

April 12, 2021

BY EMAIL

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Re: Petition for Reconsideration and Rulemaking Addressing Startup, Shutdown, and Malfunction Loopholes in State Implementation Plans [Docket Nos. EPA-R06-OAR-2018-0770, EPA-R07-OAR-2017-0416, and EPA-R04-OAR-2019-0303]

Dear Administrator Regan:

Sierra Club, Air Alliance Houston, Chesapeake Climate Action Network, Citizens for Environmental Justice, Clean Air Carolina, Clean Air Muscatine, Community In-Power and Development Association, Downwinders at Risk, Earthjustice, Environmental Integrity Project, Iowa Environmental Council, Natural Resources Defense Council, Public Citizen, Southern Environmental Law Center, and Texas Campaign for the Environment (“Petitioners”) submit this petition for reconsideration and rulemaking regarding loopholes in Clean Air Act state implementation plans (“SIPs”) for periods when industrial plants are starting up, shutting down, or malfunctioning (“SSM” periods).

I. INTRODUCTION

Pollution spikes during SSM periods can dramatically exceed Clean Air Act limits and harm human health, particularly in communities near the polluting facilities. Those communities tend to be low-income and communities of color that already struggle with disproportionate air pollution burdens. President Biden spoke of his personal familiarity with this issue in the second 2020 presidential debate. Reminiscing about growing up in Delaware near oil refineries and

chemical plants, he spoke of the need to “impose restrictions on the pollution” to protect families that live on fencelines.¹

To advance environmental justice and comply with the law, EPA must reconsider and rescind its final rules withdrawing its 2015 “SSM SIP Call” to Texas, North Carolina, and Iowa. In the SIP Call, EPA required 36 states to remove SIP provisions exempting or otherwise excusing sources’ violations of air pollution limits during SSM periods. The provisions at issue in the SIP Call included affirmative defenses to civil penalties (such as in Texas’ SIP), exemptions (such as in Iowa’s SIP), and “director’s discretion” provisions (such as in North Carolina’s SIP), which allow state air agency directors to excuse violations. EPA, in its 2015 rule, correctly concluded that these various SSM provisions are unlawful under the Clean Air Act. But EPA issued rules in 2020 withdrawing the SIP Call to Texas, North Carolina, and Iowa (the “Withdrawal Rules”). EPA should, through a single rulemaking, reverse the Withdrawal Rules and once again require these three states to correct their SIPs to remove unlawful SSM loopholes. Granting this petition to reconsider the Trump administration’s rollbacks on SSM issues would fulfill two priorities of the Biden administration: advancing racial justice and tackling the climate crisis by “hold[ing] polluters accountable, including those who disproportionately harm communities of color and low-income communities.”²

EPA must also—if it has not already done so—withdraw its October 9, 2020 purported “guidance” memorandum, which interprets the Clean Air Act to allow SSM exemptions, director’s discretion provisions, and affirmative defenses in SIPs.³ On its first day, the Biden administration specifically identified this memorandum for review,⁴ and reversing it is necessary to quickly bring EPA’s legal position into compliance with the Clean Air Act.

Petitioners also request that EPA—through the same rulemaking reversing the Withdrawal Rules—issue a SIP call under 42 U.S.C. § 7410(k)(5) to Wisconsin, North Carolina,⁵ and any other states with unlawful SIP provisions that were omitted from the 2015 SIP Call.

¹ *Debate transcript: Trump, Biden final presidential debate moderated by Kristen Welker*, USA Today (Oct. 23, 2020),

<https://www.usatoday.com/story/news/politics/elections/2020/10/23/debate-transcript-trump-biden-final-presidential-debate-nashville/3740152001/>.

² Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis § 1, Exec. Order 13,990, 86 Fed. Reg. 7,037, 7,037 (Jan. 25, 2021).

³ Andrew R. Wheeler, U.S. EPA, Memorandum: Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunction in State Implementation Plans (Oct. 9, 2020) (“SSM SIP Memo”), https://www.epa.gov/sites/production/files/2020-10/documents/placeholder_0.pdf.

⁴ White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

⁵ EPA included a director’s discretion provision from North Carolina’s SIP in the SSM SIP Call. However, North Carolina’s SIP also contains an unlawful automatic exemption for SSM periods that was not included in the 2015 rule.

This new rule reversing the Withdrawal Rules and issuing a new SIP call would be nationally applicable under the Clean Air Act’s judicial review provision, 42 U.S.C. § 7607(b)(1). To remove any doubt that the venue for any challenge to the rule would be proper only in the U.S. Court of Appeals for the D.C. Circuit, EPA should also make and publish a finding under § 7607(b)(1) that the new rule is based on a determination of nationwide scope and effect.

Finally, EPA must promptly act to implement the 2015 SIP Call. Polluters cannot be fully held accountable—and the harms that SSM loopholes cause to fenceline and other affected communities will not be relieved—unless and until these loopholes are removed from SIPs. EPA must immediately issue a finding of failure to submit for the 13 states and air districts that have not submitted any proposal in response to the SIP Call. For the states that have submitted proposed SIP revisions, EPA must act swiftly to review those proposals for compliance with the SSM SIP Call and take action on them.

II. BACKGROUND

A. SSM Events Have Severe Impacts on Surrounding Communities

High concentrations of air pollution emitted during SSM events pose a significant threat to public health and deteriorate the quality of life in surrounding communities. For example, frequent SSM events at oil refineries and chemical plants in the Houston Ship Channel—which has one of the highest concentrations of these types of facilities in the world—release dangerous pollutants like benzene, sulfur dioxide, and particulate matter, and inflict a myriad of harms on local communities.⁶ Children who live within two miles of the Ship Channel face a 56 percent greater risk of contracting leukemia.⁷ Studies show the impact of this pollution falls disproportionately on the low-income communities and communities of color in the area, including the Harrisburg/Manchester neighborhood⁸ and Channelview, which experience greater emissions densities than more distant, higher-income neighborhoods.⁹

⁶ Environment Texas, *Major Malfunction: Air Pollution from Industrial Malfunctions and Maintenance in Texas in 2017* at 4 (Jan. 2019) (“Major Malfunction Report”), <https://environmenttexas.org/reports/txe/major-malfunction>.

⁷ Cindy Horswell and Susan Carroll, *Study: Children near Ship Channel Face More Risk*, Houston Chronicle (July 25, 2011), <https://www.chron.com/news/houston-texas/article/Study-Children-near-Ship-Channel-face-more-risk-1583566.php>.

⁸ Union of Concerned Scientists and t.e.j.a.s., *Double Jeopardy in Houston: Acute and Chronic Chemical Exposures Pose Disproportionate Risks for Marginalized Communities* at 5-6 (Oct. 2016), <https://www.ucsusa.org/resources/double-jeopardy-houston>.

⁹ Sustainable Systems Research, LLC, *Evaluation of Vulnerability and Stationary Source Pollution in Houston* at 22 (Feb. 8, 2019) (“2019 Houston Vulnerability Study”), <https://www.regulations.gov/comment/EPA-R06-OAR-2018-0770-0035> (Ex. G); *see also id.* at 23 Table 5 (providing statistics showing average burden, scope, and exposure severity of emissions).

SSM events can release staggering amounts of pollutants, causing devastating and expensive public health impacts. For example, in 2019, Texas facilities reported 4,000 breakdown events, resulting in the release of more than 63 million pounds of illegal air pollution.¹⁰ The pollution spikes from SSM events cause significant public health impacts,¹¹ with annual public health costs from SSM emissions in excess of \$250 million in Texas alone.¹² A 2018 study by the American Chemical Society found that unauthorized pollution in Texas results in the premature deaths of at least 16 people a year.¹³

Industrial facilities of all kinds take advantage of unlawful SSM loopholes in SIPs. In North Carolina, the air agency has exempted emission violations for facilities including a large phosphate mine, natural gas power plant, wood pellet production facility, and pipeline compressor station. In Iowa, an SSM exemption applies to a range of emission sources at facilities like power plants, industrial grain processing plants, and herbicide manufacturers.

The massive bursts of air pollution during SSM events profoundly affect nearby and downwind community members, harming their health and gravely diminishing their quality of life. Personal stories recounting the real-world consequences of SSM events are well-documented. *See, e.g.*, SSM SIP Call, 80 Fed. Reg. 33,840, 33,850 & n.21 (June 12, 2015) (“the results of automatic and discretionary exemptions in SIP provisions, and of other provisions that interfere with effective enforcement of SIPs, are real-world consequences that adversely affect public health.”).

B. Regulatory Background

Through SIPs containing unlawful exemptions and affirmative defense provisions, states have allowed large polluters to violate Clean Air Act emission limitations and pollute surrounding communities during SSM events with impunity. Though for decades EPA has recognized that SSM provisions that provide automatic exemptions for excess emissions violate Clean Air Act requirements, it did not initiate a broad effort to fix state provisions until Sierra Club reviewed SIPs for unlawful loopholes and petitioned EPA to issue a SIP call. 80 Fed. Reg. at 33,843.

