November 6, 2014

Attention Docket ID No. EPA-HQ-OAR-2012-0322
EPA West (Air Docket)
U.S. Environmental Protection Agency
Mailcode: 6102T
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: SSM Coalition Comments on "State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States; Proposed Rule"; Docket ID No. EPA-HQ-OAR-2012-0322

Dear Sir or Madam:

This letter provides comments of the SSM Coalition on EPA's above-referenced Supplemental Proposal to find the State Implementation Plans of 17 states "substantially inadequate" and require that those SIPs be revised, based on their inclusion of an affirmative defense to civil penalties for excess emissions associated with malfunctions ("affirmative defense provisions"). Those proposed actions and EPA's purported justification for them were presented in a Federal Register notice published on September 17, 2014, 79 Fed. Reg. 55,920 (the "Supplemental Proposal").

The SSM Coalition is an *ad hoc* coalition of trade associations and business organizations interested in the methodologies EPA uses to develop stationary source emission standards under the Clean Air Act ("CAA") and the way those standards are expressed in EPA regulations. The SSM Coalition's members for purposes of these comments are the American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Iron & Steel Institute, American Petroleum Institute, American Wood Council, Brick Industry Association, Council of Industrial Boiler Owners, Florida Sugar Industry, National Lime Association, North American Insulation Manufacturers Association, Rubber Manufacturers Association, Treated Wood Council, and the Vegetable Oil SSM Coalition (consisting of the Corn Refiners Association, the National Cotton Council, the National Cottonseed Products Association, the National Oilseed Processors Association, and Sessions Peanut Company).

The businesses represented by members of the SSM Coalition would be directly affected by the changes in SIPs that the Supplemental Proposal would

demand. They operate facilities that employ various production processes and pollution control equipment that, even when properly operated and maintained, may experience different emissions during periods of startup, shutdown or malfunction than at other times. Over a long period of time (decades in many cases), those businesses, working with the state and local air pollution control agencies that regulate them, have developed regulations and permit conditions, installed pollution control technology, and established operating and maintenance procedures to ensure an appropriate level of air pollution control, while also recognizing the limitations of available technology and practices. EPA's Supplemental Proposal ignores that history and would subject those facilities to new potential penalties, based on no actual demonstration that the identified affirmative defense provisions in SIPs are causing air quality problems. If finalized as written, the Supplemental Proposal will penalize the safe and proper operation of many facilities and impose unnecessary and significant economic impacts on businesses and state governments (impacts which were not identified, quanitified or addressed in the SIP Call Notice).

1. Background and Executive Summary

The SSM Coalition filed comments on May 13, 2013 (EPA Docket ID No. EPA-HQ-OAR-2012-0322-0563) on EPA's proposed response to the Sierra Club's petition for rulemaking concerning State Implementation Plan ("SIP") startup, shutdown and malfunction ("SSM") provisions, including EPA's proposal to find the SIPs of 36 states "substantially inadequate" with respect to SSM and require that those SIPs be revised (the "Coalition SIP Call Comments"). Those proposed actions and related actions were presented in a Federal Register notice published on February 22, 2013, 78 Fed. Reg. 12,460 (the "SIP Call Notice").

The Coalition SIP Call Comments showed that the SIP Call Notice would impose tremendous resource demands on state air programs and subject many thousands of industrial, commercial, institutional, agricultural, and municipal sources to burdensome administrative proceedings, large new potential liabilities, and costly new constraints on their operations. Yet EPA has not shown that any significant air quality benefits will result from these new burdens, undermining its assertion that each of the affected SIPs is substantially inadequate to attain and maintain compliance with the National Ambient Air Quality Standards ("NAAQS") and with other applicable CAA requirements.

The Coalition SIP Call Comments demonstrated that EPA has not made the necessary showings for the proposed SIP Calls and showed why EPA's theory that SIPs that include SSM provisions cannot be adequately protective is demonstrably wrong. The comments explained why the proposed SIP Calls are not supported by any provision of the CAA (including the definition of "emission limitation" and the

enforcement provisions of the Act), nor by any judicial precedent. Rather, the SIP Call Notice is directly contrary to case law emphasizing the great flexibility states have in choosing the complex package of requirements that a state believes is appropriate to meet the goals of the SIP and, conversely, the limited role for EPA.

As part of the SIP Call Notice, EPA stated that SIPs would not be rendered inadequate by inclusion of an affirmative defense to civil penalties for excess emissions associated with malfunctions. EPA explained its conclusion that it is appropriate to allow an affirmative defense "for violations due to genuine malfunction events, in order to resolve the inherent tension between the fact that the CAA requires that SIP emission limitations must apply continuously and the fact that even properly designed, maintained and operated sources may sometimes have difficulty meeting emission limitations for reasons beyond their control." 79 Fed. Reg. 55,928.

