ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1166 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WALTER COKE, INC., *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency
80 Fed. Reg. 33,840 (June 12, 2015)

OPENING BRIEF OF STATE PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Court consolidated the following cases for review:
15-1166, 15-1216, 15-1239, 15-1243, 15-1256, 15-1265, 15-1266, 15-1267, 15-1268, 15-1270, 15-1271, 15-1272, 15-1300, 15-1301, 15-1302, 15-1308

(A) Parties, Intervenors, and Amici

Petitioners

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Big Brown Power Company, LLC
BCCA Appeal Group
Commonwealth of Kentucky
Environmental Committee of the Florida Electric Power Coordinating Group, Inc.
Georgia Coalition for Sound Environmental Policy
Georgia Industry Environmental Coalition
Georgia Power Company
Gulf Power Company
Luminant Generation Company, LLC
Mississippi Power Company
North Carolina Department of Environment and Natural Resources
Oak Grove Management Company, LLC
Sandow Power Company, LLC
Southern Company Services, Inc.
Southern Power Company
SSM Litigation Group
State of Alabama
State of Arizona
State of Arkansas
State of Delaware
State of Florida
State of Georgia
State of Kansas
State of Louisiana
State of Mississippi
State of Missouri
State of Ohio
State of Oklahoma
State of South Carolina

State of South Dakota
State of Tennessee
State of Texas
State of West Virginia
Texas Commission on Environmental Quality
Texas Oil and Gas Association
Union Electric Company d/b/a Ameren Missouri
Utility Air Regulatory Group

Respondent
Gina McCarthy, Administrator, United States Environmental Protection Agency
United States Environmental Protection Agency

Intervenors for Respondent
Citizens for Environmental Justice
Environmental Integrity Project
Natural Resources Defense Council
People Against Neighborhood Industrial Contamination
Sierra Club

(B) Rulings Under Review

All of the petitions for review challenge EPA's final rule entitled "State Implementation Plans: Responses to Petitions for Rulemaking, Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Final Rule," 80 Fed. Reg. 33840 (June 12, 2015).