In response to Sierra Club’s petition, in 2015 EPA issued a nationwide rule making clear that state-created affirmative defenses, director’s discretion provisions, and exemptions are not consistent with the Clean Air Act and issued a “SIP Call” requiring 36 states, including Texas,

¹⁰ Major Malfunction Report at 4.

¹¹ 2019 Houston Vulnerability Study at 22.

¹² Alex Hollingsworth et al., *The Health Consequences of Weak Regulation: Evidence from Excess Emissions in Texas* (May 3, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3382541; Nikolaos Ziropiannis et al., *Understanding Excess Emissions from Industrial Facilities: Evidence from Texas* (Jan. 27, 2018), <https://pubs.acs.org/doi/abs/10.1021/acs.est.7b04887?src=recsys&journalCode=esthag>.

¹³ *Understanding Excess Emissions from Industrial Facilities: Evidence from Texas*.

North Carolina, and Iowa, to eliminate these unlawful provisions. 80 Fed. Reg. 33,840. In doing so EPA relied on the D.C. Circuit's decisions in *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008), and *NRDC v. EPA*, 749 F.3d 1055, 1062-64 (D.C. Cir. 2014), which confirm that the Act prohibits SSM exemptions and affirmative defenses, respectively. *See, e.g.*, 80 Fed. Reg. at 33,874, 33,880.

After the 2017 change in presidential administrations, EPA announced plans to review the 2015 SSM SIP Call and potentially reconsider it. Nearly three years later, EPA began withdrawing the SIP Call for individual states on a piecemeal basis. On February 7, 2020, EPA withdrew the SIP Call for Texas. Texas Withdrawal Rule, 85 Fed. Reg. 7,232. A few months later, on April 28, 2020, EPA withdrew the SIP Call for North Carolina. North Carolina Withdrawal Rule, 85 Fed. Reg. 23,700. On November 17, 2020, EPA withdrew the SIP Call for Iowa. Iowa Withdrawal Rule, 85 Fed. Reg. 73,218. As documents released under the Freedom of Information Act ("FOIA") reveal, though EPA purported that each withdrawal rule was subject to review in a regional court of appeals, EPA's national headquarters was deeply involved in this process of undermining the nationally uniform SIP Call, "assess[ing] these pending SIP submissions to determine whether they may be candidates for taking action and expressing changes to the Agency's policy on SSM in SIPs, including withdrawing the SIP call for a given state."¹⁴

Further institutionalizing its disingenuous approach, EPA has published purported "guidance" indicating its intent to conduct more piecemeal withdrawal actions. On October 9, 2020, EPA published its SSM SIP Memo, announcing a changed interpretation allowing SSM exemptions and affirmative defenses and purporting to replace policy statements in the 2015 SSM SIP Call.¹⁵ The SSM SIP Memo describes EPA's intent to "review each SIP call remaining from the 2015 Action in light of this new memorandum and to conduct future notice-and-comment proceedings with respect to the disposition of those SIP calls."¹⁶

EPA noted in the SSM SIP Call rulemaking that it was aware of unlawful SSM SIP provisions that were not included in the rule. 78 Fed. Reg. 12,460, 12,464 (Feb. 22, 2013). Though environmental organizations encouraged EPA to conduct its own review of SIPs to ensure that all unlawful SSM provisions were included in the SIP Call, EPA deferred addressing additional states not identified in *Sierra Club's* petition until a later rulemaking. For example, Wisconsin's automatic exemptions did not appear in *Sierra Club's* petition, but were raised in a subsequent petition by another group before the SIP Call was finalized. EPA, however, did not include Wisconsin's unlawful SSM provisions in the 2015 SIP Call.

¹⁴ Email from Megan Brachtl, Group Leader, States and Local Programs Group, OAQPS to multiple recipients (Sept. 10, 2018) (attached as Exhibit 1).

¹⁵ SSM SIP Memo, https://www.epa.gov/sites/production/files/2020-10/documents/placeholder_0.pdf.

¹⁶ *Id.* at 2.

III. EPA MUST RECONSIDER THE WITHDRAWAL RULES

EPA is free to change its policy and interpretations regarding SSM provisions in SIPs, as long as it “display[s] awareness that it *is* changing position” and “show[s] that there are good reasons for the new policy,” and the new approach is otherwise rational and complies with the Clean Air Act’s requirements. *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009); *see also Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005) (an agency is “free within the limits of reasoned interpretation to change course if it adequately justifies the change”). As discussed below and as EPA previously concluded in its 2015 SSM SIP Call, SSM exemptions, director’s discretion provisions, and affirmative defenses are unlawful under the Act. Given that unlawfulness and the severe and disproportionate adverse impact that SSM SIP loopholes have on environmental justice communities and enforcement, there are ample good reasons for the Biden administration to prioritize reconsideration of the three Withdrawal Rules.

A. Exemptions and Director’s Discretion Provisions Are Unlawful

Under the Clean Air Act, SIPs must include emissions limitations, and those emissions limitations must be “continuous” and “enforceable.” 42 U.S.C. §§ 7602(k), 7410(a)(2)(A). Continuous means without temporal breaks—without automatic exemptions or exemptions that are effectively created through director’s discretion for SSM periods.¹⁷ Exemptions and director’s discretion provisions also render emission limitations unenforceable. Thus, SIPs cannot contain these unlawful SSM provisions, and EPA must reconsider and reverse its North Carolina and Iowa Withdrawal Rules.

In its 2015 SSM SIP Call, EPA correctly determined that these provisions are inconsistent with the Clean Air Act—concluding, among other things, that they violate the unambiguous requirement for continuous emissions limitations. EPA must return to this proper reading of the Act, and further conclude that these provisions violate the Act’s unambiguous requirement that emission limitations be enforceable.

¹⁷ In the SIP Call, EPA separately addressed director’s discretion provisions and provisions that give states overbroad enforcement discretion. EPA described the latter as provisions that permit state officials to determine that excess emissions do not constitute a violation, thereby precluding enforcement by citizens and EPA—and identified one state (Tennessee) with such provisions. 80 Fed. Reg. at 33,929, 33,965; EPA Final Br. at 22-23, No. 15-1166 (D.C. Cir. Oct. 28, 2016), ECF No. 1643446 [hereinafter “EPA Br.”]. Given the similarities between provisions that give states overbroad enforcement discretion and director’s discretion provisions and given that both types of provisions suffer from similar legal flaws, this petition treats provisions that give states overbroad enforcement discretion as falling under the umbrella of director’s discretion provisions.

1. *Exemptions and director's discretion provisions violate Congress' clear intent*

Under the Clean Air Act's plain text, emission limitations must "limit[] ... emissions of air pollutants on a continuous basis." 42 U.S.C. § 7602(k). This definition applies whenever "used in this chapter"—that is, across the Act. *Id.*; *see, e.g., McEvoy v. IEI Barge Servs., Inc.*, 622 F.3d 671, 675 (7th Cir. 2010) ("[T]here is no language in the statute indicating that the definitions [in 7602] are not applicable across-the-board."). That mandate of continuity applies whether limitations are "established by the State or the Administrator." 42 U.S.C. § 7602(k). Thus, the Act unambiguously requires that SIP limits apply continuously and unambiguously prohibits SIPs from containing exemptions—whether automatic or granted by state agency directors—for SSM periods.

The D.C. Circuit confirmed the Act's plain meaning in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). There, the court held that the Act's requirement for "continuous" emission limitations unambiguously prohibits "temporary, periodic, or limited systems of control." *Id.* at 1027 (quoting H.R. Rep. No. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170). In requiring that emission limitations be "continuous," Congress thus gave states no authority "to relax emission standards on a temporal basis." 551 F.3d at 1028. The D.C. Circuit therefore held the SSM exemptions in EPA-established emission standards under 42 U.S.C. § 7412 were unlawful. The D.C. Circuit reiterated this plain-text understanding in *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 607 (D.C. Cir. 2016), stating that exemptions are not "consistent with the Agency's enabling statutes."

The reasoning of these cases is binding on EPA in the context of SIPs. *See, e.g., Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019) ("just as binding as this holding is the reasoning underlying it."); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (explaining that courts are bound by "those portions of the opinion necessary to th[e] result"); *Int'l Union v. Faye*, 828 F.3d 969, 974 (D.C. Cir. 2016) ("the reasoning necessary to [prior] decision compels" the outcome of the current one); *EEOC v. Aramark Corp.*, 208 F.3d 266, 272 (D.C. Cir. 2000) ("Because [prior decision's] interpretation of [particular statutory provision] was essential to its reasoning as well as to its disposition of the claims before it, it stands as binding precedent."). The North Carolina and Iowa Withdrawal Rules thus contravene the Act's plain language and binding D.C. Circuit precedent because they approve emission limitations that, whether by their own terms or via an administrative override, apply only some of the time.

Exemptions and director's discretion provisions also violate the Clean Air Act's unambiguous requirement that emission limitations be enforceable. The Act is clear: in addition to being continuous, emission limitations in SIPs must be "enforceable." 42 U.S.C. § 7410(a)(2)(A). Further, state and federal emission limitations and permit conditions must be enforceable by citizens. *Id.* § 7604(a), (f). Exemptions and director's discretion provisions, however, unlawfully undermine and even eliminate citizens' ability to enforce violations during SSM events.