The Coalition SIP Call Comments explained why offering the possibility of an affirmative defense to penalties in an enforcement action, as opposed to allowing SIPs to contain emission limitations that reflect the limits of air pollution control technology and measures, including special provisions for SSM events, is not sufficient. In addition, the Coalition SIP Call Comments described numerous reasons why, even if the alternative of allowing an affirmative defense were sufficient, the scope and terms of the affirmative defense that EPA offered as an alternative for dealing with malfunction events in the SIP Call Notice was inappropriately prescriptive and limited. Finally, the Coalition SIP Call Comments showed why EPA's reasons for abandoning its long-standing view that SIPs can also include an affirmative defense for startups and shutdowns are illogical and factually inaccurate.

The Coalition SIP Call Comments are directly relevant to the Supplemental Proposal, both with respect to the lack of factual and legal justification for EPA proposing SIP Calls based on its theory that excess emissions resulting from SSM events must be termed violations, and with respect to the alternative approach of allowing SIPs to include an affirmative defense to civil penalties in an attempt to rationalize the prohibition of unavoidable emissions associated with malfunctions. The Coalition SIP Call Comments, therefore, are incorporated herein by reference.

In the Supplemental Proposal, EPA announced that it no longer believes it is consistent with the CAA for SIPs to include even the limited affirmative defense to civil penalties for malfunctions that EPA described in the SIP Call Notice as an appropriate way to address the fact that even properly designed, maintained, and operated sources may be unable at times to meet emission limits. EPA proposed to declare the SIPs of 15 of the 36 states identified in the SIP Call Notice inadequate for the additional reason that those SIPs include affirmative defense provisions, and also to issue SIP Calls to two more states not included in the SIP Call Notice, Texas and

Washington, solely because their SIPs include affirmative defense provisions.

These proposed actions would aggravate the adverse impacts of the SIP Call Notice described in the Coalition SIP Call Comments, by removing the limited protection from enforcement actions based on unavoidable emissions associated with malfunctions that currently is provided by affirmative defense provisions in 17 states. The Supplemental Proposal represents an unjustified reversal of long-standing EPA policy, expressed as recently as the SIP Call Notice. As explained below, EPA should drop its proposal to issue SIP Calls to 17 states because of the state SIPs' affirmative defense provisions, because:

- EPA's position that affirmative defense provisions in SIPs are contrary to the CAA flouts at least three federal court of appeals decisions that have upheld such provisions. Instead, EPA now chooses to rely on a D.C. Circuit decision discussing affirmative defense provisions in a completely different context (which decision specifically declined to address affirmative defense provisions in SIPs). Contrary to EPA's assertion, the reasoning of the D.C. Circuit decision does not compel a finding that affirmative defense provisions in SIPs contravene the Clean Air Act.

- CAA provisions authorizing enforcement of SIP limitations do not and cannot dictate what those limitations must be.

- EPA proposes to declare the SIPs of more than a third of the states "substantially inadequate" without demonstrating that the affirmative defense provisions to which EPA objects are interfering with meeting NAAQS. There are many reasons why EPA should not assume that SSM provisions, and especially an affirmative defense to civil penalties for malfunctions, threaten attainment of the NAAQS, and actual ambient monitoring data for many areas show clearly there is no such threat.

- EPA's claim that it can declare SIPs "substantially inadequate" without any factual showing, based on inconsistency with EPA's preferred wording of how a SIP's requirements are expressed, fails to respect EPA's limited role under the statute and runs directly contrary to judicial precedent. Moreover, the Supplemental Proposal contravenes admonitions from the courts and prior statements by EPA about the need to look at the effectiveness of the entire set of requirements constituting the SIP.

- The Supplemental Proposal would impose large administrative obligations on state agencies, as well as significant costs for regulated facilities arising out of those state proceedings, without any clear environmental benefit. The state burden includes not only removing the affirmative defense provisions EPA

identifies in the Supplemental Proposal, but also reviewing countless existing emission limitations to assess their reasonableness without the affirmative defense provisions, and promulgating new emission limitations addressing the effect of SSM events on achievable emissions. EPA has not even attempted to analyze those financial and paperwork burdens.

Although, for the reasons set forth in the Coalition SIP Call Comments, EPA should not issue SIP Calls at all for states that have provisions excusing emissions resulting from SSM events from any enforcement consequences, if EPA persists in doing so, it should not claim in addition that states' affirmative defense provisions render their SIPs substantially inadequate. It is particularly unjustified for EPA to base this exercise of its very limited authority to override state SIP decisions on EPA's interpretation of a court decision under a different portion of the CAA, when the three decisions that are on point all have concluded that SIPs can include an affirmative defense for malfunctions.

