ASSISTANT ADMINISTRATOR FOR AIR AND RADIATION
WASHINGTON, D.C. 20460

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MEMORANDUM

SUBJECT: SSM Policy Implementation Following the *Environ. Comm. Fl. Elec. Power v. EPA* Decision

FROM: Joseph Goffman
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TO: Regional Administrators, Regions 1-10

The purpose of this memorandum is to provide clarity to state and local air agencies on how the Environmental Protection Agency (EPA) intends to evaluate state implementation plan (SIP)[1] submittals following the March 1, 2024, decision from the United States Court of Appeals for the District of Columbia in *Environ. Comm. Fl. Elec. Power v. EPA*, 94 F.4th 77 (D.C. Cir. 2024) (2024 SSM Decision). The 2024 SSM Decision addresses provisions in SIPs pertaining to excess emissions during periods of startup, shutdown, and malfunction. A summary of the 2024 SSM Decision is provided in Section II. *Environ. Comm. Fl. Elec. Power v. EPA* of this memorandum.

This memorandum constitutes guidance. As guidance, this memorandum does not bind states, the EPA, or other entities and does not constitute a "final" action. The EPA's evaluation of any SIP submissions will be conducted through notice-and-comment proceedings in which the EPA will determine whether a given SIP provision, taken in light of the considerations outlined in this memorandum and all other applicable requirements, is consistent with the requirements of the Clean Air Act (CAA). If the policy described here is relied upon in a future EPA action on a SIP, such interpretation will be open to notice-and-comment in that future proceeding. This memorandum's application in each such notice-and-comment proceeding will be proposed, open for public comment, and subject to judicial review in any resulting final agency action.

[1] For convenience, in this document the EPA refers to "state implementation plans," but acknowledges that the ideas discussed in this memorandum may be equally applicable to federal implementation plans or tribal implementation plans. Also for convenience, the EPA refers to "state" or "states" and "air agency" or ''air agencies'' in this memorandum collectively when meaning to refer in general to states, the District of Columbia, U.S. territories, local air permitting authorities and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans.

I. Background

General Information on SIPs

With regard to implementation of the national ambient air quality standards or NAAQS, a SIP comprises the EPA approved state requirements to implement, maintain, and enforce the NAAQS within the state for six criteria air pollutants: carbon monoxide (CO), lead (Pb), ozone (O_3), nitrogen dioxide (NO_2), particulate matter (PM), and sulfur dioxide (SO_2). By approval into the SIP, these state requirements become federally enforceable legal obligations in accordance with the CAA. The SIP also includes other non-NAAQS implementation requirements such as those for the Regional Haze Program that pertains to visibility impairment in designated areas (Class I areas) across the United States as described in CAA sections 169A and 169B.[2]

Once the EPA promulgates a new or revised NAAQS, a series of SIP requirements are triggered — first by the promulgation, and second, by the EPA's designation of every area in the country as meeting or not meeting the new or revised NAAQS. States have discretion regarding how best to meet their obligations to implement, attain, maintain, and enforce the NAAQS, as long as they meet applicable statutory and regulatory requirements. A SIP submission to address implementation, attainment, maintenance, and enforcement of the NAAQS or other SIP requirements can include a wide variety of types of provisions, such as: source-specific emission limitations and associated monitoring, recordkeeping, and reporting; applicable state or local rules (or state laws) regarding controls on sources or categories of sources; other local or state commitments to undertake certain activities; and non-regulatory supporting information.[3] The EPA evaluates and acts on SIP submissions through notice and comment rulemaking. The Agency reviews each submission against the applicable CAA requirements for that particular submission, which can vary based on program requirements and the relevant NAAQS.