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

GLOSSARY ix

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

INTRODUCTION 2

STATUTES AND REGULATIONS 3

STATEMENT OF THE CASE 3

I. THE SIP PROGRAM OF THE CLEAN AIR ACT 3

II. REGULATION OF SSM PERIODS 6

III. THE SIP CALL 8

SUMMARY OF THE ARGUMENT 9

STANDING 11

STANDARD OF REVIEW 11

ARGUMENT 12

I. EPA HAS NOT PROPERLY FOUND THAT ANY SIP IS SUBSTANTIALLY INADEQUATE. 12

II. EVEN IF EPA PROPERLY INTERPRETED ITS SIP CALL AUTHORITY, IT MISINTERPRETED THE ACT'S REQUIREMENTS AND SIPS. 22

A. EPA's Decision to Ignore "General Duty" Requirements Violates the Act. 22

TABLE OF CONTENTS – *cont'd*

B. EPA Incorrectly Interpreted SIPs As Containing Automatic Exemptions During SSM Periods. 24

C. EPA Incorrectly Determined That Director's Discretion Provisions Violate the Act. 28

D. The Act Permits States to Include Affirmative Defenses in SIPs. 34

III. EPA CANNOT CALL SIPS FOR REASONS IT DID NOT CLAIM CONSTITUTED SUBSTANTIAL INADEQUACIES. 37

CONCLUSION 38

CERTIFICATE OF COMPLIANCE 44

CERTIFICATE OF SERVICE 45

TABLE OF AUTHORITIES

Cases

Council for Urological Interests v. Burwell,
790 F.3d 212 (D.C. Cir. 2015) 37

Cty. of L.A. v. Shalala,
192 F.3d 1005 (D.C. Cir. 1999) 12

Fla. Power & Light Co. v. Costle,
650 F.2d 579 (5th Cir. 1981) 20

Luminant Generation Co. v. EPA,
714 F.3d 841 (5th Cir. 2013) 18, 28, 35, 37

Nat'l Ass'n of Clean Air Agencies v. EPA,
489 F.3d 1221 (D.C. Cir. 2007) 11

NRDC v. EPA,
749 F.3d 1055 (D.C. Cir. 2014) 5, 7, 8, 10, 18, 35, 36

Texas v. EPA,
690 F.3d 670 (5th Cir. 2012) 23, 28, 37

Train v. NRDC,
421 U.S. 60 (1975) 5

US Magnesium, LLC v. EPA,
690 F.3d 1157 (10th Cir. 2012) 19

Virginia v. EPA,
108 F.3d 1397 (D.C. Cir. 1997) 4, 5, 15

West Virginia v. EPA,
362 F.3d 861 (D.C. Cir. 2004) 11

Whitman v. Am. Trucking Ass'n,
531 U.S. 457, 473 (2001) 4

Statutes

CAA § 107, 42 U.S.C. § 7407 4

CAA § 109, 42 U.S.C. § 7409 .... 3, 4

CAA § 110, 42 U.S.C. § 7410......1, 2, 4, 5, 6, 8, 9, 10, 12, 13, 14, 16, 19, 24, 29, 33, 34, 35, 36

CAA § 111, 42 U.S.C. 7411 30

CAA § 112, 42 U.S.C. § 7412 .... 30, 35

CAA § 301, 42 U.S.C. § 7601 36

CAA § 302, 42 U.S.C. § 7602 .... 5, 8, 24, 26

CAA § 304, 42 U.S.C. § 7604 .... 31, 35, 36, 42

CAA § 307, 42 U.S.C. § 7607 .... 1, 11

Federal Regulations

40 C.F.R. § 50.12 3

40 C.F.R. § 51.112 16

40 C.F.R. § 51.15 16

40 C.F.R. § 51.211 16

40 C.F.R. § 51.214 16

40 C.F.R. § 51.321 16

40 C.F.R. § 58.16 16

40 C.F.R. § 70.6 33

State Statutes and Regulations

Ark. Code Reg. § 19.1004 27

7 Del. Admin. Code 1103 33

7 Del. Admin. Code 1104 27

Fla. Admin. Code § 62-210.700 .... 20, 27, 37

Ga. Comp. R. & Regs. 391-3-1-.02 .... 25, 26

401 Ky. Admin. Reg. 50:055 .... 29, 33

La. Admin. Code tit. 33, pt. III, § 929 33

15A N.C. Admin. Code 2D0535 32

Ohio Admin. Code 3745-15-06 31

S.D. Admin. R. § 74:36:12:02 22

Tenn. Comp. R. & Regs. § 1200-03-20-.07 32

Tenn. Comp. R. & Regs. § 1200-03-20-.02 22

Tenn. Comp. R. & Regs. § 1200-03-20-.09 32

W. Va. Code St. R. § 45-2-9.2 27

W. Va. Code St. R. § 45-7-10.3 28

Federal Register

47 Fed. Reg. 3,111 (Jan 2, 1982) 27

53 Fed. Reg. 34,500-01 (Sept. 7, 1988) 15

54 Fed. Reg. 19,169-01 (May 4, 1989) 17

58 Fed. Reg. 41,430-01 (Aug. 4, 1993) 15

71 Fed. Reg. 19,432-01 (Apr. 14, 2006) 15

76 Fed. Reg. 41,424-01 (July 14, 2011) 15

76 Fed. Reg. 763-01 (Jan. 6, 2011) 15

78 Fed. Reg. 12,460 (Feb. 22, 2013), EPA-HQ-OAR-0322-0055 .... 6, 8, 18, 20, 37

79 Fed. Reg. 55,920 (Sept. 17, 2014), EPA-HQ-OAR-2013-0322-0909 18

80 Fed. Reg. 33,840 (June 12, 2015), EPA-HQ-OAR-2012-0322-1136. .....ii, ix, 1, 6, 8, 9, 14, 15, 17, 19, 20, 21, 23, 24, 25, 26, 28, 29, 32, 34, 38

Miscellaneous

1982 Memo, EPA-HQ-OAR-2012-0322-0005 .... 6, 7

1983 Memo, EPA-HQ-OAR-2012-0322-0006 7

1999 Memo, EPA-HQ-OAR-2012-0322-0007 .... 6, 7, 17

2001 Memo, EPA-HQ-OAR-2013-0322-0038 8

Am. Heritage Dictionary of the English Language (1981) 13

Ariz. Comment, EPA-HQ-OAR-2012-0322-0599 17

Black's Law Dictionary (9th ed. 2009) 13

Colo. Comment, EPA-HQ-OAR-2012-0322-0525 21

Del. Comment, EPA-HQ-OAR-2012-0322-0570 16

Fla. Comment, EPA-HQ-OAR-2012-0322-0878 17

Ga. Comment, EPA-HQ-OAR-2012-0322-0557 16

N.C. Comment, EPA-HQ-OAR-2012-0322-0619 32

Ohio Comment, EPA-HQ-OAR-2012-0322-0532 31

S.D. Comment, EPA-HQ-OAR-2012-0322-0441 .... 16, 17, 23

W. Va. Comment, EPA-HQ-OAR-2012-0322-0614 29

GLOSSARY

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1983 Memo	Mem. from Kathleen M. Bennett, Ass't Admr. For Air, Noise and Radiation to Reg'l Admrs., Regions I-X (Feb. 15, 1983)
1999 Memo	Mem. from Steven A. Herman, Ass't Adm'r for Enforcement & Compliance Assur. to Reg'l Adm'rs, Regions I-X (Aug. 11, 1999)
2001 Memo	Mem. from Eric Shaeffer, Dir., Ofc. of Regulatory Enforcement, to John S. Seitz, Dir., Ofc. of Air Quality Planning & Standards, Ofc. of Air & Radiation (Dec. 5, 2001)
CAA or Act	Clean Air Act, 42 U.S.C. § 7401 *et seq.*
Comment Response	EPA, *Response to Comments on February 2013 and September 2014 Proposals for Action, "State Implementation Plans: Response to Petition for Rulemaking, Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy, and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction"* (May 2015)
EPA	United States Environmental Protection Agency
NAAQS	National ambient air quality standards
SIP	State implementation plan
SIP Calls	*State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Final Rule*, 80 Fed. Reg. 33,840 (June 12, 2015)
SSM	Startup, shutdown, and malfunction

JURISDICTIONAL STATEMENT

State Petitioners[1] seek review of a final rule promulgated by the U.S. Environmental Protection Agency (EPA) entitled "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Final Rule," 80 Fed. Reg. 33,840 (June 12, 2015) (the SIP Calls), Joint Appendix (JA), __. Petitions for review were timely filed under section 307(b)(1) of the Clean Air Act (CAA or Act), which provides this Court jurisdiction to review final EPA actions.