2. EPA's New View that Affirmative Defense Provisions Are Inconsistent with the CAA Is Not Required by, and in Fact Is Contrary to, Relevant Case Law.

Reversing long-standing EPA interpretations of its CAA responsibilities, including as recently as the SIP Call Notice, EPA now proposes to find SIPs "substantially inadequate" because they include an affirmative defense to civil penalties for excess emissions associated with malfunctions. The only reason EPA gives in the Supplemental Proposal for doing so is EPA's interpretation of a recent holding of the U.S. Court of Appeals for the District of Columbia Circuit, *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (2014) ("the Portland Cement NESHAP decision"). See 79 Fed. Reg. at 55,930 (the Portland Cement NESHAP decision "compels the Agency to reevaluate its interpretation of the CAA and its proposed action on the [Sierra Club] Petition concerning affirmative defense provisions in SIPs."). But the Portland Cement NESHAP decision explicitly declines to address whether affirmative defense provisions in SIPs are consistent with the CAA, and at least three court of appeals decisions have upheld inclusion of affirmative defense provisions in SIPs and FIPs. See 749 F.3d at 1069 n.2; 79 Fed. Reg. at 55,931 n. 21.

In fact, one of those decisions upheld the specific affirmative defense provision that EPA now proposes to find renders Texas SIPs substantially inadequate. See *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir.2013), *cert. denied* 134 S. Ct. 387 (2013). EPA has been criticized for engaging in collusive, "sue and settle" arrangements, where an interest group sues EPA, and the Agency, often despite good defenses, enters into a settlement dictating future rulemaking. In this instance, because the *Luminant Generation* decision rejected

arguments by Sierra Club *et al*. and upheld the same Texas affirmative defense provision that EPA now proposes to reject in response to Sierra Club's petition for rulemaking, the Supplemental Proposal could be called an example of "sue, lose, and still settle."

Other than calling the Portland Cement NESHAP decision a "newer" decision [by a couple of years], EPA does little to explain its justification for arguing by analogy from the Portland Cement NESHAP decision, rather than following the three court of appeals decisions that are directly on point. See 79 Fed. Reg. at 55,931-32. Given that the policy reasons for allowing an affirmative defense for malfunctions, which EPA has followed for decades and reinforced in the SIP Call Notice just last year, are undiminished, it is arbitrary and capricious for EPA to abandon that policy when the directly applicable case law supports EPA's long-standing policy position.

In any event, however, EPA is incorrect that the reasoning of the Portland Cement NESHAP decision supports a conclusion that including affirmative defense provisions in SIPs is inconsistent with CAA requirements. The D.C. Circuit's decision that EPA lacked authority to include an affirmative defense provision in NESHAPs for the Portland Cement Manufacturing source category was based on a simple rationale: Once an emission standard has been violated, it is up to the district court to determine what, if any, penalties are appropriate for that violation in a civil enforcement action. See 749 F.3d at 1063. The Court's analysis was based solely on the statutory language that indicates Congress intended the courts, not EPA, to decide what constitutes an appropriate penalty once a violation has occurred and a civil enforcement action has been brought in the district court.[1]

In the Supplemental Proposal, EPA applies that principle in a circular fashion. In effect, EPA is saying: because only a court can decide what penalty is appropriate once a SIP has been violated, the SIP has to make any excess emissions associated with malfunctions a violation, subject to penalties. EPA's conclusion does not flow from the logic the Court followed in the Portland Cement NESHAP decision. As noted, that decision concerned only whether EPA could issue a rule that limited the courts' ability to determine appropriate civil penalties when a National Emission Standard for Hazardous Air Pollutant Standard has been violated. Whether a SIP has been violated depends on the terms of the approved SIP; but, if it has been, then nothing prevents the courts from imposing civil penalties for the violation of the SIP.

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[1] *Id*. The CAA section 113(e) criteria for determining an appropriate penalty, which the Portland Cement NESHAP decision said must be applied by the courts in an enforcement action rather than by EPA in a regulation, apply only once a violation has been proven, rather than specifying what conduct constitutes a violation. See *id*.; see also *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 229 (4th Cir. 1997) (§ 113(e) criteria apply at penalty phase rather than liability phase).

Whether a SIP is substantially inadequate because it contains affirmative defense provisions is based on a number of considerations, discussed in the next section, which EPA ignored in the Supplemental Proposal. But if a SIP is properly adopted by the state and approved by EPA, and that SIP specifies that certain emissions will not be subject to sanctions if the source meets certain requirements, then there is no violation of the SIP for which a civil penalty can be imposed. The reasoning of the Portland Cement NESHAP decision about who can determine the size of that penalty is not implicated.

3. EPA's Proposed Approach to Affirmative Defense Provisions Is Not Required by the Definition of "Emission Limitation" nor any other CAA Provision.