Emission Limitations

Section 302(k) of the CAA defines "emission limitation" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice, or operational standard promulgated under [the CAA]." In the context of a SIP, that can mean 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 in a SIP provision. By definition, an emission limitation can take various forms or a combination of forms, but in order to be approvable into a

[2] For more information on the regional haze program, *see* https://www.epa.gov/visibility/regional-haze-program.
[3] Basic Information About Air Quality SIPs, *https://www.epa.gov/air-quality-implementation-plans/basic-information-about-air-quality-sips* (last updated January 20, 2023).

SIP, it 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. Importantly, the EPA has observed that an emission limitation may include different numerical levels or other specific control requirements that apply during different modes of operation and the EPA has approved SIP provisions that include different requirements applicable during periods of, for example, startup and shutdown, than during routine operations. EPA refers to these types of limitations that apply during specific modes of operation such as startup or shutdown as "alternative emission limitations" (AELs).[4] Regardless of its form, a fully approvable SIP emission limitation must also meet all substantive requirements of the CAA applicable to such a SIP provision, e.g., the statutory requirement of CAA section 172(c)(1) for imposition of reasonably available control measures and reasonably available control technology (RACM and RACT) on sources located in designated nonattainment areas.

2015 SSM SIP Action and SIP Call

On June 12, 2015, the EPA finalized an action regarding SSM-related provisions in SIPs (2015 SSM SIP Action).[5] The 2015 SSM SIP Action affirmed EPA's longstanding position that certain types of provisions related to emissions during SSM events are inconsistent with CAA requirements. As described in the 2015 SSM SIP Action, such provisions include: automatic exemptions, director's discretion exemptions, overly broad enforcement discretion provisions, and affirmative defense provisions. At the same time, the EPA issued a SIP call pursuant to CAA section 110(k)(5) to 36 states (applicable in 45 statewide and local jurisdictions) directing them to revise their SIPs to correct deficiencies in specific individual SIP provisions related to emissions during SSM events. The 2015 SSM Action was challenged in the D.C. Circuit Court of Appeals.

II. *Environ. Comm. Fl. Elec. Power v. EPA*

On March 1, 2024, the D.C. Circuit Court of Appeals issued a decision in *Environ. Comm. Fl. Elec. Power v. EPA*, 94 F.4th 77. The case was a consolidated set of petitions for review of the 2015 SSM SIP Action. As is described in more detail below, the court upheld both EPA's interpretation of its SIP call authority under CAA section 110(k)(5)[6] and certain aspects of its 2015 SIP Call, but also found that the Agency had not correctly interpreted certain other requirements of CAA section 110(a)(2)(A) during its 2015 SIP Call. *Id.*

[4] A continuous emission limitation can include different requirements that apply during certain modes of operation that include different numerical levels, technological control requirements, valid work practice standards, etc.
[5] 80 FR 33840 (June 12, 2015).
[6] CAA section 110(k)(5): "Whenever the Administrator finds that the [SIP] for any area is substantially inadequate to…otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan…"

The court granted the petitions in part, vacating the 2015 SIP Call with respect to SIP provisions that the EPA identified as automatic exemptions, director's discretion provisions, and affirmative defenses that are functionally exemptions. *Id.* at 116. The court denied the petitions in part as to EPA's 2015 SIP Call based on overbroad enforcement discretion provisions and affirmative defense provisions that would preclude or limit a court from imposing relief in the case of violations, which the court also refers to as "specific relief." *Id*. As such, the 2015 SSM SIP Call remains in effect for those provisions identified as overbroad enforcement discretion or impermissible affirmative defense provisions. Below is a summary of the different types of exemptions as they were discussed by the 2024 SSM Decision.

