to the Director's satisfaction"); 15A NCAC 2D .0540(h) (requiring correction of facility's fugitive dust control plan where "the Director finds that the plan inadequately controls fugitive dust emissions"); 15A NCAC 2D .2602(i) (authorizing Director to allow deviations from testing procedures required under the SIP).

whether a NAAQS violation occurs, including a general statement that NAAQS monitoring stations are not generally located around most sources. Commenters further assert that EPA must assume that absence of a documented NAAQS violation will be treated as sufficient proof that a violation did not occur. Commenters conclude that consequently, few exemptions are expected to be denied even if the excess emissions, in reality, caused a violation.

Commenters assert that North Carolina's procedures for obtaining an exemption are generally appropriate for an approach based on enforcement discretion, but point out that EPA and citizen enforcement would be limited. Commenters state that EPA can be assumed to exercise appropriate enforcement discretion and that citizen enforcement does not generally result in unfair outcomes for sources. Commenters conclude that EPA could revisit its national policy and revert to one that applied for decades in which SSM exemptions are not allowed except via enforcement discretion, and all SIP emission limits apply continuously. Commenters state that alternative emission limits could be developed for periods of SSM as well.

Commenters state that Congress required continuously applicable emission limitations to ensure citizens would have meaningful access to the remedy provided by [the Act's citizen-suit provision] to assure compliance with emission limitations and other requirements of the Act but that exemptions remove citizens' ability to enforce emission limitations and thus contravene the Act.

Response 12: Commenters provide no concrete evidence that the provisions relied upon in the North Carolina SIP have a low probability of being effective in practice. Generally speaking, as discussed in response to Comment 8, North Carolina's air quality has continued to improve in recent years, and no areas of North Carolina are currently designated nonattainment

for any NAAQS. Commenters have not provided information indicating that the existence of the SSM exemption provisions in the SIP have precluded enforcement or that the Director in North Carolina has abused his or her discretion. Commenters provide no basis for speculating that the they expect the North Carolina Director to deny few exemption demonstrations, even if a violation occurred. Detailed information about historical usage of director's discretion provisions in the North Carolina SIP is included in our response to Comment 10 above.

Region 4 disagrees with the comment that allowing Director's discretion SSM exemption provisions to remain in the North Carolina SIP will hamper citizen enforcement, in contravention of the CAA requirements. As discussed in Section III of this final notice, the exercise of authority under the Director's discretion provisions of 15A NCAC 2D .0535 shall not be construed to bar, preclude, or otherwise impair the right of action by the United States or citizens to enforce a violation of an emission limitation or emission standard in the SIP or a permit where the demonstration by a source or a determination by the Director does not comply with the framework and authority under 15 NCAC 2D .0535. Failure to comply with such framework and authority would invalidate the Director's determination. North Carolina's comment letter on the proposed SSM SIP Call[193] similarly indicates that the Director's discretion exemption provisions are not intended to prevent enforcement: "[n]othing in the existing SIP provisions prohibits or restricts in any way the ability of EPA and/or a citizen to file an action in federal court seeking enforcement of the SIP provisions."[194]

[193] *See* 78 FR 12460 (February 22, 2013).
[194] Letter from Sheila C. Holman, Director, NC DAQ, to EPA, May 13, 2013, page 3, Docket ID: EPA-HQ-OAR-2012-0322-0619, available at www.regulations.gov.

Emissions information for sources in North Carolina is available and obtainable, and commenters have not presented information indicating otherwise. As discussed above, the SIP requires that excess emissions lasting more than four hours be reported to the State at 15A NCAC 2D .0535. Additionally, title V permits require semiannual reports to include deviations from applicable requirements as well as annual compliance certifications at 15A NCAC 2Q .0508. This information assists the Director in determining whether a NAAQS violation likely occurred. North Carolina also makes public the inspection reports, compliance reports, and other materials related to emissions compliance at facilities. Further, NC DAQ maintains records of determinations of malfunctions available for public inspection in its compliance database (accessible at https://deq.nc.gov/about/divisions/air-quality/air-quality-compliance). This information is available for title V sources, small permitted sources, and small exempt (non-permitted) sources.

In response to the comment regarding the monitoring network, Region 4 notes that the EPA works collaboratively with states and tribes to monitor air quality for each criteria pollutant, as well as air toxics, through ambient air monitoring networks. North Carolina has an ambient monitoring network plan that meets or exceeds the requirements of 40 CFR part 58 and is subject to public comment, with the objective of long-term assessment of air quality. The data collected serve as one of the factors for determining whether an area is attaining the NAAQS, based on the form of the standard and design value calculation for each standard.

Region 4 notes that North Carolina has an approved monitoring network plan, pursuant to 40 CFR part 58.[195] In accordance with EPA regulatory requirements, NC DAQ maintains a

[195] North Carolina's 2019-2020 monitoring network plan was approved by EPA on February 7, 2020.

network of 40 monitoring stations across the state and measures the concentration of pollutants subject to the NAAQS. Several monitors operated by the State are indeed source-oriented where required by EPA or deemed appropriate by the state due to local impacts of certain types of pollutants. For example, in accordance with EPA's Data Requirements Rule for the 2010 1-Hour SO_2 Primary NAAQS (80 FR 51052, August 21, 2015), the State operates several SO_2 monitors near large sources of SO_2 emissions.[196]

Region 4 acknowledges that alternative emission limits may also be included in the North Carolina SIP. The State has flexibility to adopt "whatever mix of emission limitations it deems best suited to its particular situation."[197] This could include alternative emission limitations, but, as Region 4 has concluded in this notice, in the context of North Carolina's entire SIP, North Carolina's exemption provisions are also acceptable.