Although EPA says its proposal to disapprove SIPs in 17 states because they include affirmative defense provisions is compelled by the Portland Cement NESHAP decision, the Supplemental Proposal is an outgrowth of EPA's incorrect position in the SIP Call Notice that SIPs may not contain provisions excusing excess emissions during SSM events from compliance with emission limitations developed to reflect normal operations. The Coalition SIP Call Comments demonstrated that the Agency's position, contrary to EPA's suggestion, does not flow from the definition of "emission limitation" and "emission standard" in CAA section 302(k), and it is not required by any other portion of the Act. In fact, EPA's position is contrary to a long history of EPA interpreting the Clean Air Act, with the approval and encouragement of the courts, as allowing it to establish emission limitations or standards that impose alternative requirements during SSM events.

EPA's position generally seems to be that the statement in the definition that an emission limitation is "a requirement…which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis…" means that the same limitation must apply at all times; in other words, that by describing emission limitations as applying "on a continuous basis," Congress intended to require that processes and associated pollution control equipment operate perfectly at all times and without variation. There is no basis for that position in the language of the CAA or its legislative history, and, in fact, there are many indications that EPA's (new) position about the effect of the definition of "emission limitation" is wrong.

The statute does not say that "emission limitations," required to be included in SIPs, must be expressed as a single, numerical, not-to-be-exceeded-at-all-times limitation. On its face, a "requirement" that limits emissions "on a continuous basis" does not have to impose the same limitation at all times. Nor does the form of the limitation have to always be the same.[2] A set of regulations that imposes numerical

[2] The D.C. Circuit also reached that conclusion in *Sierra Club v. EPA*, acknowledging that section 302(k)'s "inclusion of [the] broad phrase" "any requirement relating to the operation

limitations on the mass or concentration of pollutants emitted during normal operations, but that also includes conditions during which those numerical limitations do not apply, still represents a continuously applicable requirement.

EPA also ignores the remainder of CAA section 302(k), which provides an alternative to a specific limitation on the quantity, rate, or concentration of emissions. An "emission limitation" or "emission standard" includes: "any design, equipment, work practice or operational standard promulgated under" the Act. A SIP provision that spells out the circumstances under which a source is allowed to deviate from the numerical emission limitations (or work practices) that apply during normal operations, and specifies the requirements for the operation of the source during SSM events meets that definition. It is simply inaccurate to describe such SIP regulations as not providing for control of emissions on a continuous basis.

In addition, CAA section 110(a)(2) specifies that SIPs include not only "enforceable emission limitations," but also "other control measures, means, or techniques…as may be necessary or appropriate to meet the applicable requirements of" the CAA. To the extent that SSM provisions in SIPs, including affirmative defense provisions, do not satisfy the definition of "emission limitation," they would still be approvable elements of a SIP as "other control measures, means, or techniques."

The arguments set forth in the Coalition SIP Call Comments are even more compelling in the context of EPA's new position, announced in the Supplemental Proposal, that a SIP cannot even provide that certain emissions during SSM events will not be subject to penalties (but still may trigger an agency or court compliance order). The affirmative defense provisions that EPA heretofore considered consistent with the CAA (with the approval of the courts of appeals), but that EPA now claims render 17 SIPs substantially inadequate, set forth requirements that a source must meet during malfunction periods. They also limit the circumstances that are considered a malfunction subject to the affirmative defense requirements. Such restrictions meet the CAA definition of "emission limitation" or "emission standard" in CAA section 302(k) and therefore are acceptable elements of SIPs. The states with affirmative defense provisions in their SIPs are imposing greater restrictions on source operations and emissions than states that do not subject SSM events even to compliance orders. Because the latter are not inconsistent with the CAA, as demonstrated in the Coalition SIP Call Comments, certainly the former cannot be.

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or maintenance of a source to assure continuous emission reduction" in the definition of "emission standard" suggests that EPA can establish MACT standards consistent with CAA section 112 "without necessarily continuously applying a single standard." 551 F.3d 1019, 1027 (D.C. Cir. 2008). "Indeed, this reading is supported by the legislative history of section 302(k)." *Id.* See also *id*. at 1021 ("accepting that 'continuous' for purposes of the definition of 'emission standards' under CAA section 302(k) does not mean unchanging").

4. EPA Has Not Demonstrated that the Affirmative Defense Provisions Render the SIPs in the 17 Identified States Substantially Inadequate.

Clean Air Act section 110(k)(5) authorizes EPA to direct a state to revise an existing SIP when EPA finds that the SIP is "substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately [interstate pollutant transport], or to otherwise comply with any requirement of" the CAA. This authority to issue a "SIP Call" is much more limited than EPA's general authority to review and approve SIPs. The Supplemental Proposal does not reflect EPA's limited role, does not defer to the states on how to achieve CAA objectives, and wholly fails to demonstrate that the affected SIPs are in fact "substantially inadequate to attain or maintain" applicable NAAQS and meet other CAA requirements. As explained in much more detail in the Coalition SIP Call Comments incorporated herein by reference, this is not what Congress intended.