Congress enacted the Act’s citizen suit provision, 42 U.S.C. § 7604, “to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.” *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Congress expressly authorized citizen suits over violations of “an emission standard or limitation under this chapter,” 42 U.S.C. § 7604(a)(1), which Congress defined to include an “emission limitation . . .” “which is in effect under . . . an applicable implementation plan.” *Id.* § 7604(f). That expressly includes “the portion (or portions) of the implementation plan . . . approved under section 7410.” *Id.* § 7602(q). Thus, read together, these provisions mean that citizens have the right to bring suits in federal court over violations of emission limitations, including those established in EPA-approved SIPs.

Emission limitations subject to exemptions and director’s discretion provisions violate both Congress’ instruction that citizens have the right to enforce emissions limitations and the requirement that SIPs contain “enforceable emission limitations.” Automatic exemptions strip citizens of the right to enforce emission limitations at all when the exemption applies; discretionary exemptions similarly block enforcement unless citizens can somehow prove the director’s decision to excuse a violation was unlawful. *See* 85 Fed. Reg. at 23,728 (exemptions do not preclude citizen enforcement “where the demonstration by a source or a determination by the Director does not comply with the [criteria for the discretionary exemption].”).

2. *EPA correctly concluded in the SIP Call that exemptions and director’s discretion provisions are unlawful*

Before the 2017 change in presidential administrations, EPA concluded in the SSM SIP Call that exemptions and director’s discretion provisions are unlawful. In fact, EPA’s position that the Clean Air Act prohibits exemptions dates back roughly three decades—to at least 1982. 80 Fed. Reg. at 33,889.

In the SIP Call, EPA correctly concluded that the Clean Air Act unambiguously requires that emission limitations in SIPs provide continuous control of a source’s emissions, during all modes of operation. 80 Fed. Reg. at 33,901 & n.207; EPA Br. at 38. EPA also concluded that automatic exemptions and director’s discretion SIP provisions violate this requirement of continuous control. 80 Fed. Reg. at 33,902; EPA Br. at 20, 51. EPA agreed that the D.C. Circuit’s reasoning in *Sierra Club* applies equally in the context of emission limitations required in SIPs. 80 Fed. Reg. at 33,893; EPA Br. at 40. EPA further correctly concluded that, “[e]ven if section 7602(k)’s ‘continuous’ requirement was ambiguous,” EPA’s interpretation regarding SSM exemptions was reasonable. EPA Br. at 38-39. For example, EPA explained, “[w]ithout 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.” 80 Fed. Reg. at 33,901 (quoting H.R. Rep. No. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170).

EPA also concluded that automatic exemptions frustrate enforcement of limitations that may be needed to attain NAAQS and other Clean Air Act protections. 80 Fed. Reg. at 33,927.

EPA emphasized that injunctive relief through enforcement may be necessary to bring violators into compliance, and penalties “encourage appropriate design, operation and maintenance of sources and [] encourage efforts by source operators to prevent and to minimize excess emissions in order to protect the NAAQS or to meet other [Act] requirements.” *Id.* The agency found that SSM exemptions interfere with both these tools to protect air quality. *Id.*

EPA likewise concluded that discretionary exemptions “pose the same set of problems as do automatic exemptions: interference with the Act’s air quality requirements, preclusion of enforcement, and elimination of deterrence.” EPA Br. at 21 (citing 80 Fed. Reg. at 33,874-75, 33,958); *see also* 80 Fed. Reg. at 33,929 (noting that discretionary exemptions “are inconsistent with and undermine the enforcement structure of the [Act] ... which provide[s] independent authority to the EPA and citizens to enforce SIP provisions, including emission limitations”). EPA also concluded that director’s discretion provisions unlawfully revise SIPs without the required review and approval from EPA. 80 Fed. Reg. at 33,918, 33,977-78 (citing 42 U.S.C. § 7410(k)(3), (*I*)); EPA Br. at 52-53.

EPA’s SIP Call also recognized the significant public health concerns at stake. In the SIP Call, EPA correctly emphasized that pollution during SSM events has “real-world consequences that adversely affect public health.” 80 Fed. Reg. at 33,850. EPA recognized that “[s]ources may emit large amounts of pollutants during SSM events.” EPA Br. at 18 (citing *US Magnesium v. EPA*, 690 F.3d 1157, 1163 (10th Cir. 2012) (where “one plant releas[ed] three times its daily limit of sulphur dioxide over a nine-hour period”); 76 Fed. Reg. 21,639, 21,643 (Apr. 18, 2011) (other examples)). And it expressly tied the requirement that emissions limitations apply continuously to the Act’s public health goal: “Compliance with the applicable requirements is intended to achieve the air quality protection and improvement purposes and objectives of the [Act].” 80 Fed. Reg. at 33,850.

In sum, EPA’s position from the SIP Call that exemptions and director’s discretion provisions are contrary to the plain meaning of the Clean Air Act was the correct one. EPA’s contrary conclusions in the North Carolina and Iowa Withdrawal Rules are incorrect. Further, EPA never rationally explained its departure from the SIP Call in these Withdrawal Rules (nor could it have, given the Act’s clear prohibition of exemptions and director’s discretion provisions). *See* Pet’rs’ Proof Opening Br. at 22-45, No. 20-1229 (D.C. Cir. Nov. 25, 2020), ECF No. 1873196 (North Carolina); Joint Comments of Environmental and Public Health Organizations at 5-29, Docket No. EPA-R07-OAR-2017-0416-0060 (July 22, 2020) (Iowa). EPA must reverse these two Withdrawal Rules. In doing so, the agency must reaffirm its reading from the 2015 SIP Call and, at the same time, also explicitly conclude that exemptions and director’s discretion provisions violate the Act’s unambiguous requirement that emission limitations be enforceable, as discussed above.

B. Affirmative Defense Provisions Are Unlawful.

Affirmative defense provisions in SIPs allow polluters to avoid penalties for SSM events, including so-called “upset” events, even where the violations are egregious. These provisions directly conflict with the Clean Air Act because they limit courts’ discretion to assess penalties for violations and prevent courts from considering statutory factors. The Act unambiguously gives courts the discretion to assess penalties for violations, and specifies a list of factors courts must consider, including “the seriousness of the violation” and “other factors as justice may require.” 42 U.S.C. §§ 7413(b), (e)(1), 7604(a).

1. *Affirmative defense provisions violate Congress’ clear intent*

Congress made expressly clear in the Act that: (1) citizens can sue over violations of emission standards established by SIPs, *id.* § 7604(a)(1), (f); (2) district courts have exclusive jurisdiction to hear such cases, “enforce such an emission standard or limitation,” and “apply any appropriate civil penalties,” *id.* § 7604(a), (a)(1), (f);¹⁸ and (3) the court must consider specific factors in making that determination, *id.* § 7413(e)(1). Similarly, in civil actions brought by EPA in the district courts, “such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, ... and to award any other appropriate relief.” *Id.* § 7413(b). Affirmative defenses to civil penalties contravene Congress’ express, exclusive grant of jurisdiction to the federal district courts to apply any appropriate civil penalties in citizen suits and EPA enforcement suits to enforce violations of emission limitations. Because “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). The agency may not allow affirmative defense provisions, as they contravene the text of the Act.

Further, the Act specifically lists factors that the district courts are to consider in assessing penalties:

In determining the amount of any penalty ..., the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1). Thus, the statute mandates courts must consider these factors in determining the amount, if any, of any civil penalties to assess for any violation. Affirmative

¹⁸ See also *NRDC v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (holding that § 7604(a) “clearly vests authority over private suits in the courts, not EPA”).

defense provisions, such as in Texas' SIP, purport to strip courts of the ability to weigh these criteria and thus unlawfully abrogate the Act. 42 U.S.C. §§ 7604, 7413(e)(1).

NRDC v. EPA makes clear that the statute precludes affirmative defense provisions. There, the court invalidated an EPA-created affirmative defense against penalties for excess emissions, reasoning that “the Judiciary, not any executive agency, determines ‘the scope’—*including the available remedies*—‘of judicial power vested by’ statutes establishing private rights of action.” 749 F.3d at 1062-64 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013)). This holding logically excludes any entity other than the district courts—such as a state in its SIP—from determining civil penalties, since it is the courts alone that have jurisdiction to determine the civil penalties that apply in judicial proceedings brought against any entity that violates “an emission standard or limitation under this chapter,” and the courts alone that must determine those civil penalties. Allowing affirmative defense provisions in SIPs acts to prevent the courts from applying penalties pursuant to the statutorily prescribed factors. 42 U.S.C. §§ 7413(e)(1), 7604(a)(1); *NRDC*, 749 F.3d at 1063-64.