STATEMENT OF THE ISSUES

1. Whether EPA may satisfy CAA § 110(k)(5)'s requirement to "find[]" that SIPs are "substantially inadequate" and call States' SIPs solely on the basis of an asserted mismatch between the SIPs and CAA legal requirements, without making factual findings supporting its determination that any inadequacies are substantial.

2. Whether, assuming EPA's interpretation of its SIP call authority was permissible, EPA properly called SIPs because they contain what EPA terms

[1] State of Florida, State of Alabama, State of Arizona, State of Arkansas, State of Delaware, State of Georgia, State of Kansas, State of Louisiana, State of Mississippi, State of Missouri, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of West Virginia, Commonwealth of Kentucky, North Carolina Department of Environment and Natural Resources, State of Texas, and State of Tennessee.

"automatic exemptions," "director's discretion provisions," and "affirmative defenses" for emissions during SSM periods.

3. Whether, to the extent applicable, EPA may call SIPs for reasons that it did not find constitute substantial inadequacies.

INTRODUCTION

The Clean Air Act (the Act) establishes a system of cooperative federalism to reduce air pollution in the United States. In that system, EPA and the States occupy distinct and complementary roles. EPA creates National Ambient Air Quality Standards (NAAQS) setting the maximum ambient-air concentration for certain air pollutants that will not jeopardize public health or welfare. The States may provide input, but the decision lies with EPA. States are responsible for determining the best approach to achieve the NAAQS through state implementation plans (SIPs). If the SIP meets the requirements of the Act, EPA must approve the SIP. EPA has no authority to substitute its policy preferences about the best means to reduce air pollution. This system has been in place since Congress passed the Act in 1970.

Once EPA approves a SIP, it cannot require a State to revise that SIP just because EPPA interprets some aspect of the SIP as technically inconsistent. Instead, section 110(k)(5) of the Act requires EPA to "find[] that [the SIP] is substantially inadequate." Only upon making such a finding can the EPA require a State to revise the SIP. This procedure is called a SIP call.

This case involves EPA's decision to call SIPs in 35 States and the District of Columbia (for provisions applicable in 45 statewide and local jurisdictions) because of how those SIPs treated periods of startup, shutdown, and malfunction (SSM). The SIP Calls do not purport to improve air quality. EPA made no findings at all about the air-quality effects of the States' SSM regulations in general, much less State-specific findings about the specific provisions that EPA has identified as substantially inadequate. Instead, EPA asserted that certain CAA requirements are "fundamental," such that any SIP provision that failed to satisfy them was substantially inadequate. In the absence of any factual finding of substantial inadequacy, however, EPA's SIP Calls do not comply with the Act. And even had it correctly construed its SIP call authority, EPA's superficial analysis of SIP provisions classified SIPs as substantially inadequate when, under EPA's own reading of the Act, they plainly are not. These failures require the SIP Call to be vacated.

STATUTES AND REGULATIONS

Pertinent statutes, regulations, and SIP provisions are set forth in the separately filed Statutory and Regulatory Addendum.

STATEMENT OF THE CASE

I. THE SIP PROGRAM OF THE CLEAN AIR ACT

Under section 109 of the Act, EPA establishes primary and secondary NAAQS to protect human health and welfare. These air quality standards set maximum concentrations for the pollutants in the ambient air, *e.g.* 40 C.F.R. § 50.12 (1.5 $\mu g/m^3$

for lead); they do not themselves set limitations on how much or how fast a source can emit a particular pollutant. In setting the NAAQS, EPA is to determine, based on available scientific information, the maximum concentration of the pollutant in the ambient air "requisite" to protect public health and welfare, CAA § 109(b)—that is, the standards must provide limits that are "sufficient, but not more than necessary," with an adequate margin of safety to achieve those goals. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 473 (2001).

EPA is not, however, primarily responsible for attaining the NAAQS. The Act is an exercise in cooperative federalism. EPA "identifies the end to be achieved" by establishing the NAAQS, and States "choose the particular means for realizing that end" through their SIPs. *Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997) . Thus, States, not EPA, have the "primary responsibility for assuring air quality" through a "state implementation plan" (or SIP), through which a State "specif[ies] the manner in which national primary and secondary ambient air quality standards will be achieved and maintained." CAA § 107(a).