In the Supplemental Proposal, EPA asserts broad authority to find an existing SIP "substantially inadequate" based on EPA's just-announced new SSM policy, rather than on demonstrated failures to attain and maintain NAAQS and meet other applicable CAA requirements. In particular, EPA asserts that it can issue SIP Calls because it has changed its view about the consistency of affirmative defense provisions with CAA requirements, without any information showing that SIPs that include affirmative defense provisions in fact are failing to meet NAAQS or other CAA requirements. See, e.g., 79 Fed. Reg. at 55,935 ("there is no need to demonstrate that the use of the affirmative defense would be causally connected to any particular impact… or the undermining of the effective enforcement for a particular violation by a particular source"). EPA cites nothing in the statute or its legislative history to suggest that Congress intended for EPA to usurp the primary role of the states and dictate to the states the wording of their SIPs, without regard to whether the SIP in fact is and has been adequate to protect air quality.

The Coalition SIP Call Comments explained why EPA cannot simply declare SIPs substantially inadequate without considering whether, in practice, the SIP is meeting the goals of the CAA. In *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), for example, the court rejected just such an EPA assertion, on general principles, that a SIP was substantially inadequate to attain or maintain the NAAQS. "In the absence of applicable modeling," the Court held, "no such agency finding could be made. Thus, there is no existing basis for these SIP calls." *Id*. at 1414-15. Moreover, "If a state plan is inadequate – that is, if the state is not achieving an ambient air quality standard – EPA can call only for revisions 'as necessary' to correct that problem." *Id*. at 1410. In this case, EPA has not identified a "problem," but only a new policy that EPA wants to impose on the states.

It is particularly inappropriate for EPA to base the extraordinary remedy of a

SIP Call on an EPA decision to change its policy, to reflect EPA's view of the rationale of a court decision dealing with a different CAA regulatory program, when at least three appellate decisions found that EPA can approve a SIP with an affirmative defense for (unplanned) malfunctions, or can include such a provision in a FIP. This EPA policy choice not only is arbitrary, but it also cannot form the basis for EPA's assertion that states must remove EPA-approved affirmative defense provisions in their SIPs to be "consistent with CAA requirements." See, e.g. *Luminant Generation*, 675 F.3d at 932 (EPA cannot apply "extra-statutory standards that [it has] created out of whole cloth" in reviewing a state's SIP submission).

EPA attempts to justify reversing its prior determinations that each of the SIPs identified in the SIP Call Notice satisfies the requirements of the CAA by saying that it is not precluded from changing its prior policy interpretations, especially in light of subsequent judicial rulings. See, e.g. 79 Fed. Reg. at 55,934. But a determination that a previously approved SIP is now substantially inadequate to meet NAAQS and other CAA requirements is not simply a policy choice. It is, as the courts have noted, a factual determination, and EPA has not created a record that supports a different factual determination than it made when it approved the SIP containing the affirmative defense provisions. *Cf. FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 129 S. Ct. 1800, 1811 (2009). This record support would have to be developed for each SIP provision that EPA claims is substantially inadequate, in each state.

There are many reasons why it would be inappropriate for EPA to assume that an affirmative defense provision would render a SIP substantially inadequate to assure compliance with NAAQS and other CAA substantive requirements. Those reasons are discussed at length in the Coalition SIP Call Comments. In fact, there is no indication that affirmative defense provisions have interfered with the ability of the SIPs of the 17 states to meet NAAQS and other CAA requirements.

Moreover, logic suggests that they would not. By definition, the affirmative defense provisions only provide relief for events that are infrequent, not the result of operator error or intentional conduct, and not the result of improper design or maintenance of equipment. See, e.g., 79 Fed. Reg. at 55,928. EPA speculates that removing affirmative defenses from SIPs may cause sources to make changes to their physical equipment or operating practices "so as to comply with existing emission limits continuously and thereby reduce the risk of enforcement action." *Id*. at 55,926. But these improvements that EPA imagines are (a) inconsistent with the definition of "malfunction" and EPA's previous policy on acceptable affirmative defense provisions and (b) contrary to EPA's recognition, in numerous contexts, that even the best-designed and -operated facilities still will experience excess emissions associated with malfunctions. The events covered by the affirmative defense are those that cannot be avoided by reasonable design or operating measures, so there is no basis for EPA to assert that removing the affirmative defense will result in companies installing equipment or adopting operating practices that will avoid such

events.