In arriving at this conclusion, the D.C. Circuit relied on only two provisions of the Clean Air Act: § 7604(a), which gives federal district courts “jurisdiction ... to apply any appropriate civil penalties” in suits by citizens; and § 7413(e)(1), which specifies the factors federal district courts “shall take into consideration” “[i]n determining the amount of any penalty to be assessed under this section or section 7604(a).” *NRDC*, 749 F.3d at 1062-64. Both these provisions apply broadly and cover suits over violations of emission standards or limitations established in SIPs. 42 U.S.C. § 7604(f). Although the particular affirmative defense at issue in *NRDC* was established by EPA in an emission standard under § 7412, the *NRDC* court did not cite § 7412 in striking down the affirmative defense, 749 F.3d at 1062-64. As such, *NRDC*'s logic applies broadly to any citizen-enforceable emission standard under the Act. *See U.S. Sugar Corp.*, 830 F.3d at 599 (characterizing *NRDC* as broadly rejecting all EPA-adopted affirmative defenses against civil penalties); *see also, e.g., Bucklew*, 139 S. Ct. at 1126 (“just as binding as this holding is the reasoning underlying it.”).

As *NRDC* shows, and the plain text of the Act makes clear, Congress gave federal courts—not EPA or state agencies—the exclusive authority and obligation to determine what penalties (if any) are appropriate in enforcement cases. *NRDC*'s reasoning applies with equal force in the context of citizen suits alleging violations of SIP emission limits.

In the SIP Call, EPA correctly concluded that affirmative defenses—like exemptions and director's discretion provisions—undermine enforcement and thus harm public health. EPA's position in the SIP Call was that “affirmative defense provisions interfere with effective enforcement of SIP emission limitations.” 80 Fed. Reg. at 33,870; *see also id.* at 33,852; SIP Call Memorandum: Statutory, Regulatory, and Policy Context for this Rulemaking at 22-24, Docket No. EPA-HQ-OAR-2012-0322-0029 (Feb. 4, 2013) (explaining that affirmative defenses undermine the enforcement structure in the Act both “in a technical sense ... [and] in reality”). EPA reasoned in the SIP Call that such interference with enforcement “eliminate[s] incentives to

comply with emission limitations at all times and properly design, maintain and operate sources.” EPA Br. at 24 (citing 80 Fed. Reg. at 33,852). EPA also recognized in the SIP Call that, by reducing incentives for compliance, affirmative defenses “adversely impact public health.” EPA Br. at 19 (citing 80 Fed. Reg. at 33,874); *see also* 80 Fed. Reg. at 33,850 & n.21 (affirmative defenses have “real-world consequences that adversely affect public health”).

2. *The Fifth Circuit’s Luminant decision does not prevent EPA from issuing a SIP call regarding the Texas affirmative defense*

The Fifth Circuit’s decision in *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013), does not allow the agency to ignore the plain language of the Clean Air Act, nor is that decision irreconcilable with *NRDC*. Section 7604(a), together with § 7413(e)(1), unambiguously precludes EPA from approving affirmative defense provisions into SIPs. *Luminant* was wrongly decided—and the Fifth Circuit should not have deferred to EPA—because critically, among other reasons, the court there did not address § 7604(a),¹⁹ which was the basis for the D.C. Circuit’s decision in *NRDC*.

Even assuming that the plain text of the statute did not dictate the outcome (it does), EPA’s position in the 2015 SIP Call was still a reasonable exercise of the agency’s authority, regardless of the *Luminant* decision. As the agency noted in the SIP Call:

the Fifth Circuit determined that *Chevron* step 1 was not applicable [in *Luminant*] and “turn[ed] to step two of *Chevron*”²⁰ in holding that the Agency’s interpretation of the CAA at that time was a “permissible interpretation of section [113], warranting deference.”²¹ The Fifth Circuit did not determine that the EPA’s interpretation at the time of the *Luminant Generation v. EPA* decision was the only or even the best permissible interpretation. It is clearly within the EPA’s legal authority to now revise its interpretation to a different, but still permissible, interpretation of the statute.

80 Fed. Reg. at 33,856. Since *Luminant* was decided at *Chevron* step two, EPA can revise its interpretation of the statute, so long as EPA explains the reasons for doing so. *See, e.g., Brand X Internet Servs.*, 545 U.S. at 982-83; *Petit v. U.S. Dep’t of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012). EPA’s SIP Call easily satisfies that standard. The *Luminant* court simply accepted EPA’s

¹⁹ While the Fifth Circuit mentioned § 7604(a), it did so only in passing, when discussing the background related to the environmental petitioners’ arguments in that case: “Further, as pointed out by petitioners, the CAA provides that, in the case of EPA enforcement and citizen suits, a federal district court ‘shall have jurisdiction’ to assess a ‘civil penalty.’” 714 F.3d at 851 (citing §§ 7413(b) and 7604(a)). In other words, the *Luminant* court did not actually analyze the impact of § 7604(a) on the ability of EPA to approve SIP affirmative defense provisions.

²⁰ 714 F.3d at 852.

²¹ *Id.* at 853.

interpretation at the time under § 7413(e)(1) and applied *Chevron* step 2, as the agency at the time urged it to do. Thus, even if *Luminant* were correctly decided (it was not), it would in no way foreclose a determination by EPA that the affirmative defense provisions must be removed from Texas' SIP.

In sum, both the statute and *NRDC* make clear that Congress left to the courts—not states or EPA—the task of determining liability and imposing penalties for alleged violations of the Clean Air Act. 42 U.S.C. §§ 7413, 7604. The Texas Withdrawal Rule provides no rational basis for once again allowing affirmative defenses in SIPs—nor could it have, given the Act's clear prohibition of affirmative defenses. *See* Pet'rs' Proof Opening Br. at 24-45, No. 20-1115 (D.C. Cir. Nov. 13, 2020), ECF No. 1871212. EPA must reverse the Texas Withdrawal Rule. In doing so, the agency must conclude that affirmative defenses are unlawful under *Chevron* step 1. At the very least, EPA must return to its position from the SIP Call that affirmative defenses are unlawful under *Chevron* step 2.

C. EPA's Withdrawal Rules and SSM SIP Memo Violate the Act's and EPA's Regulations' Command for Fostering Regional Consistency

As discussed, and consistent with the Clean Air Act, EPA's 2015 SIP Call standardized the agency's national SSM affirmative defense and exemption policy. It declared categorically that SSM affirmative defense and exemption provisions are inconsistent with the Act, and to ensure national uniformity and consistency, directed the states to correct their state plans by removing any such provisions. Rather than facilitating the consistent implementation and application of the national SSM policy, EPA's Withdrawal Rules explicitly "deviate" from the SIP Call, 85 Fed. Reg. at 7,240, and declare that SSM affirmative defense and exemption SIP provisions are now approvable under the Act. The agency further concluded that its regional offices can intentionally and voluntarily *create inconsistency* with the national rule simply by obtaining approval—that is, a "concurrence" letter—from EPA headquarters pursuant to the agency's regional consistency regulations. *See, e.g.*, 85 Fed. Reg. at 7,240 (Texas Withdrawal); 85 Fed. Reg. at 23,709 (North Carolina Withdrawal).

EPA should reconsider its use of its regional consistency regulations to create a patchwork of state SSM policies that are inconsistent with the nationally applicable SIP Call, for several reasons. *First*, it is good public policy to ensure that the regional offices and states implement the Clean Air Act's enforcement and emission limitation requirements consistently across the country. EPA has ten Regional offices that review and approve or disapprove SIP submittals, and implement numerous other national Clean Air Act programs. The public and regulated entities should be able to have confidence that EPA and the states will interpret, apply, and enforce the Clean Air Act in the same way in every state in the country. Specifically, companies that operate in more than one state should be assured that activities in one state are regulated and enforced in the same manner in all other states. The public should similarly be confident that it can rely on the consistent and fair application and enforcement of Clean Air Act

emission limitations and requirements to protect air quality the same way whether they live in Texas, North Carolina, Iowa, or any state in between.

Second, reconsidering the Withdrawal Rules to ensure the uniform application of national rules would be consistent not only with good governance, but with the Clean Air Act itself, which reflects a clear intent that EPA “assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the [Act].” 42 U.S.C. § 7601(a)(2)(A). To that end, EPA’s Regional Consistency Regulations provide that the regional offices “shall assure that actions taken under the act: (1) Are carried out fairly and in a manner that is consistent with the Act and Agency policy as set forth in the Agency rules and program directives, (2) Are as consistent as reasonably possible with the activities of other Regional Offices, and (3) Comply with the mechanisms developed under § 56.4 of this part.” 40 C.F.R. § 56.5. Where regional inconsistencies exist, EPA must “provide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the act.” 40 C.F.R. § 56.3(b).²² EPA “is not free to ignore or violate its regulations while they remain in effect.” *Nat’l Env’t Dev. Ass’n’s Clean Air Project v. EPA* (“*Clean Air Project*”), 752 F.3d 999, 1011 (D.C. Cir. 2014) (quoting *U.S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 526 n.20 (D.C. Cir. 1978)).