Section 110 of the Clean Air Act sets requirements for SIPs. Two provisions are particularly relevant here. First, a SIP must contain "enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable requirements of this chapter." CAA § 110(a)(2)(A). The Act provides States with broad discretion to regulate through "emission limitations" and "other control measures" that the State deems "necessary

or appropriate." *Id.* That discretion is apparent in the definition of "emission limitation": any "requirement" that "limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." *Id.* § 302(k). The definition includes "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 this chapter." *Id.* Separately, a SIP must contain a "program to provide for the enforcement" of various requirements, including emission limitations. CAA § 110(a)(2)(C).[2] Thus, the Act gives States discretion over how to design emission limitations and other control measures to attain the NAAQS and how those limitations should be enforced.

If the SIP meets CAA requirements, EPA "shall approve" the plan. CAA § 110(k)(3). In other words, if the SIP meets CAA requirements, the Act gives EPA "no authority to question the wisdom of a State's choices of emission limitations." *Train v. NRDC*, 421 U.S. 60, 79 (1975); *see also Virginia*, 108 F.3d at 1410 ("Congress did not give EPA authority to choose the control measures or mix of measures states would put in their implementation plans."). Once a SIP is approved, the Act also significantly limits EPA's authority to require a State to change it. Under the SIP call authority at issue here, only if EPA "finds on the basis of information available to the

[2] This obligation is independent of the obligation to ensure that the State has sufficient resources to carry out the SIP. *Id.* § 110(a)(2)(E).

Administrator" that the SIP is not just inadequate, but "substantially" so, must a State revise its SIP. CAA §§ 110(a)(2)(H)(ii), 110(k)(5).

II. Regulation of SSM Periods

Since States first submitted SIPs in the 1970s, they have recognized that emissions controls may not work as well when sources are starting up, shutting down, or malfunctioning. EPA, too, has "recognize[d]" both that "even the best available emissions control systems may not be consistently effective during startup and shut-down periods" and "even equipment that is properly designed and maintained can sometimes fail." 1999 Memo 2, 3, JA __. Therefore, SIPs have "often included" special provisions for operation during SSM periods, relating both to what the limitations are during those periods, and also how enforcement should take place. 78 Fed. Reg. 12,460, 12,464 (Feb. 22, 2013), JA __. The widespread nature of such provisions is best illustrated by the fact that the SIP Calls require revisions to SSM rules in 35 States and the District of Columbia. 80 Fed. Reg. at 33,847.

EPA first suggested its preferred approach to "excess emissions," defined as any time an SSM period resulted in "an air emission rate which exceeds any applicable emission limitation," in SIPs in 1982. 1982 Memo 3, JA __. Although EPA determined that excess emissions should be treated as violations, it recognized that in some cases, excess emissions would result from unavoidable malfunctions. *Id.* Rather than offer an "automatic exemption where a malfunction is alleged by a source," EPA advised States to use enforcement discretion. *Id.* Under EPA's preferred approach, the

State could "require the source to demonstrate to the appropriate State agency that the excess emissions, though constituting a violation, were due to an unavoidable malfunction." *Id.* For periods of startup and shutdown, EPA believed no enforcement discretion was appropriate, because sources should be able to plan for such events. *Id.* at 4, JA __. The next year, EPA reversed course on start-up and shut-down periods, recognizing that sometimes "careful and prudent planning and design will not totally eliminate infrequent[,] short periods of excesses during startup and shutdown." 1983 Memo 1-2, JA __. Although the 1982 and 1983 Memos both addressed States' treatment of emissions that exceeded applicable limitations, EPA did not purport to limit States' authority to determine that certain emission limitations would not apply during SSM periods.

In 1999, EPA again revised its SSM policy to reduce the possibility that SSM emissions could cause sources with unavoidable SSM emissions to be subject to monetary penalties.[3] For both malfunctions and startup and shutdown, EPA advised States that they could create affirmative defenses to monetary penalties subject to certain criteria 1999 Memo Attachment 3-5, JA __. These defenses, if satisfied, would allow sources to avoid monetary penalties in citizen suits, but they would be subject to injunctions for violating the applicable emissions standard. EPA later clarified that the

[3] This issue arose following the 1990 CAA amendments, which allowed citizen suits to seek monetary penalties for the first time. *See NRDC v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014).

1999 Memo applied only to future SIP revisions and "was not intended to affect existing permit terms or conditions." 2001 Memo 2, JA __.

III. THE SIP CALL

The SIP Calls arise out of a 2011 EPA settlement with Sierra Club. Under the consent decree, EPA was required to respond to the organization's petition concerning SIP provisions addressing SSM periods. The petition asked EPA to call SIPs from 38 States and the District of Columbia because, among other reasons, they automatically exempted emissions during SSM periods, they gave the director of the State air pollution control agency discretion to provide exemptions from applicable emission limitations, or they provided affirmative defenses to an alleged violation. 78 Fed. Reg. 12,460, 12,464 (Feb. 22, 2013), JA __. EPA agreed with Sierra Club that automatic exemptions from emission limitations during SSM periods violate the requirement that a SIP contain continuous emission limitations under sections 110(a)(2)(A) and 302(k) of the Act, that director's discretion provisions violate the prohibition on modifying SIPs without EPA approval, and reversing its previous position,[4] that affirmative defenses improperly infringe on the courts' jurisdiction to impose monetary penalties for violations in citizen suits. 80 Fed. Reg. at 33-889-924, JA __. EPA concluded that each type of provision failed "fundamental legal