Moreover, EPA's theory that eliminating affirmative defense provisions somehow will result in reductions in the incidence of excess emissions associated with malfunctions rests on the questionable (indeed, inaccurate) assumption that facilities currently do not use their best efforts to avoid excess emissions because of the availability in the applicable SIPs of affirmative defense provisions. Given the stringent applicability criteria for the "narrowly drawn" affirmative defense[3], a facility has no assurance that an affirmative defense will apply to any particular malfunction event. Additionally, even if the affirmative defense was available, it would not shield the facility from compliance orders or other injunctive relief (nor from criminal prosecution). There is, therefore, no logical basis behind EPA's assumption that eliminating a SIP's affirmative defense provision will cause facilities to improve their compliance efforts. It also is inconsistent with the fact that many companies, including many of the companies that are members of the groups making up the SSM Coalition, have policies that require them to operate in compliance with environmental laws (not simply in a way that will avoid penalties).

Thus, EPA has failed to demonstrate – and there is no reason to believe – that substantial reductions in emissions would result from eliminating SIP provisions that protect source operators from civil penalties when an excursion above a particular emission limit occurs despite the reasonable design, operation, and maintenance of equipment to meet those requirements. Unavoidable process upsets and pollution control or monitoring equipment malfunctions will still occur, because no technology is perfect, even if states were to eliminate the affirmative defense provisions identified in the Supplemental Proposal.[4]

These realities controvert any claim by EPA that the existing SIPs identified in the Supplemental Proposal are substantially inadequate because of their inclusion of affirmative defense provisions. Rather than prevent a situation that is causing or threatening an exceedance of NAAQS, the changes in the SIPs that EPA proposes to require would merely increase the potential that properly designed and operated facilities would be subject to the possibility of increased liability for penalties and, therefore, would face increased pressure to settle enforcement cases and to reimburse citizen-suit plaintiffs for their legal fees.

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[3] See 79 Fed. Reg. at 55,926.

[4] Note that, even if EPA could show that eliminating affirmative defense provisions would actually reduce excursions above SIP emission limitations, that would not, in and of itself, justify an EPA finding that SIPs are substantially inadequate unless they are stripped of affirmative defense provisions. As the Coalition SIP Call Comments demonstrated, there are numerous reasons why EPA cannot just assume that the infrequent excursions during malfunction events jeopardize attainment and maintenance of NAAQS. See *id*. at pp. 6-13.

5. The Supplemental Proposal Ignores and Usurps the Statutory Role of the States.

As demonstrated above, elimination of affirmative defense provisions in SIPs is not required by any statutory provision, regulation, or applicable court decision. Rather, the Supplemental Proposal reflects EPA's intention to substitute its (just-revised) policy judgment for that of the states about how stationary sources should be regulated and NAAQS should be attained and maintained. Indeed, for each of the proposed SIP Calls for 17 states discussed in the Supplemental Proposal, EPA previously has approved, as consistent with the CAA, the very affirmative defense provisions that EPA now asserts render the SIP substantially inadequate. EPA has not attempted to prove, nor could it, that the only way to attain or maintain NAAQS is to remove the identified affirmative defense provisions from each state's SIPs.

The CAA gives states a wide degree of discretion in adopting SIP provisions. Conversely, EPA's role is quite limited. See, e.g., *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981) ("The great flexibility accorded the states under the Clean Air Act is further illustrated by the sharply contrasting, narrow role to be played by EPA.") If a SIP can reasonably be expected to attain and maintain compliance with the NAAQS, then EPA has no authority to require the state to revise the SIP so that the SIP accomplishes that same goal in a manner that EPA prefers. The CAA absolutely prohibits EPA from "from using the SIP process to force States to adopt specific control measures."[5] The Supplemental Proposal is just such an assertion of EPA authority, however.

The state's primary responsibility for determining how to meet CAA air quality goals, and EPA's limited role, is spelled out in the statute and in decisions by the U.S. Supreme Court and the U.S. courts of appeals. The CAA simply does not allow EPA "to reject a State's legislative choices in regulating air pollution, even though 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." *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976); see also *BCCA Appeal Group v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003) (the CAA "supplies the goals and basic requirements of [SIPs], but the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements."). The Supreme Court has considered just the question raised by the Supplemental Proposal and stated unequivocally that EPA cannot dictate the specifics of a state's complex set of provisions, so long as "the ultimate effect of a State's choice of emission limitations is compliance with the" NAAQS. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). See also *Luminant*, 675 F.3d at 921; *Clean COALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008).

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[5] *EME Homer City Generation v. EPA*, 696 F.3d 7, 29 (D.C. Cir. 2012), citing *Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000) and *Virginia v. EPA*, 108 F.3d at 1410.