13. Comments that SIP submissions must be evaluated independently, not in context of SIP overall.

Comment 13: Commenters state that section 110 of the Act makes clear that EPA actions on SIPs must also depend on whether a SIP or submittals meet all of the applicable requirements of the Act. Commenters conclude that EPA may not accept a SIP, approve a submission, or withdraw a SIP Call by asserting that the approved SIP, as a whole, operates continuously to ensure attainment and maintenance of the NAAQS if such SIP, submission or withdrawal means the SIP would not meet all of the applicable requirements of the CAA.

[196] *See* North Carolina Div. of Air Quality, 2019–2020 Annual Monitoring Network Plan for the North Carolina Division of Air Quality (October 15, 2019), available at https://files.nc.gov/ncdeq/Air%20Quality/monitor/monitoring_plan/NC-Network-Plan.pdf.
[197] *Train*, 421 U.S. at 79.

Commenters conclude that the proposal contradicts the plain language and plain meaning of the CAA by dispensing with the independent legal requirement that SIPs, submissions or withdrawals of a SIP Call ensure compliance with all applicable requirements of the Act.

Response 13: As described in Section III of this notice of final action, Region 4's policy interpretation is not inconsistent with any applicable requirements of the CAA. Section III of this notice fully explains Region 4's interpretation of the interplay between sections 110 and 302(k), which provides a reasonable and permissible interpretation of these provisions, even though it differs from prior interpretations. Not only did Region 4 determine to take this action and approve this SIP revision based on an understanding that the SIP will continue to be protective of the NAAQS, this action and SIP approval are consistent with the statutory interpretations offered in this notice. Region 4 has a reasonable basis to conclude, upon evaluation and consideration of the protective requirements contained in the SIP as a whole, that the provisions which create exemptions for excess emissions that may occur during periods of SSM events do not preclude approvability of the North Carolina SIP.

The alternative policy announced in this action, which provides an interpretation of CAA sections 110 and 302 that supports Region 4's decision to withdraw the SIP Call, is not inconsistent with the applicable requirements of the CAA, including the provisions cited by the commenters at CAA 110(k)(3), (k)(5), and (*l*). In Section III of this notice of final action, Region 4 withdraws the SIP Call that was issued in the 2015 SSM SIP action with respect to 15A NCAC 2D .0535(c) and 15A NCAC 2D .0535(g), and makes a finding that these SIP provisions are not inconsistent with CAA requirements. Region 4 is approving the changes to 15A NCAC

2D .1423 submitted by the State on June 5, 2017, because it has determined that the change is in compliance with all applicable CAA requirements.

14. Comments of a miscellaneous or general nature.

Comment 14: Commenters state that, in retrospect, EPA in the 2015 SSM SIP Call should not have concluded that alternative emission limitations during periods of SSM could be established, particularly in the timeframe necessary for the corrective SIPs.

***Response 14*:** This comment is not in scope for this rulemaking. Region 4 cannot address comments received about the referenced June 12, 2015, action.

VI. Incorporation by Reference

In this document, Region 4 is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, Region 4 is finalizing the incorporation by reference of 15A NCAC 2D .1423—"Large Internal Combustion Engines," state effective July 15, 2002, which is modified to clarify applicability, correct typos, standardize exclusions, clarify that alternative compliance methods must show compliance status of the engine, clarify by adding the word "shall" and revising language to better define ozone season, and clarify that CEMS records must identify the reason for, the action taken to correct, and the action taken to prevent excess emissions. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 4 Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information). Therefore, these materials have been approved by Region 4 for inclusion in the SIP, have been incorporated by reference by Region 4 into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final

rulemaking of Region 4's approval, and will be incorporated by reference in the next update to the SIP compilation.[198]

VII. Final Action

Region 4 is withdrawing the SIP call issued to North Carolina for 15A NCAC 2D .0535(c) and 15A NCAC 2D .0535(g) pursuant to CAA section 110(k)(5), originally published on June 12, 2015. In connection with this withdrawal, Region 4 finds that these state regulatory provisions included in the North Carolina SIP are not substantially inadequate to meet CAA requirements.

Pursuant to section 110 of the CAA, Region 4 is approving the aforementioned changes to 15A NCAC 2D .1423 and incorporating these changes into the North Carolina SIP. Region 4 has evaluated the changes to 15A NCAC 2D .1423 as included in North Carolina's June 5, 2017, SIP revision, and has determined that they meet the applicable requirements of the CAA and its implementing regulations.

VIII. Statutory and Executive Order Reviews

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

[198] *See* 62 FR 27968 (May 22, 1997).

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Results from on a new interpretation and does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated:

Mary S. Walker,

Regional Administrator,

Region 4.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart II – North Carolina

2. Section 52.1770(c), is amended in (1), under "Subchapter 2D Air Pollution Control Requirements" by revising the entry for "Section .1423" to read as follows.

§52.1770 Identification of plan.

* * * * *

(c) * * *

(1) EPA APPROVED NORTH CAROLINA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
Subchapter 2D Air Pollution Control Requirements				
**	**	*	*	*
Section .1400 Nitrogen Oxides				
Section .1423	Large Internal Combustion Engines	7/15/2002	[Insert date of publication in Federal Register] [Insert citation of publication]	