EPA’s use of the purportedly state-specific Withdrawal Rules to create inconsistency with the nationally applicable SIP Call arbitrarily flouts the mandate of the Act and EPA’s regional consistency regulations to “assure that actions taken under the act ... [are] carried out fairly and in a manner that is consistent with the Act” and its regulations. *Id.* at 1009 (quoting 40 C.F.R. § 56.5(a)(1), (2)) (alteration in original). Section 56.5(b)’s text cannot rationally be read to allow the EPA regions to take actions that intentionally adopt and implement supposedly state-specific policies that are flatly inconsistent with the agency’s binding interpretation of the statute reflected in a national applicable EPA final action. Indeed, the regulatory concurrence process speaks to situations where a region’s action “*may result in inconsistent application*” of policy, 40 C.F.R. § 56.5(b) (emphasis added)—not situations where a region is intentionally creating inconsistency with a national rule.

Moreover, EPA may not simply issue Section 56.5(b) concurrences for any region that requests it. Instead, EPA has an obligation to “*correct[] inconsistencies by standardizing*” the nationally-applicable policies that must be employed by the EPA regional offices implementing and enforcing the Act. 40 C.F.R. § 56.3(b) (emphasis added). To correct the inconsistencies EPA’s Withdrawal Rules created, EPA must convene a reconsideration proceeding to reaffirm the nationally-applicable prohibition against SSM affirmative defenses and exemptions in SIPs,

²² See also 42 U.S.C. § 7601(a)(2)(A), (C); 44 Fed. Reg. 13,043, 13,045 (Mar. 9, 1979) (the agency “interprets § 301(a)(2) of the Act as a mandate to assure greater consistency among the Regional Offices in implementing the Act, certainly *not* as a license to institutionalize the kind of inconsistencies that prompted Congress to enact this provision”) (emphasis added); *accord* 81 Fed. Reg. 51,102, 51,108 (Aug. 3, 2016).

which EPA regional offices must employ in implementing and enforcing the Act, 40 C.F.R. § 56.3(b). EPA must then reverse the Withdrawal Rules to restore and apply its national, uniform position.

Third, even if the regional consistency regulation could be rationally interpreted to allow the agency to voluntarily create state-by-state SSM polices that are inconsistent with the national rule, EPA should reconsider the Withdrawal Rules because the agency failed to comply (and failed to rationally explain how it complied) with process required under those regulations. Although EPA’s rulemaking records for the Texas, North Carolina, and Iowa Withdrawals each include letters signed by the Director of Air Quality Planning and Standards purporting to “concur” with the region’s decision “to deviate from the national policy,” there is no record evidence that EPA complied with the other procedural requirements for exempting those states from the national SSM policy. Where, as here, 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. 40 C.F.R. § 56.5(c) (emphasis added). Because the special action category is generally reserved for actions with national policy implications, the Guidelines make clear that “special actions” require “full concurrence” at the Assistant Administrator or General Counsel level prior to publication in the Federal Register by the Office of the Administrator (including the Office of General Counsel), the Office of Air, Noise, and Radiation, the Office of Enforcement, and the Office of Planning and Management. SIP Guidelines § 7.2, §§ 6.1, 6.3, fig.5. The “fundamental purpose” of Headquarters review of “special actions” is to ensure that all relevant staff have adequately reviewed issues with national policy implications, or issues that may result in inconsistent litigation positions. Simply obtaining a concurrence letter from the Director of Air Quality Planning and Standards is *not*, by itself, sufficient to demonstrate compliance with the text and purpose of the regional consistency guidelines.

In issuing the first two final Withdrawal Rules, EPA admitted that it “deviate[d]” from the national prohibition against SSM affirmative defenses, but asserted that it need not comply with the mandatory guidelines referenced in 40 C.F.R. § 56.5(c) because the agency followed the most recent iteration of the EPA’s consistency guidance. *E.g.*, 82 Fed. Reg. at 7,240; 85 Fed. Reg. at 23,718. But like the mandatory guidelines referenced in section 56.5(c), EPA’s 2018 SIP Consistency Issues Guide contemplates a detailed, multi-step review and consultation process, requiring the regional office to document and “ensur[e] the issue is fully analyzed, including seeking and consolidating input from other offices including regional offices, OAQPS, OTAQ, OGC, and other HQ offices.” *See, e.g.*, EPA Guide at 6, 21-33, Docket No. EPA-R06-2018-0770-0046 (Jan. 30, 2018). And like EPA’s failure to comply with the mandatory Guidelines, there is no evidence EPA’s regional offices actually complied with any of those detailed requirements in the Withdrawal Rule processes.

Compliance with the consistency regulations and guidelines is not a mere “box-checking” exercise. Instead, it is required to give meaning and effect to Congress’ “mandate to assure greater consistency among the Regional Offices in implementing the Act.” 44 Fed. Reg. at 13,045; *see also* 42 U.S.C. § 7601(a)(2)(A) (directing EPA to establish regulations that “shall be designed” to “assure fairness and uniformity” in the application of the Clean Air Act). Because the rulemaking records do not contain sufficient evidence demonstrating that the agency complied with the regional consistency regulations before exempting Texas, North Carolina, and Iowa from the national SSM policy, EPA should convene a reconsideration proceeding to comply with all applicable Clean Air Act requirements. 42 U.S.C. § 7410(l).

Finally, EPA’s October 2020 SSM SIP Memo highlights the need to reconsider the Withdrawal Rules, and conduct a national rulemaking “correcting” EPA’s inconsistent implementation of the Clean Air Act’s enforcement provisions. 40 C.F.R. § 56.3(b). Indeed, EPA’s SSM SIP Memorandum—issued only after the opportunity for public comment on the Withdrawal Rules—institutionalizes, rather than corrects, EPA’s arbitrarily inconsistent application of the Clean Air Act’s prohibition against SSM affirmative defenses and exemptions. Specifically, the guidance purportedly “supersedes and replaces” aspects of the national 2015 SSM policy, provides states with examples of purportedly lawful SSM affirmative defense or exemption provisions, and sets out a process by which the regional offices may review and exempt individual states from compliance with the nationally-applicable SSM SIP Call. 2020 SSM SIP Memo at 10. The agency further claims that “in line with EPA’s consistency requirements, EPA believes that SSM provisions in SIPs may be permissible in certain circumstances, as outlined in the remainder of this guidance memorandum.” *Id.* at 2.

EPA should reconsider the Withdrawal Rules because EPA’s October 9, 2020 SSM SIP Memo further institutionalizes EPA’s inconsistent application of the national prohibition against SSM affirmative defenses and exemptions contrary to the Act and the regional consistency regulations. Rather than “correcting” and “standardizing” EPA’s SSM policy to assure consistent application and implementation of the Clean Air Act, as required by 40 C.F.R. § 56.3, the 2020 SSM SIP Memo unlawfully provides the regional offices with a “license to institutionalize the kind of inconsistencies that prompted Congress to enact” 42 U.S.C. § 7601(a)(2). 44 Fed. Reg. at 13,045.

IV. EPA MUST WITHDRAW ITS OCTOBER 2020 SSM SIP MEMO

EPA must also immediately withdraw its October 9, 2020 SSM SIP Memo—or, at the least, must do so by the time it reverses the Withdrawal Rules.²³ That Memo interprets the Clean

²³ We here take no position on whether EPA must follow its procedures for withdrawing guidance documents, EPA Guidance; Administrative Procedures for Issuance and Public Petitions, 85 Fed. Reg. 66,230 (Oct. 19, 2020). Petitioners note, however, that Executive Order 13992 § 2 revoked Executive Order 13891 of October 9, 2019 (Promoting the Rule of Law Through Improved Agency Guidance Documents), which directed EPA to promulgate the

Air Act to allow SIPs to once again contain outright exemptions, director's discretion provisions, and affirmative defenses against civil penalties, thus reversing EPA's position from its 2015 SSM SIP Call. For all of the reasons discussed above, the memo's interpretation is directly at odds with the statute, the D.C. Circuit's *NRDC* and *Sierra Club* decisions, and the 2015 SIP Call, and must immediately be withdrawn.²⁴

V. EPA MUST ISSUE A SIP CALL TO WISCONSIN, NORTH CAROLINA, AND ANY OTHER STATES WITH UNLAWFUL SIP PROVISIONS THAT WERE INADVERTENTLY OMITTED FROM THE 2015 SIP CALL

As noted above, EPA acknowledged in the 2015 SIP Call that it was not including all unlawful SSM SIP provisions in that rule and that it intended to require other states to correct SSM SIP provisions in future rulemaking actions. In the SIP Call, EPA recognized that "there may be additional SIP provisions that are deficient," but the agency chose to focus the rule only on the provisions identified in *Sierra Club's* petition for rulemaking. 80 Fed. Reg. at 33,880. While EPA agreed with comments that including all unlawful SSM SIP provisions in the rule would serve "regulatory efficiency" and "ensure that companies in all states are treated equally," 80 Fed. Reg. at 33,879-80, it decided to address other SSM provisions through future rulemaking actions.