[4] EPA initially proposed to deny the Petition as to affirmative defenses to monetary penalties. 78 Fed. Reg. at 12,469. EPA reversed course after this Court disapproved such an affirmative defense in an EPA-created technology-based emission standard for certain hazardous air pollutants in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). *See infra* p. 35.

requirements" of the Act, rendering a SIP "substantially inadequate," as required for a SIP call. In the SIP Calls, EPA required States to revise SIPs that, in its judgment, might be construed as containing automatic exemptions, directors' discretion provisions, or affirmative defenses, and also identified other issues as to which EPA had not made a substantial-inadequacy finding.[5] Altogether, EPA called SIPs in 35 States and the District of Columbia (with provisions applicable in 45 statewide and local jurisdictions). 80 Fed. Reg. at 33,846, JA __. Nineteen State Petitioners, along with other petitioners, timely sought review.

SUMMARY OF THE ARGUMENT

In the SIP Call, EPA did not set out to address threats to air quality. The only basis EPA identified for the calls was the SIPs' alleged failure to meet certain legal requirements of the CAA as EPA now interprets it. But the SIP call process is not designed to address any and all perceived shortcomings. Contrary to the plain language of CAA § 110(k)(5), EPA has made no "find[ings]" that support its conclusion that these claimed inadequacies are "substantial." This problem is exemplified by EPA's decision to call SIPs containing affirmative defenses to monetary penalties, which went from EPA's preferred approach to addressing SSM emissions to a substantial inadequacy requiring a SIP call—not because EPA's assessment of the effects of those provisions changed, but because its view of the law

[5] EPA also revised its SSM policy, though it did not determine that aspects of the policy other than those just discussed constituted substantial inadequacies. *See* 80 Fed. Reg. at 33,927-29, 33,976-82, JA __.

did. Still more troubling, EPA interprets its SIP call authority to extend not just to such alleged technical inadequacies, but to potential ones. By reading the requirement to find a substantial inadequacy out of the Act, EPA significantly undermines Congress's cooperative federalism design.

Setting aside EPA's disregard of section 110(k)(5)'s plain text, EPA's decision to call various SIPs based on its conclusion that they contain improper automatic exemptions, director's discretion provisions, and affirmative defenses rests on a combination of impermissible interpretations of both the Act and SIP provisions. These errors fall into four categories. *First*, EPA refused to consider simultaneously operating general-duty requirements that limit emissions during SSM periods just because they were not cross-referenced in the SSM provisions EPA deemed inadequate. *Second*, EPA incorrectly applied its definition of emission limitation to determine that certain SSM provisions did not limit emissions, even though, on their face, those provisions require sources to limit emissions at all times, including SSM periods, to avoid a violation. *Third*, among other errors, EPA incorrectly interpreted provisions that guide State air agencies' exercise of their enforcement discretion to preclude EPA and citizen enforcement, notwithstanding those States' comments pointing out the incorrect interpretation. *Fourth*, EPA erred by asserting that the Act does not permit affirmative defenses, either to violations or just to monetary penalties. In doing so, it impermissibly relied on this Court's decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), to conclude that the Act prevents States from including

affirmative defenses to monetary penalties in their SIPs, notwithstanding that the Act specifically gives States the authority to design an enforcement regime for their SIPs, that *NRDC* explicitly does not address affirmative defenses in SIPs, and that the Fifth Circuit previously specifically approved the affirmative defenses that EPA now claims are impermissible.

Finally, it is unclear whether EPA also purports to call SIPs based on factors beyond those issues that it has determined to constitute substantial inadequacies. To the extent those issues are the basis for the SIP Call, EPA's action is improper.

For these reasons, the SIP Call should be vacated.

STANDING

State Petitioners have standing as States or State agencies required to revise SIPs to comply with EPA's SIP Call. *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004).

STANDARD OF REVIEW

Final agency actions under the Clean Air Act must be vacated when "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." CAA § 307(d)(9)(A); *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008). When considering EPA's action under the CAA, courts must first determine *de novo* whether "the intent of Congress is clear" by "employing traditional tools of statutory construction." *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007). If so, EPA is accorded no deference, because "the court, as well as the agency

must give effect to the unambiguously expressed intent of Congress." *Id.* Only when the statute does not resolve an issue will the Court defer to EPA, provided that the agency's interpretation is reasonable. *Id.*

ARGUMENT

I. EPA HAS NOT PROPERLY FOUND THAT ANY SIP IS SUBSTANTIALLY INADEQUATE.

EPA's most fundamental error was failing to comply with the Act's requirement to "find[]" that a SIP is "substantially inadequate to attain or maintain the relevant national ambient air quality standard . . . or to otherwise comply with any requirement of" the Act before calling a SIP. CAA § 110(k)(5). Specifically, EPA erred by determining that the standard is satisfied whenever EPA interprets any SIP provision as not complying with a legal requirement, regardless of the effects or magnitude of the inadequacy. Congress's requirement of a "find[ing] on the basis of information available to the administrator," *id.* § 110(a)(2)(H)(ii), contemplates that a SIP call will be based on facts, not speculation. Beyond that, EPA extends its authority to call SIPs to provisions that may not even be "inadequate . . . to comply" with CAA requirements, determining that ambiguous provisions, or even provisions it misread, can justify a SIP call. EPA's misinterpretation of its SIP call authority alone requires vacatur and remand for EPA to apply the correct legal standard. *Cty. of L.A. v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999).