Yet that is precisely what the Supplemental Proposal would do. It would substitute EPA's preferred approach for the state's judgment that the combination of measures the state has adopted, which include affirmative defense provisions, are not only sufficient but are appropriate for achieving compliance with the NAAQS and other requirements of the CAA, consistent with the needs of the state. EPA has recognized that "a SIP is a complex, multi-faceted set of obligations." *Ass'n of Irritated Residents v. EPA*, 686 F.3d 668, 677 (9th Cir. 2011). For EPA to now claim that 17 states have inadequate SIPs, simply because one element of their "complex, multi-faceted set of obligations" limits the sanctions for excess emissions associated with certain malfunction events, contravenes the statutory requirement to defer to the state's choice of how to meet ambient air quality standards.[6]

6. The SIP Revisions Contemplated in the Supplemental Proposal Would Require Very Extensive Rulemaking and Legislation, and Existing Emission Limitations and Operating Permits Would Have To Be Reviewed and Revised.

The SIP Calls proposed in the Supplemental Proposal would require a great deal of work by state air pollution control agencies in the affected states to adopt modifications to each of the affected SIPs and prepare SIP revision packages for EPA review and approval. In numerous states, the SSM provisions EPA claims render the SIP substantially inadequate will have to be changed or reviewed by the state legislature. As noted in the Coalition SIP Call Comments, that effort could not reasonably be completed in many states within the 18 months EPA proposes to allow for SIP revisions in response to the final SSM-related SIP Calls. But that effort to revise the SIPs of the 17 states is only a small part of the burden the Supplemental Proposal would impose.

Because CAA Title V and EPA's Title V permitting regulations in 40 C.F.R. pt. 70 contemplated inclusion of any applicable requirements that affected the source's compliance obligations, the SSM provisions that EPA proposes to require 36 states to remove from their SIPs have been incorporated into thousands of Title V permits, either explicitly or by reference. Those Title V permits—likely thousands of them—would, in turn, need to be modified if the affirmative defense provisions are stripped from the approved SIPs, and also if the state adopts an affirmative defense

[6] As just one example, a state may choose to adopt, in conjunction with its adoption of an affirmative defense for malfunctions, more-stringent limitations applicable during normal operations than the state would have considered reasonable in the absence of an affirmative defense provision. The Supplemental Proposal would ignore the state's judgment about such tradeoffs and would declare that state SIP substantially inadequate solely because it would not impose civil penalties for an exceedance of those more-stringent emissions limitations if the exceedance was the result of a bona fide malfunction.

consistent with the SIP Call Notice. States might also need to amend an even larger number of minor source permits. That is a large administrative burden that EPA should not ignore, particularly since many state (and EPA region) permitting officials already are significantly behind in acting on Title V amendments and renewals, and many of the same personnel also are needed for processing of permits for new and modified facilities that are key to the Nation's economic recovery.

Additionally, as EPA and courts have recognized, changing a regulation that specifies how an emissions limitation will be implemented (such as monitoring or reporting provisions) can have the effect of changing the stringency of that limitation and, potentially, warranting revision of the limitation. Under federal law and the law of many states, removing language in the existing SIP that currently provides less stringent sanctions for exceedances of numerical emission limitations caused by a malfunction would, because it has the effect of increasing the stringency of the emission limitations, represent a reopening of those limitations to challenge by the source. If the state did not review, on its own initiative, the emission limitations that would be changed by removing affirmative defense provisions from the SIP, then in most states the affected sources would have the right to petition the state agency for rulemaking to force it to do so.[7]

Thus, the 17 states addressed in the Supplemental Proposal will have to reevaluate the emission limitations currently contained in their SIPs to determine if those limitations – adopted with consideration of the limited sanctions that would apply if certain criteria were met during unavoidable malfunction events – still are consistent with federal and state law (e.g., represent reasonably available control technology). Thereafter, those states may have to adopt revised emission limitations (after following required procedures, including public participation). Those revised limitations would in turn have to be submitted to EPA for review and approval as SIP revisions. The affected states also will have to reevaluate all source-specific emission limitations contained in Title V permits or in state minor-source preconstruction or operating permits, to confirm that those limitations still will reflect federal and state law requirements for the development of emission limitations, and otherwise will represent a reasonable allocation of pollution control burdens, once the affirmative defense provisions applicable to those emission limitations have been rescinded.