Commenters informed EPA during the SIP Call rulemaking that the Wisconsin SIP contains unlawful SSM provisions, and that a separate petition had been submitted to EPA to take action on the Wisconsin SIP provision. With respect to that Wisconsin petition, EPA specifically stated that it "will take action on that petition in a future rulemaking." 80 Fed. Reg. at 33,880 n.108.

Additionally, as EPA explained in the North Carolina Withdrawal Rule, the North Carolina SIP contains an automatic SSM exemption that was not included in the 2015 SIP Call.

procedures. 86 Fed. Reg. 7,049, 7,049 (Jan. 20, 2021). In addition, Executive Order 13992 § 3 directed EPA to "promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing the [revoked Executive Order], as appropriate and consistent with applicable law" — and if "such rescission cannot be finalized immediately," to "promptly take steps to provide all available exemptions authorized by any such orders, rules, regulations, guidelines, or policies, as appropriate and consistent with applicable law." *Id.* 40 C.F.R. § 2.507(f) contains such an exemption, as it allows EPA to overlook putative flaws in submissions asking for withdrawal of guidance documents.

²⁴ The SSM SIP Memo repeated most or all of EPA's reasoning from the Withdrawal Rules. For additional discussion of why that reasoning provides no lawful, non-arbitrary basis for allowing SSM loopholes, see environmental groups' opening briefs in their D.C. Circuit cases challenging the Texas and North Carolina Withdrawal Rules and environmental groups' comments regarding the proposed Iowa Withdrawal Rule. Pet'rs' Proof Opening Br. at 24-45, No. 20-1115, ECF No. 1871212 (Texas); Pet'rs' Proof Opening Br. at 22-45, No. 20-1229, ECF No. 1873196 (North Carolina); Joint Comments of Environmental and Public Health Organizations at 5-29, Docket No. EPA-R07-OAR-2017-0416-0060 (Iowa).

The SIP Call included two director’s discretion provisions in the North Carolina SIP, 85 Fed. Reg. at 23,700 n.3, but it did not include a provision that automatically exempts periods of SSM for certain large internal combustion engines. *Id.* at 23,700 n.4. In the North Carolina Withdrawal Rule, EPA reiterated its rationale from the SIP Call that the automatic exemption—15A NCAC 02D.1423—was not included in the rule because it was not identified in Sierra Club’s petition. *Id.*

EPA’s action to reverse the Texas, North Carolina, and Iowa Withdrawal Rules should also include a SIP call for Wisconsin, the North Carolina automatic exemption, and the implementation plan of any other state or jurisdiction with unlawful SSM provisions that were not included in the 2015 SIP Call. One comprehensive rulemaking action is the most expedient means of correcting these unlawful SIP provisions and ensuring consistency and a level playing field among states. A single rulemaking is also appropriate because the reaffirmation of EPA’s understanding that SSM exemptions and affirmative defenses in SIPs are unlawful is based on a common legal interpretation, as EPA acknowledged in the 2015 SIP Call.

All SIPs must comply with the requirements of the Clean Air Act, and § 7410(k)(5) requires EPA to issue a SIP call directing a state to revise its SIP whenever EPA finds the SIP is “substantially inadequate” “to comply with any requirement of” the Act. EPA’s 2015 SIP Call confirmed that SSM exemptions, director discretion provisions, and affirmative defenses are inconsistent with the Clean Air Act, and that any SIP containing such provisions is “substantially inadequate” to comply with the fundamental legal requirements of the Act. 80 Fed. Reg. at 33,976 *et seq.* The SSM SIP provisions in Wisconsin and North Carolina discussed above—along with any other unlawful SSM SIP provisions not included in the 2015 SIP Call—are likewise substantially inadequate to comply with the Act and must be SIP-called.

VI. ANY RECONSIDERATION OF THE WITHDRAWAL RULES WOULD BE NATIONALLY APPLICABLE AND BASED ON DETERMINATIONS OF NATIONWIDE SCOPE AND EFFECT, AND MUST THEREFORE BE REVIEWED IN THE D.C. CIRCUIT

The Clean Air Act “evinces a clear congressional intent” to centralize review in the D.C. Circuit of “matters on which national uniformity is desirable.” *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *4 (5th Cir. Feb. 24, 2011); *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996); *see also Clean Air Project*, 891 F.3d 1041, 054 (D.C. Cir. 2018) (Silberman, J., concurring) (the Clean Air Act’s venue provision reflects “a clear congressional mandate: uniform judicial review of regulatory issues of national importance”). To that end, the D.C. Circuit Court of Appeals is the appropriate venue for review of “nationally applicable regulations,” and actions “based on a determination of nationwide scope or effect” where EPA has published such a determination. 42 U.S.C. § 7607(b)(1).

As EPA recognized in the 2015 SSM SIP Call, the agency’s “legal interpretation of the [Clean Air Act] concerning permissible SIP provisions to address emissions during SSM events”

was a “nationally applicable” rule. 80 Fed. Reg. at 33,864. At the core of the SIP Call was EPA’s implementation of “interpretations of the CAA in the SSM Policy that apply to SIP provisions for all states across the nation”—namely, that SIP provisions cannot include exemptions or affirmative defenses for SSM events. *See* 78 Fed. Reg. at 12,540 (Proposal); 79 Fed. Reg. 55,920, 55,955-56 (Sept. 17, 2014) (Supplemental Proposal); 80 Fed. Reg. at 33,883 (Final). EPA further concluded that the SIP Call was based on a common nationwide interpretation of the Clean Air Act, and reached numerous states in multiple judicial circuits. 78 Fed. Reg. at 12,540; 79 Fed. Reg. at 55,956. Accordingly, any petitions for judicial review of the SSM SIP Call were required to be filed in the D.C. Circuit, where fourteen petitions for review were ultimately consolidated, fully briefed, and remain pending.²⁵

In its Withdrawal Rules, EPA reversed course, and issued findings that its revisions to the national rule should be reviewed in the regional circuit courts, rather than the D.C. Circuit. As Petitioners have explained in their briefing challenging the Texas and North Carolina Withdrawal Rules, those rules are themselves nationally applicable and based on determinations of nationwide scope and effect.²⁶ In fact, EPA communications recently obtained through the FOIA confirm that EPA headquarters centrally planned to announce changes in its SSM policy through the Withdrawal Rules.

With the help of regional staff and ORC, OAQPS and OGC staff/attorneys assessed these pending SIP submissions to determine whether they may be candidates for taking action and expressing changes to the Agency's policy on SSM in SIPs, including withdrawing the SIP call for a given state.²⁷

Although EPA issued the Withdrawal Rules through separate Federal Register notices, they were each nationally applicable because they revised the nationally applicable SIP Call. 42 U.S.C. § 7607(b)(1). Indeed, the Withdrawal Rules created exceptions to the national prohibition against affirmative defenses and exemptions, and set out the circumstances under which EPA regions may approve SIPs that deviate from the national SSM SIP policy. 85 Fed. Reg. at 7,234-

²⁵ Nineteen states and eighteen industrial groups or companies filed challenges to the 2015 rule. *See Env't Comm. of the Fla. Elec. Power Coordinating Grp. v. EPA*, Case No. 15-1239 (and consolidated cases). The current consolidated petitions are: Case Nos. 15-1239, 15-1243, 15-1256, 15-1265, 15-1267, 15-1268, 15-1270, 15-1271, and 15-1272. Former petitioners Southeastern Legal Foundation, Inc., and Walter Coke, Inc., voluntarily dismissed their appeals, Case Nos. 15-1166 and 15-1216. Many of the undersigned Environmental Petitioners intervened in support of EPA to defend the SIP Call. *See* No. 15-1239 (D.C. Cir. July 13, 2015), ECF Doc. 1562320.

²⁶ Pet'rs' Proof Opening Br. at 51-61, No. 20-1115, ECF No. 1871212 (Texas); Pet'rs' Proof Opening Br. at 46-54, No. 20-1229, ECF No. 1873196 (North Carolina); *see also* Pet'rs' Mot. to Confirm Venue, Consolidate, and Hold in Abeyance, No. 20-1115 (D.C. Cir. Apr. 21, 2020), ECF No. 1839160.

²⁷ Email from Megan Brachtl, Group Leader, States and Local Programs Group, OAQPS to multiple recipients (Sept. 10, 2018) (attached as Exhibit 1).

35. Coupled with the 2020 SIP Memo, the Withdrawal Rules provide the states and EPA regions with nationally applicable “example[s]” of “properly crafted” exemptions to the SSM SIP Call. *E.g.*, 85 Fed. Reg. at 7,238, 7,240. Even if the Withdrawal Rules were not nationally applicable (they are), each of the rules was necessarily based on EPA’s determination that SSM affirmative defenses and exemptions were no longer categorically prohibited. That determination is necessarily one of nationwide scope and effect, and EPA’s refusal to publish a finding to that effect was arbitrary. *Id.* at 7,240.