1. EPA's first error was to ignore the required factual finding of substantial inadequacy. To be subject to a call, a SIP must not only be "inadequate" to meet the NAAQS or comply with a CAA requirement; it must be "substantially" so—that is, "[c]onsiderable in importance, value, degree, amount, or extent." *Am. Heritage Dictionary of the English Language* 1284 (1981). Although Congress did not precisely define the point at which an inadequacy becomes substantial, it did tell EPA that the substantial-inadequacy determination must result from a "find[ing] on the basis of information available to the Administrator." CAA § 110(a)(2)(H)(ii); *see also id.* § 110(k)(5). By requiring that EPA find substantial inadequacy, Congress directed EPA to review evidence and make a factual determination to justify its SIP call. *Black's Law Dictionary* 707 (9th ed. 2009) (defining "find" as "[t]o determine a fact in dispute by verdict or decision"); *cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983) (administrative finding needed to be based on "substantial evidence"); *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1034 (D.C. Cir. 2001) ("failure to examine the relevant data" rendered EPA rulemaking arbitrary). Moreover, Congress gave EPA the tools to require "[a]ny State" to submit "any . . . information" that EPA requires to assess the "need for revision" of any SIP. CAA § 110(p).

Comparing the SIP call standard to other standards of review in section 110 reinforces this interpretation. When a SIP is submitted for approval in the first instance, EPA must approve it only "if it meets all of the applicable requirements" of

the CAA. *Id.* § 110(k)(3). Similarly, when a State submits a new SIP revision, EPA must disapprove it if it "would interfere with any applicable requirement" of the CAA. *Id.* § 110(*l*). By their plain text, these are not substantial-compliance standards. They are absolute-compliance standards; EPA must approve a SIP or SIP revision only if it meets *all* applicable CAA requirements. Thus, although a SIP may be inadequate based solely on a mismatch between a legal requirement of the Act and the text of the SIP—and therefore not approvable in the first instance under sections 110(k)(3) or 110(*l*)—determining whether it is substantially so involves a factual question, not just a legal one. Rather than respecting the differences between these standards, EPA collapses them, contending that it may call SIPs "whenever the Agency later determines [revision] to be necessary to meet CAA requirements." 80 Fed. Reg. at 33,937. In so doing, EPA alters the cooperative federalism balance that Congress designed.

Instead of the factual inquiry the Act demands, EPA created a category of "fundamental legal requirements" that must be satisfied absolutely to avoid a SIP call. EPA does not explain what separates fundamental requirements that create substantial inadequacies from those non-fundamental ones that do not. Congress found all of the Act's requirements important enough to put in the Act and required EPA to ensure that all new plans and revisions satisfy them all. CAA §§ 110(k)(3), 110(*l*). More significantly, EPA's argument that some requirements are fundamental implicitly concedes that facts about the practical effects of an inadequacy are the only

way to determine if that inadequacy is substantial. EPA justifies this new category based heavily on factual scenarios that could result if these "fundamental legal requirements" are not met. But rather than find those facts, as required, EPA speculated about what those facts might be. It hypothesized that the target SIP provisions would undermine "attainment and maintenance of the NAAQS, protection of PSD increments[,] and improvement of visibility," 80 Fed. Reg. at 33,927, 33,929, JA __, or allow "potentially dramatic adverse impacts inconsistent with the objectives of the CAA," 80 Fed. Reg. 33928, JA __.

Notably, EPA did not cite a single instance in which any State's SSM provisions prevented attainment of the NAAQS, PSD increments, or improved visibility, or caused any other "potentially dramatic" adverse impacts in the SIP Calls. Nor did it cite any predictive studies or models demonstrating that its conclusion rested on anything other than conjecture. This is significant, because SSM rules, by their nature, apply to very limited periods of operation, leading one to expect their impact would be minimal. EPA, of course, knows how to compile a factual record supporting its administrative actions, and it has done so in previous SIP calls.[6] Because EPA's determination rests only on speculation, it cannot constitute a finding. *See Virginia*,

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[6] *See, e.g.*, 76 Fed. Reg. 41424-01 (July 14, 2011) (SIP call in light of NAAQS exceedances); 76 Fed. Reg. 763-01 (Jan. 6, 2011) (proposed SIP call based on modeling); 71 Fed. Reg. 19432-01 (Apr. 14, 2006) (SIP call in light of NAAQS exceedances); 58 Fed. Reg. 41430-01 (Aug. 4, 1993) (SIP call based on predictive modeling anticipating NAAQS exceedances); 53 Fed. Reg. 34500-01 (Sept. 7, 1988) (SIP call in light of NAAQS exceedances).