1. **Automatic Exemptions**
    a. Automatic exemptions are "a generally applicable provision in a SIP that would provide that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations of the applicable emission limitations." 80 FR at 33842. "Automatic exemptions exclude SSM periods from otherwise applicable emission restrictions." 94 F.4th at 99.
    b. EPA's 2015 SIP Call action with respect to automatic exemption provisions relied on the premise that the specific provisions at issue submitted by states to meet various SIP requirements were "emission limitations," as per the definition in CAA section 302(k), and thus were required to be continuous. Under CAA section 110(a)(2)(A), SIPs shall include "enforceable emission limitations and other control measures, means or techniques…as may be necessary or appropriate to meet" CAA requirements.
    c. Based on the language of CAA section 110(a)(2)(A), the D.C. Circuit found that, regardless of the labels a state placed on the provisions submitted as part of their SIP, not every SIP provision must necessarily be an "emission limitation" and thus required to meet the definition of "emission limitation," because it could potentially qualify instead as "other control measures, means or techniques." In fact, the D.C. Circuit said it would only be appropriate for the EPA to issue a SIP call based upon an automatic SSM exemption in a SIP provision if the EPA first made a determination that it was "necessary or appropriate" for the SIP provision to meet the definition of "emission limitation" for the state to attain or maintain the NAAQS or to meet some other requirement of the CAA. Because the EPA had not made any such "necessary or appropriate" determinations for the specific SIP provisions that contained automatic exemptions for emissions during SSM or other events, the court vacated the SIP call with respect to those provisions.

2. **Director's Discretion Exemptions**
    a. Director's discretion exemptions, which are a subset of provisions that the EPA has historically called "director's discretion provisions," are "regulatory provision[s] that authorize[] a state regulatory official unilaterally to grant exemptions or variances from otherwise applicable emission limitations or control measures, or to excuse noncompliance with otherwise applicable emission limitations or control measures,

which would be binding on the EPA and the public." 80 FR at 33842. "Director's discretion provisions give state officials discretion to grant SSM-related exemptions from otherwise applicable emission limitations." 94 F.4th at 110.

b. The court vacated the 2015 SSM SIP Call as to specific director's discretion exemption provisions, finding that "the continuity rationale fails as to director's discretion provisions for the same reason it fails as to automatic exemptions." *Id.* The court again found that a "necessary or appropriate" determination by the EPA would be required before the EPA could issue a SIP call for a SIP provision because it contains a director's discretion term that authorizes exemptions and is thus not continuous.

c. However, the court stated that it was not "foreclose[ing] the possibility that EPA in the SIP Calls touched on reasons that specific director's discretion provisions, depending on their particulars, might interfere with the CAA." *Id.* For example, "a provision might be so unbounded as to interfere with the agency's ability to predict the impact on compliance with the CAA's requirements." *Id.* The court thus acknowledged the EPA's concern that a given SIP provision could include such unbounded discretion that it would not meet applicable CAA requirements. Those requirements could be both substantive and procedural. Given this, the court did not foreclose EPA's authority to disapprove a SIP submission on the basis that the contents include an impermissibly unbounded director's discretion provision, notwithstanding the absence of a broader SIP call being in effect.

3. **Affirmative Defenses**

a. Affirmative defense provisions are "state law provision[s] in a SIP that specif[y] particular criteria or preconditions that, if met, would purport to preclude a court from imposing monetary penalties or other forms of relief for violations of SIP requirements." 80 FR at 33842. The D.C. Circuit distinguished between two different kinds of affirmative defenses. The first provide "a complete affirmative defense to an action brought for noncompliance with an emission rule", which "create an exemption from the normal emission rule." 94 F.4th at 114 (internal quotations removed). The second "preclude certain remedies after a source has violated an emission rule." *Id.*

b. The D.C. Circuit held that the first type of affirmative defense provision—i.e., those that provide a "complete affirmative defense"—was simply an exemption provision by another name, and vacated EPA's action with respect to the lone "complete affirmative defense" provision that had been SIP called. *Id*. Similar to exemption provisions, the court found that EPA had not made the appropriate "necessary or appropriate" determination. *Id.* The court upheld EPA's 2015 SIP Call with respect to affirmative defense provisions that "preclude certain remedies," finding that they would otherwise interfere with the CAA's enforcement regime. *Id.* at 115.