As a result of EPA’s venue findings in the Withdrawal Rules, there is a risk that different SSM affirmative defense and exemption standards will apply in different areas of the country, thereby defeating the Clean Air Act’s goal of ensuring uniformity of national issues. In fact, EPA’s inconsistent venue findings have already resulted in judicial inefficiency, confusion, and wasted resources litigating the same purely legal issues in separate cases. Rather than the consolidation of the challenges to the Withdrawal Rules with the still-pending 2015 SIP Call litigation, EPA’s inconsistent approach to venue has resulted in four separate cases and multiple sets of briefing involving EPA’s interpretation of the very same core Clean Air Act provisions and legal precedent. There is no rational basis for such an inefficient and potentially inconsistent approach to judicial review of the Clean Air Act’s core requirements.

As explained *supra*, EPA must reconsider the Withdrawal Rules and its 2020 SSM SIP Memo, and reinstate its uniform, nationally applicable and categorical prohibition against SSM affirmative defense and exemption provisions in SIPs. In doing so, EPA should issue and publish findings that any such rulemaking is both nationally applicable and based on the same determinations of nationwide scope and effect as the 2015 SIP Call, thereby making clear that any challenge to the reconsideration rulemaking should be reviewed in the D.C. Circuit. *See* 42 U.S.C. § 7607(b)(1).

A. Reconsideration of the Withdrawal Rules and the 2020 National SIP Memo Would Be Nationally Applicable

EPA should conclude that any reconsideration of the Withdrawal Rules and the 2020 SIP Memo are part of the same overarching and “nationally applicable” SIP Call under 42 U.S.C. § 7607(b)(1), for several reasons. First, any reconsideration rule should be part of, and reaffirm, the same nationally applicable SIP Call prohibition against SSM affirmative defenses and exemptions, which “applied the same standard to every state and mandated revisions based on that standard to states with nonconforming SIPs in multiple regions of the country.” 80 Fed. Reg. at 33,883 (quoting *ATK Launch Systems, Inc. v. EPA*, 651 F.3d 1194, 1199 (10th Cir. 2011)). Like the 2015 SIP Call itself, the core of any reconsideration rulemaking would necessarily involve the implementation of “interpretations of the CAA in the SSM Policy that apply to SIP provisions for all states across the nation”—namely, that SIP provisions cannot include exemptions or affirmative defenses for emissions during SSM events. 80 Fed. Reg. at 33,883.

That EPA chose to promulgate the Withdrawal Rules through separate Federal Register notices does not preclude the agency from concluding in a single nationally applicable rulemaking that it is necessary to reconsider the Withdrawal Rules and reinstate the nationally applicable prohibition against SSM affirmative defense and exemption provisions across the country. *See Fox Television*, 556 U.S. at 515 (an agency may revisit prior policy determinations as long as it “display[s] awareness that it *is* changing position” and provides a reasoned explanation for the change). If it were to do so, such a reconsideration rulemaking would be nationally applicable and reviewable only in the D.C. Circuit because EPA would be reinstating the SIP Call policy to apply to Texas, North Carolina, Iowa, and all of the 33 other states subject to the 2015 rule. Moreover, it would make clear to all states and EPA regions that such affirmative defense and exemption SIP provisions are not permissible or approvable.

Precedent supports the conclusion that the reversal of the Withdrawal Rules, rescission of the 2020 SIP Memo, and reaffirmation of the 2015 SSM SIP Call policy would be “nationally applicable.” Courts routinely conclude that such so-called “SIP Calls” are nationally applicable and should be consolidated for centralized review in the D.C. Circuit. *E.g.*, *W. Va. Chamber of Com. v. Browner*, No. 98-1013, 1998 WL 827315, at *5-*8 (4th Cir. Dec. 1, 1998); *Texas*, 2011 WL 710598, at *5. In fact, in litigation challenging the 2015 SSM SIP Call itself, EPA consistently argued—and the Fifth Circuit correctly agreed—that all challenges to EPA’s national SSM affirmative defense policy should be reviewed in the D.C. Circuit. *See Order Transferring Case, Luminant Generation Co. v. EPA*, No. 15-60424 (5th Cir. Aug. 28, 2015), ECF Doc. 00513174477.

B. EPA Should Publish a Finding that Any Reconsideration and Rescission of the Withdrawal Rules and 2020 SIP Memo Are Based on Determinations of Nationwide Scope and Effect

Even if a reconsideration rulemaking is not nationally applicable (it would be), EPA should also find that judicial review is appropriate only in the D.C. Circuit by publishing a finding that any reconsideration and rescission of the Withdrawal Rules or 2020 SIP Memo is “based on a determination of nationwide scope and effect.” 42 U.S.C. § 7607(b)(1). The Clean Air Act “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.” *Texas v. EPA*, 829 F.3d 405, 419-20 (5th Cir. 2016). Whether a regulation is nationwide in scope and effect focuses on the “‘determination’ that the challenged action is ‘based on.’” *Id.* at 419, 422. “These determinations are the justifications the agency gives for the action and they can be found in the agency’s explanation of its action.” *Id.* at 419. Further, “[b]ecause the statute speaks of the determinations the action ‘is based on,’ the relevant determinations are those that lie at the core of the agency action.” *Id.*

Here, any reconsideration of the Withdrawal Rules and the 2020 SIP Memo would be based on several core determinations of nationwide scope and effect, and EPA should publish a finding to that effect, thereby ensuring that any challenge to a final reconsideration rule must be

filed only in the D.C. Circuit. 42 U.S.C. § 7607(b)(1). First, any action reconsidering and rescinding the Withdrawal Rules and the 2020 SIP Memo would be “based on” the very same determinations of nationwide scope and effect as the SSM SIP Call—namely, the determination that affirmative defense and exemption provisions in individual SIPs are categorically impermissible under the Clean Air Act.

Second, a determination of nationwide scope and effect is particularly appropriate where, as here, a reconsideration rulemaking would “encompass[] two or more judicial circuits.” *See* H.R. Rep. No. 95-294, at 322-24 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1401-03 (“if any action of the Administrator is found by him to be based on a determination of nationwide scope or effect (including a determination which has scope or effect *beyond a single judicial circuit*), then exclusive venue for review is in the [D.C. Circuit]”) (emphasis added); *see also PPG Indus., Inc. v. Harrison*, 587 F.2d 237, 243 n.6 (5th Cir. 1979), *rev’d on other grounds*, 446 U.S. 578 (1980) (quoting same). EPA has applied this same rationale in finding that regionally applicable actions were based on determinations of nationwide scope and effect. *See, e.g.*, 79 Fed. Reg. 29,362, 29,368 (May 22, 2014) (determination of nationwide scope and effect made in regional SIP action applying to North Carolina and Florida). Here, EPA’s reconsideration rulemaking would, on its face, apply to at least three different judicial circuits, and should therefore be reviewed only in the D.C. Circuit.

Third, if EPA reconsiders the Withdrawal Rules it should publish a determination of nationwide scope and effect to ensure consistency with the agency’s findings regarding the 2015 SSM SIP Call. There, EPA found that venue was appropriate in the D.C. Circuit because the agency was “revising its interpretations with respect to [certain issues] (*e.g.*, so that SIP provisions cannot include affirmative defenses for emissions during SSM events)” and “establishing a national policy that it is applying to states across the nation.” 80 Fed. Reg. at 33,883. EPA further recognized that a “key purpose” of the Clean Air Act’s venue provision was is to “minimize instances where the same legal and policy basis for decisions may be challenged in multiple courts of appeals, which instances would potentially lead to inconsistent judicial holdings and a patchwork application of the CAA across the country.” *Id.* EPA should similarly find that the reconsideration and rescission of the Withdrawal Rules and the 2020 SIP Memo are based on determinations of nationwide scope and effect and thus must be reviewed in the D.C. Circuit.

Finally, EPA should reconsider the Withdrawal Rules and the 2020 SIP Memo (if it has not already been withdrawn) in a single nationally applicable or nationwide rulemaking to further the Clean Air Act’s goal of ensuring the consistent and uniform judicial review and implementation of the Act’s core requirements. *Tex. Mun. Power Agency*, 89 F.3d at 867; *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 673 (7th Cir. 2017) (noting the Act’s “obvious aim of centralizing judicial review of national rules in the D.C. Circuit”); *Texas*, 2011 WL 710598, at *4 (The Act “evinces a clear congressional intent to ‘centralize review’” in the D.C. Circuit of “matters on which national uniformity is desirable”); *see also Clean Air Project*, 891 F.3d at

1054 (Silberman, J., concurring) (noting Act’s “clear Congressional mandate” for “uniform judicial review of regulatory issues of national importance”). As noted, EPA’s effort to dismantle the national rule on a piecemeal basis has not only created a situation where the Clean Air Act’s core provisions apply differently in different areas of the country, but has already resulted in judicial inefficiency, confusion, and wasted resources litigating the same purely legal issues in multiple cases. EPA can correct that inconsistency and inefficiency by reconsidering the Withdrawal Rules and its 2020 SSM SIP Memo and reinstating its “nationally applicable” prohibition against SSM affirmative defense and exemption provisions in SIPs. *See* 42 U.S.C. § 7607(b)(1).