108 F.3d at 1415 (noting that a finding of substantial inadequacy could not be made "[i]n the absence of applicable modeling," and vacating a SIP call on that basis).

As important as the facts that EPA did not find is the "information available" that EPA simply ignored. *See* § 110(a)(2)(H)(ii). EPA requires States to submit ambient air quality data to EPA quarterly, pursuant to monitoring plans it approves. CAA § 110(a)(2)(B); 40 C.F.R. §§ 51.15, 58.16. In addition, SIPs require stationary sources to continuously monitor emissions, with annual reports to EPA. 40 C.F.R. §§ 51.15, 51.211, 51.214, 51.321. Further, States must demonstrate that submitted SIPs will result in attainment of the NAAQS, which includes consideration of actual source emissions, applicable emission limitations, and any applicable exemptions or alternative limitations. *Id.* §§ 51.15, 51.112. Had EPA considered this information, it is hard to imagine that EPA would have found States' SSM provisions substantially inadequate across the board, or even State by State. For example, Georgia reported to EPA that in 2012, two-thirds of Georgia sources had no emissions exceeding numerical standards, and the average duration of excess emissions during SSM Periods for those that did was just six hours per reporting period. Ga. Comment 2, JA __. South Dakota indicated it fully attains all NAAQS. S.D. Comment 3, JA __. Delaware pointed out that its provision allowing the State to set specific rules for startup and shutdown periods has not caused excess emissions that contribute to its ozone nonattainment problem. Del. Comment 3, JA __. Similarly, Arizona's affirmative defense provision, which applies only if the emissions do not cause a

NAAQS violation and good design and maintenance procedures are followed, had never been invoked since it was created in 2001. Ariz. Comment 1-2, JA __.

EPA's failure to point to any facts concerning adverse effects of the States' SSM provisions is particularly striking in light of the long and widespread experience with the SSM rules EPA has called. Many SIP provisions EPA now considers substantially inadequate have existed for decades. *E.g.*, Fla. Comment 4, JA __ (Florida's SSM provision first approved in 1982); S.D. Comment 3, JA __ (South Dakota's provision first approved in 1975); 54 Fed. Reg. 19,169-01 (May 4, 1989) (approving Kentucky's provision in 1989). If, in fact, any of the dozens of SIPs EPA called were substantially inadequate, one would expect that EPA could marshal some evidence as to the provisions' real-world detrimental effects. Instead, EPA did the opposite, acknowledging that States may permissibly respond to the SIP Call by loosening emission limitations on sources to ensure that increased emissions during SSM periods do not result in violations, paradoxically allowing for *more* air pollution, not less. 80 Fed. Reg. at 33,955, JA __.

EPA's reversal on affirmative defenses perfectly illustrates the irrelevance of factual findings to the SIP Call. In its 1999 Memo, EPA recommended that States address SSM events by giving affirmative defenses to monetary penalties when sources could show that it was impossible to avoid excess emissions and satisfy other conditions. 1999 Memo Attachment 3-6, JA __. The February 2013 NPRM continued to authorize "appropriately drawn" affirmative defenses, albeit with several new

restrictions, 78 Fed. Reg. 12,469-70, 12,478-79, JA __, and one month later, the Fifth Circuit approved EPA's longstanding view, holding that the CAA authorizes States to include affirmative defenses. *See Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013); *accord* 79 Fed. Reg. 55,920, 55,945 (Sept. 17, 2014), JA __.

EPA abruptly shifted course in its September 2014 supplemental notice, concluding that all affirmative defenses constitute substantial inadequacies. 79 Fed. Reg. at 55,929-30, JA __. What changed during this one-and-a-half-year period? Nothing, except this Court's decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), that EPA was not authorized to create affirmative defenses in its hazardous air pollutant standards. 79 Fed. Reg. at 55,929-30, 55,935, 55,945, JA __. But *NRDC* did not address state authority to include affirmative defenses to monetary penalties in SIPs under CAA § 110. *See infra* pp. 35-37. Regardless, EPA has identified no facts that would support "find[ing]" such an inadequacy "substantial," contrary to EPA's prior conclusion that Texas's SIP was appropriately drawn to balance air-quality protection with the reality of SSM periods. Just as before, Texas's affirmative defense applies only during unplanned and unavoidable "upset" periods, provided that such emissions do not "cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution." *Luminant*, 714 F.3d at 854 (quoting Tex. Admin. Code § 101.222(c)(9)).[7]

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[7] *Luminant* and Texas's affirmative defense provision are discussed in greater detail in the Texas Petitioner's brief.