4. **Overbroad Enforcement Discretion**

The EPA issued its 2015 SIP Call to only a single state's "overbroad enforcement discretion" provisions because they could be read to allow state officials, in the name of enforcement discretion, to excuse emission violations during SSM periods in a way that forecloses the EPA enforcement actions and citizen suits. The court upheld EPA's action.

While the D.C. Circuit vacated certain portions of EPA's 2015 SSM SIP Call, the court's vacatur was premised on the view that the Agency did not first make a determination that it was "necessary or appropriate" under CAA section 110(a)(2)(A) for the specific SIP provisions at issue to be "emission limitations," and thus continuous, in order to provide for attainment or maintenance of the NAAQS, or to meet other CAA requirements. Crucially, the court did not opine on whether or not the SIP provisions with automatic or director's discretion exemptions belonged in the SIP. To the contrary, the court explicitly withheld judgment as to whether or not the "called SIPs' relevant emission restrictions in fact amount to (or must amount to) 'emission limitations' per the statutory definition." 94 F.4th at 110. The Court stated that if EPA "were to determine that, for states to meet the CAA's applicable requirements, it is 'necessary or appropriate' for their emission reduction measures to meet the statutory definition of 'emission limitations' and operate during SSM periods, the agency could explain and implement that rationale and its action would be subject to judicial review." *Id.*

Following the D.C. Circuit decision, the EPA has taken a series of administrative actions the Agency deemed procedurally necessary as a result of the partial vacatur, including partially withdrawing the Findings of Failure to Submit (FFS) that the EPA issued to 13 states that did not submit a response to the 2015 SSM SIP Call[7] and issuing CAA section 110(k)(6) error corrections for two states (Delaware and Louisiana).[8] By those actions, the EPA stopped sanctions and Federal Implementation Plan (FIP) clocks for states with SIP provisions addressed in the 2015 SSM SIP Call that were affected by the partial vacatur.

III. Evaluating SIP Submittals Following the 2024 SSM Decision

To provide clarity regarding the EPA's implementation of its SSM policy and review of SIPs following the 2024 SSM Decision, the Agency intends for this memorandum to be used as a tool for state and local air agencies in developing and submitting SIP actions that comport with the EPA's SSM policy and the D.C. Circuit's 2024 SSM Decision. As such, the EPA provides the following information regarding how the Agency plans to evaluate SIP submissions that raise issues related to emissions during SSM or similar events.

[7] Further information regarding the status of the FFS and ongoing state obligations can be found at 89 FR 93187 (November 26, 2024).

[8] *See* 89 FR 87826 (November 5, 2024); *See* 89 FR 88688 (November 8, 2024).

Any SIP provision that is required by law to be an "emission limitation," or that the EPA determines is "necessary or appropriate" that it be an "emission limitation," must be continuous in accordance with the definition of that term in CAA section 302(k). Thus, such an emission limitation may not contain any exemption for emissions during SSM events (or during other events such as maintenance, soot blowing, etc.).[9]

Consistent with EPA's longstanding implementation of the CAA's division of roles in the SIP submission process (the cooperative federalism concept), the D.C. Circuit affirmed that "states are initially charged with determining whether an 'emission limitation' is 'necessary or appropriate' to meet the CAA's applicable requirements." 94 F.4th at 107. The court also made it clear that the final determination of what is "necessary or appropriate" is EPA's responsibility:

> To be sure, EPA could determine that the hypothetical state is wrong in concluding that its chosen mix of "other control measures" is "necessary or appropriate" to meet the NAAQS. If so, EPA might decide that, for the state to meet the NAAQS, at least one of the "other control measures" must be adjusted such that it satisfies the definition of an "emission limitation"—including, for instance, by converting it from a discontinuous to a continuous measure.[10]

Consistent with this responsibility, the EPA expects states, in the first instance, to articulate in their SIP submittals their views on whether it is "necessary or appropriate" for the provisions being proposed for inclusion into the SIP to be emission limitations. The EPA intends to review an air agency's determination of whether it is "necessary or appropriate" for a provision it submits for EPA's evaluation and approval into the SIP to be an "emissions limitation" in order to meet CAA requirements by considering the following categories of provisions.