VII. EPA MUST IMPLEMENT THE 2015 SSM SIP CALL

The 2015 SSM SIP Call required states to submit their revised state plans within 18 months, by November 22, 2016. 80 Fed. Reg. at 33,840. After states submit proposed SIPs, the next step is for EPA to determine whether a SIP submittal is administratively complete. 42 U.S.C. § 7410(k)(1)(B). If, six months after a submittal is due, a state has failed to submit any required SIP submittal, and there is no submittal that may be deemed administratively complete, EPA must make a determination that the state failed to submit the required SIP submittal. *Id.* This determination is referred to as a “finding of failure to submit.”

Thirteen states and air districts have ignored the SSM SIP Call mandate and have not submitted SIP revisions to EPA in response to the SIP Call.²⁸ Because more than six months have passed since the November 22, 2016 due date for these submittals, EPA must immediately issue a finding of failure to submit for these states and air districts. 42 U.S.C. § 7410(k)(1)(B).

EPA has also failed to take final action upon 28 state or air district proposals submitted in response to the SIP Call.²⁹ If EPA fails to make a completeness finding six months after receipt of a SIP submission, the submission is “deemed by operation of law” to meet the minimum statutory criteria. 42 U.S.C. § 7410(k)(1)(B). Once that happens, EPA must act within 12 months to approve in part or in full, conditionally approve, or disapprove the SIP revision. *See* 42 U.S.C. § 7410(k)(2)-(4). More than 18 months have passed since responsive SIPs were submitted. *See* Exhibit 2 at Table 2. EPA must act swiftly to review and take final action upon those state proposals for compliance with the 2015 SIP Call.

²⁸ *See* Exhibit 2 at Table 1. These states and air districts are Alabama, Arkansas, California – San Joaquin, District of Columbia, Illinois, North Carolina – Forsyth County, New Jersey, Ohio, Rhode Island, South Dakota, Tennessee – Shelby, and two Washington air districts.

²⁹ *See* Exhibit 2 at Table 1. These states and air districts are Alaska, Arizona, Arizona – Maricopa, California – Eastern Kern, California – Imperial, Colorado, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, North Dakota, New Mexico, New Mexico – Albuquerque-Bernalillo, Oklahoma, South Carolina, Tennessee, Virginia, Washington, and West Virginia.

VIII. CONCLUSION

For all of the reasons discussed above, EPA must reconsider and reverse its Withdrawal Rules and issue a SIP call to all states with unlawful SSM loopholes that were not addressed by the 2015 SSM SIP Call. EPA should do so through a single rule, which would be nationally applicable. EPA must also immediately withdraw its October 9, 2020 SSM SIP Memo. Lastly, EPA must implement the 2015 SSM SIP Call to ensure that the individual unlawful loopholes that were the subject of that rule are promptly removed from SIPs.

Thank you for your time and consideration of this petition.

Sincerely,

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Exhibit 1

Message

From: Wieber, Kirk [Wieber.Kirk@epa.gov]
Sent: 9/11/2018 6:34:18 PM
To: Brachtl, Megan [Brachtl.Megan@epa.gov]
CC: Ruvo, Richard [Ruvo.Richard@epa.gov]; Gardella, Anthony [Gardella.Anthony@epa.gov]; Lorang, Phil [Lorang.Phil@epa.gov]
Subject: RE: seeking APM review: briefing for OAR management on SSM SIP policy and pending SIP actions
Attachments: R2 SSM Policy Options - Sept 12 OAR briefing_for APMs.docx

Hi Megan – Region 2 reviewed the material and has just a few minor corrections to the write-up for New Jersey on page 7. There are actually

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Thanks for sharing with us and let us know if you have any further questions.

-Kirk

From: Brachtl, Megan

Sent: Monday, September 10, 2018 5:32 PM

To: Algoe-Eakin, Amy <Algoe-Eakin.Amy@epa.gov>; Jay, Michael <Jay.Michael@epa.gov>; Benjamin, Lynorae <benjamin.lynorae@epa.gov>; Davis, Scott <Davis.ScottR@epa.gov>; Jackson, Scott <Jackson.Scott@epa.gov>; Morales, Monica <Morales.Monica@epa.gov>; Ruvo, Richard <Ruvo.Richard@epa.gov>; Wieber, Kirk <Wieber.Kirk@epa.gov>; Donaldson, Guy <Donaldson.Guy@epa.gov>; Feldman, Michael <Feldman.Michael@epa.gov>; Blakley, Pamela <blakley.pamela@epa.gov>; Aburano, Douglas <aburano.douglas@epa.gov>; Garcia, Ariel <Garcia.Ariel@epa.gov>; Wortman, Eric <Wortman.Eric@epa.gov>; Spielberger, Susan <spielberger.susan@epa.gov>

Cc: Mastro, Donna <Mastro.Donna@epa.gov>; Selbst, Elizabeth <selbst.elizabeth@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Seidman, Emily <seidman.emily@epa.gov>; Lorang, Phil <Lorang.Phil@epa.gov>; Sutton, Lisa <Sutton.Lisa@epa.gov>; Buchsbaum, Seth <buchsbaum.seth@epa.gov>

Subject: seeking APM review: briefing for OAR management on SSM SIP policy and pending SIP actions

Importance: High

Hello planning APMs – We are scheduled to brief Bill Wehrum and Clint Woods this Wednesday on the results of our analysis of

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP) With the help of regional staff and ORC, OAQPS and OGC staff/attorneys assessed these pending SIP submissions to determine whether they may be candidates for taking action and expressing changes to the Agency's policy on SSM in SIPs, including withdrawing the SIP call for a given state.

I understand your staff have been given an opportunity to review this document, but I want to be certain that you all have seen this briefing and concur with how we're characterizing the pending SIPs for state(s) in your respective regions. I also want to make sure you're aware of which SIP submissions we're recommending taking action on, and why.

Please review the attached document and let me know ASAP if you or your ADD have any concerns or any revisions you would like us to make. With the briefing currently scheduled for noon (ET) on Wednesday, the sooner the better.

Even if you don't have any changes to offer, I'd appreciate a confirmation email that you and your ADD have reviewed the document.

Thanks for your attention to this!

Best regards,
Megan

Exhibit 2

Table 1: States That Did Not Respond to the 2015 SIP Call

State/County	Submitted Proposal to EPA (Y/N)
Alabama	No
Arkansas	No
CA – San Joaquin	No
District of Columbia	No
Illinois	No
North Carolina - Forsyth	No
New Jersey	No
Ohio	No
Rhode Island	No
South Dakota	No
Tennessee - Shelby (Memphis)	No
Washington – EFSEC	No
Washington - SWCAA	No

Table 2: States with Submitted SIP Proposals but No Final Rule

State/County	Submitted Proposal to EPA (Y/N)	Date of Submitted SIP Proposal	Federal Register Notice
Alaska	Yes	1/5/2017	N/A
Arizona	Yes	11/17/2016	Approval of Arizona Air Plan Revisions, Arizona Department of Environmental Quality and Maricopa County Air Quality Department, 82 FR 13084 (Mar. 09, 2017)
Arizona - Maricopa	Yes	11/18/2016	Approval of Arizona Air Plan Revisions, Arizona Department of Environmental Quality and Maricopa County Air Quality Department, 82 FR 13084 (Mar. 09, 2017)
California – Eastern Kern	Yes	12/6/2016	Approval of California Air Plan Revisions, Eastern Kern Air Pollution Control District and Imperial County Air Pollution Control District, 82 FR 20295 (May 01, 2017)
California - Imperial	Yes	3/28/2016	Approval of California Air Plan Revisions, Eastern Kern Air Pollution Control District and Imperial County Air Pollution Control District, 82 FR 20295 (May 01, 2017)
Colorado	Yes	11/21/2016	N/A
Delaware	Yes	11/26/2016	N/A
Florida	Yes	11/22/2016	N/A
Georgia	Yes	11/17/2016	N/A
Indiana	Yes	11/14/2016	N/A
Kansas	Yes	11/22/2016	N/A
Kentucky	Yes	11/17/2016	N/A
Louisiana	Yes	11/22/2016	N/A
Maine	Yes	05/21/2019	N/A
Michigan	Yes	2/7/2017 (Commitment to comply w/ SIP Call submitted on 11/15/2016)	N/A
Minnesota	Yes	11/22/2016	N/A
Missouri	Yes	11/28/2016	N/A
Mississippi	Yes	11/17/2016	N/A
Montana	Yes	7/6/2016	Montana Administrative Rule Revisions: 17.8.334, 82 FR 16770 (Apr. 06, 2017)
North Carolina	Yes	11/22/2016	N/A
North Dakota	Yes	10/27/2016	N/A
New Mexico	Yes	10/13/2016	N/A
NM - Albuquerque-Bernalillo	Yes	10/17/2016	N/A
Oklahoma	Yes	11/7/2016	N/A

South Carolina	Yes	11/4/2016	N/A
Tennessee	Yes	11/18/2016	N/A
Texas	Yes	11/18/2016	N/A
Virginia	Yes	8/1/2016	N/A
Washington	Yes	10/25/2019	N/A
West Virginia	Yes	6/29/2016	N/A