EPA acknowledges that "affected states may choose to consider reassessing particular emission limitations, for example to determine whether those limits can be revised such that well-managed emissions during planned operations such as startup and shutdown would not exceed the revised emission limitation, while still

[7] State law provisions that would compel states to review emission limitations if they deleted regulations that limit the sanctions for exceedances, such as the affirmative defense provisions, are discussed in greater detail at pp. 25-27 of the Coalition SIP Call Comments.

protecting air quality." 79 Fed. Reg. at 55,926. But, that statement does not go far enough. It would be arbitrary and capricious for a state that – with EPA encouragement and then approval – included affirmative defense provisions in its SIP, "in order to resolve the inherent tension" between continuously applicable emission limitations and the inability of available technology to meet those limitations at all times, now to remove the affirmative defense provisions from its SIP and yet do nothing to adjust, or at a minimum reevaluate the appropriateness of, those continuously applicable emission limitations. The process that states will be legally compelled to follow will require a great deal of resources for state air pollution control agencies, as well as for the regulated public. EPA has not even acknowledged that impact, yet alone attempted to analyze the magnitude of the burden. See, e.g., 79 Fed. Reg. at 55,926-27, 55,954-55.

In addition: EPA suggests in the Supplemental Proposal that states that choose to revise emission limitations in their SIPs in conjunction with removing an affirmative defense provision could take those actions on separate tracks. See 79 Fed. Reg. at 55,926. But, as these comments and the Coalition SIP Call Comments demonstrate, it would be improper for the state to remove its affirmative defense provisions without reviewing and revising, as appropriate, the SIP emission limitations adopted along with the affirmative defense provisions. At a minimum, if EPA takes the actions described in the Supplemental Proposal, EPA must clearly indicate that states will not be required to remove the identified affirmative defense provisions from their SIPs <u>until</u> the state has had time to consider whether emission limitations in state regulations and in construction and operating permits need to be modified, and to obtain any necessary EPA approval for the modified requirements.

7. EPA Unlawfully Failed To Assess the Undoubtedly High Costs the Proposed SIP Calls Would Impose on States and Regulated Sources.

EPA asserts that the proposed SIP Calls would not have a significant economic impact on a substantial number of small entities (for purposes of the Regulatory Flexibility Act) and would not result in expenditures in any one year of $100 million or more for state, local, and tribal governments, in the aggregate, or for the private sector (for purposes of the Unfunded Mandates Reform Act). 79 Fed. Reg. at 55,954-55. The Supplemental Proposal is totally lacking in any analysis of what this EPA action would cost the states, stationary sources, and the public, however. In fact, EPA says it does not know what the costs of complying with the Supplemental Proposal would be, either for the states or for the affected sources. *Id.* at 55,926-27. EPA also says that it cannot even estimate the number, nature, or cost of changes that will result from removal of the affirmative defense provisions in the SIPs of the 17 states, nor the "resulting emission reductions that will indirectly result [sic] from the removal of such provisions from the affected SIPs." *Id*. at 55,927.

This absence of economic impact analysis is contrary to the above-cited statutes and to Administration policy, because the Supplemental Proposal could, as described above, impose significant burdens on state regulatory agencies and, ultimately, on affected sources. Imposing huge new unfunded mandates on already strapped state regulatory agencies and forcing industrial, institutional, commercial, agricultural, and municipal stationary sources to absorb additional costs should be evaluated carefully. This is especially true when the proposed agency action is dictated by a new EPA policy position, rather than a demonstrated environmental need. EPA failed to perform such an assessment of the costs and benefits.

For the reasons discussed above, there is little reason to think there would be any significant benefit from eliminating the affirmative defense provisions in 17 states' SIPs – many of which have already demonstrated consistent compliance with the applicable NAAQS – as required by the Supplemental Proposal. In fact, EPA's inability to identify any specific emission reductions that would result from the Supplemental Proposal, or any benefit at all, belies EPA's assertion that the SIPs of 17 states are substantially inadequate unless their affirmative defense provisions are removed.

10. Conclusion

For the forgoing reasons, supplemented by the Coalition SIP Call Comments, EPA should drop its proposal to require 17 states to eliminate affirmative defense provisions from their SIPs. EPA has not demonstrated that the identified affirmative defense provisions have rendered those SIPs substantially inadequate, and a violation of those SIPs (i.e., an action that is subject to civil penalties under the provisions of the SIP) is fully enforceable, as required by the CAA.

If you have any questions about these comments or wish to discuss these issues further with members of the SSM Coalition, please contact our counsel, Russell Frye, at 202-572-8267 or rfrye@fryelaw.com.

Sincerely,

American Chemistry Council
American Forest & Paper Association
American Fuel & Petrochemical Manufacturers
American Iron & Steel Institute
American Petroleum Institute
American Wood Council
Brick Industry Association

Council of Industrial Boiler Owners
Florida Sugar Industry
National Lime Association
North American Insulation Manufacturers Association
Rubber Manufacturers Association
Treated Wood Council
Vegetable Oil SSM Coalition (consisting of the Corn Refiners Association, the National Cotton Council, the National Cottonseed Products Association, the National Oilseed Processors Association, and Sessions Peanut Company)

cc: OMB – Desk Officer for EPA