1. The provision is required to be an emission limitation or emissions standard under a provision of the CAA other than section 110(a)(2)(A).
2. The state is using the provision explicitly to achieve attainment or maintenance of a NAAQS or the state's Regional Haze program goals and requirements.

[9] As explained in the 2015 SSM SIP Action, the CAA allows SIP provisions that include numerical limitations, specific technological control requirements and/or work practice requirements that limit emissions during startup and shutdown as components of a continuously applicable emission limitation. Regardless of its form, the emission limitation as a whole must be continuous, must meet applicable CAA stringency requirements, and must be legally and practically enforceable. *See* 80 FR 33978-33980.

[10] 94 F.4th at 101. The Supreme Court has affirmed that a measure of discretion is due to federal agencies when they are empowered to "regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.'" *Loper Bright v. Raimondo*, 144 S. Ct. 2244, 2263 (2024). The statutory language in CAA section 110(a)(2)(A) ("…as may be necessary or appropriate to meet the applicable requirements of this chapter...") is squarely within the type of language the Supreme Court was referring to that allows EPA to take the ultimate discretionary role in determining what is "necessary or appropriate."

When evaluating a submitted SIP provision, if the state indicates that the provision falls into any of the two categories above or the state does not provide any relevant information, then the EPA will presume that it is "necessary or appropriate" for that provision to meet the definition of emission limitation under CAA section 302(k) and therefore must be continuous. For example, if a provision was assumed to be continuous when it was modeled for an attainment demonstration to show attainment of the NAAQS, the EPA will presume that the SIP provision is an emission limitation and therefore must be continuous. In other words, the application of the provision in practice must match the assumptions made about its application in the submission.

To the extent a future SIP submittal contains a provision that meets at least one of these two categories and has no information clarifying whether that SIP provision should or should not meet the statutory definition of emission limitation, the EPA intends to presume the state's intention is that it is necessary or appropriate for the provision to be an emission limitation. If the state or air agency does not agree that it is necessary or appropriate for the provision at issue to be an emission limitation, the state or air agency may include rationale and analysis rebutting the EPA's presumption in its SIP submission for EPA consideration. If the state disagrees with the EPA's proposed action on their SIP submittal, they may continue to rebut the EPA's determination during the public comment period.

Additional rationale for each of the two categories is included below.

Category 1: The provision is required to be an emission limitation or emission standard under any provision of the statute other than CAA section 110(a)(2)(A).

This category is intended to capture situations where the submitted SIP provision is already required to be an "emission limitation" under some other provision of the CAA. Two examples include (1) if the provision was intended to constitute Best Available Control Technology (BACT) per CAA section 169(3) and is being submitted for inclusion in the SIP to satisfy a SIP obligation; and (2) if the provision is an emission limitation from the New Source Performance Standards (NSPS) that was adopted by the State and is being incorporated into the SIP to satisfy a SIP obligation.

If a SIP provision was established to meet a requirement under the Act that is already required to be an emission standard or an emission limitation, then it is necessary for such provision to also be an emission limitation and apply continuously when submitted as a SIP provision. In this context, a noncontinuous emission limitation would be inconsistent with applicable requirements of the CAA.

Category 2: The state is using the provision explicitly to achieve attainment or maintenance of a NAAQS or to meet Regional Haze program goals and requirements.[11]

If a state's purpose in submitting a particular SIP provision is to achieve attainment or maintenance of the NAAQS or to meet Regional Haze Rule requirements as required by the statute, then automatic exemptions or unbounded director's discretion (including authority to grant discretionary exemptions) make it difficult or impossible for the Agency to assess whether the provision will in fact accomplish that purpose. For example, if a state submits a modeled attainment demonstration that incorporates a particular provision but that also provides an exemption during SSM periods, the attainment modeling might not take into account the excess emissions during SSM events that the provision does not restrict. In general, there is an expectation when these types of provisions are used to accomplish substantive goals under the CAA—i.e., if a state is using them to meet some CAA requirement that would have the effect of addressing emissions for purposes of either achieving attainment or maintenance of the NAAQS, or to meet Regional Haze Rule requirements—the provision, which may incorporate a single numerical limit or different limits and other control requirements, must apply in a continuous manner. The EPA recognizes that SIP provisions do not have to be composed solely of numerical emission limitations —SIPs can contain both non-numerical types of emission limitations and other forms of controls in addition to emission limitations. Certain forms of controls other than emission limitations may not need to apply to sources continuously in order to achieve the goals of the SIP.[12] However, without at least some limits applying at all times, there is no guarantee that the emissions impacts the state is counting on will be accomplished.[13]

IV. Next Steps

The SIP development and submission process is cyclical, with air agencies across the United States at different stages of SIP development for multiple NAAQS and other CAA obligations such as Regional Haze. Due to the fundamental nature of the issues addressed in this memorandum, the EPA intends to apply the analytical framework described in this memorandum going forward as of the date of this memorandum. This approach is expected to be consistent with the CAA and provide the most streamlined way for the EPA to evaluate and take action on SIP submissions.

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[11] This includes interstate air pollution transport requirements, which states use both to assist in attainment or maintenance of the NAAQS in other states and to meet regional haze requirements.

[12] *See*, e.g., 71 FR 7683 (February 14, 2006) (approving as BACM the use of ''conservation management practices'' to control fugitive dust emissions from agricultural sources, including techniques that limit emissions only during certain activities or times); *See* also, e.g., 68 FR 56181 (September 30, 2003) (approving as BACM an ''episodic wood burning curtailment'' program that restricts the use of wood-burning stoves based on predicted particulate matter concentrations); See also 40 CFR § 51.100(n) for additional examples of control measures that would not constitute emission limitations.

[13] Historically, EPA has treated certain types of SIP submissions as directly affecting attainment or maintenance of the NAAQS: attainment demonstrations, Reasonably Available Control Measures (RACM), Reasonable Further Progress (RFP), and contingency measures, etc. *See* 40 CFR §§ 51.1318, 51.1015.

To the extent air agencies have already made a SIP submission to the EPA for which they wish to clarify the characterization of any SIP provisions, EPA recommends that the state or air agency reach out to EPA Regional Office contacts to discuss options and plan to provide additional information to the EPA as expeditiously as possible. Withdrawal of submitted SIPs, submitting a supplemental revision, and/or resubmittal may be available paths forward for air agencies that want to provide additional information. However, all of these actions may have legal implications consistent with CAA deadlines and obligations. The EPA appreciates the importance of taking timely and appropriate action on submissions, consistent with CAA applicable requirements and to ensure timely attainment and maintenance of the NAAQS. However, to support the cooperative federalism approach under the CAA, the EPA encourages states to review their any SIP submissions pending at EPA and provide any clarifying information that is needed from their perspectives. Such information should be provided expeditiously so as to have minimal impact on EPA actions to meet CAA deadlines.

With regard to SIPs under development, air agencies may choose to exercise their discretion to characterize emissions provisions or simply rely on the presumptions that the EPA intends to apply during its review of any submission. Notably, the EPA has not conducted a systematic review of all SIPs to identify SSM SIP provisions that may or may not be consistent with the 2024 SSM Decision. Therefore, the EPA intends to coordinate closely with air agencies in evaluating SIP submittals to determine the applicability of the Agency's SSM policy and the D.C. Circuit's 2024 SSM Decision.