2. EPA's interpretation of its SIP call authority does not stop at actual but trivial inadequacy to meet CAA legal requirements. EPA claims authority to issue a SIP call based on the mere *potential* for an inadequacy—in other words, EPA believes it may issue SIP calls "to address ambiguous SIP provisions that *could* be read by a court in a way that would violate the requirements of the CAA." 80 Fed. Reg. at 33,926, JA __ (emphasis added). If a SIP might or might not contain a provision that is inadequate to comply with the CAA, then EPA has not shown that the SIP is inadequate, much less substantially so. *But see US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1167-68 (10th Cir. 2012) (allowing EPA to call Utah's SIP in light of "potential conflicts" between the SIP and CAA requirements). Still more ambitiously, EPA suggests that the fact that it overlooked applicable limitations during its review of the called SIPs justifies a call. Faced with arguments that it failed to take into account provisions that applied simultaneously with SIP-specific provisions, EPA responded, "If the EPA was unable to ascertain, what, if anything, applied," then "regulated entities, members of and [*sic*] the public, and the courts will have the same problem." 80 Fed. Reg. at 33,943, JA __.

By transforming a standard that would protect any SIP that was not "substantially inadequate" into one that does not require even a genuine inconsistency with the Act, EPA makes the SIP call standard even lower than the standard for its initial review under section 110(k)(3). The CAA's text makes it clear that Congress did not intend such a result.

EPA's interpretation of its SIP call authority to force States to rewrite their SIPs on such a thin basis is particularly puzzling in light of its rejection of Sierra Club's request that EPA not rely on State interpretive letters in the rulemaking process to clarify ambiguous provisions. 80 Fed. Reg. at 33,885, JA __. EPA recognized that "reliance on interpretive letters to address concerns about perceived ambiguity can often be the most efficient and timely way to resolve concerns about the correct meaning of regulatory provisions." 80 Fed. Reg. at 33,885, JA __; *see also Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 588 (5th Cir. 1981) (EPA "should defer to the state's interpretation of the terms of its air pollution control plan when said interpretation is consistent with the Clean Air Act"). The alternative, as EPA recognizes, is to require States to "reinitiate a complete administrative process merely to resolve perceived ambiguity in a provision in a SIP submission." 80 Fed. Reg. at 33,885.

Relying on interpretive letters is particularly important in the SIP context, because the Act does not "specify that air agencies must use specific regulatory terminology, phraseology, or format" in SIP provisions. *Id.* But in pronouncing SIP provisions substantially inadequate, EPA rejected States' explanations of state law and how their SIPs worked, often focusing on word choice. *See, e.g.*, 78 Fed. Reg. at 12,503 (asserting that Fla. Admin. Code § 62-210.700(1) is an exemption, not a limitation, and focusing on the phrase "shall be permitted"). EPA's decision to call SIPs in the face of States' reasonable resolution of any EPA-perceived ambiguities is not the

cooperation that Congress envisioned. By extending its SIP call authority to reach provisions that it views as ambiguous or difficult to read, EPA substitutes its desire that States rewrite provisions that are at most potentially inadequate for Congress's clear instruction that a SIP call requires not just actual, but substantial inadequacy.

3. In requiring EPA to meet a higher standard before calling a SIP, Congress protected States from the administrative burdens of rewriting SIPs every time EPA decides that a SIP could be written better. As EPA acknowledges, developing a SIP involves "time and resource-intensive administrative processes." 80 Fed. Reg. at 33,885, JA __. In addition to months-long State rulemaking procedures, States must also determine just how, as a policy and technical matter, to comply with EPA's new interpretation. This is no small matter. SSM events are not all created equal. Different sources face different challenges, and it may be difficult to develop the kinds of narrowly tailored SSM provisions that EPA apparently envisions, particularly in a cost-effective manner. *See generally* Colo. Comment 5-6, JA __. By forcing States to revise SIPs based on new interpretations of the Act without any finding that noncompliance has substantial effects, EPA undermines the balance of power Congress set in the Act.

Because EPA called SIPs without "find[ing]" any SIP to be "substantially inadequate," the SIP Calls must be vacated and remanded in their entirety.

II. EVEN IF EPA PROPERLY INTERPRETED ITS SIP CALL AUTHORITY, IT MISINTERPRETED THE ACT'S REQUIREMENTS AND SIPS.

EPA's SIP Calls are unlawful even under its expansive view of its SIP call authority. In calling SIPs for containing so-called automatic exemptions, director's discretion provisions, and affirmative defense provisions, EPA incorrectly interpreted both the Act and the SIPs. These errors require vacatur.

A. EPA's Decision to Ignore "General Duty" Requirements Violates the Act.

First, EPA erred by refusing to consider what it calls "general duty" provisions that operate simultaneously with the SSM provisions EPA claims are substantially inadequate. These provisions require sources to control emissions through work-practice standards. For example, Tennessee's SIP requires sources to "take all reasonable measures to keep emissions to a minimum" even during SSM periods. Tenn. Comp. R. & Regs. § 1200-3-20-.02(1). Moreover, emissions failures constitute violations if they exceed otherwise-applicable limits and result from "poor maintenance, careless operation or any other preventable upset condition or preventable equipment breakdown." *Id.*[8] General-duty provisions like Tennessee's are

[8] Similarly, while South Dakota's SIP excepts from its visible emissions ("opacity") restrictions for brief periods of SSM and soot blowing, and malfunctions. S.D. Admin. R. § 74:36:12:02(3), other rules in the SIP require sources to be in compliance with all criteria pollutant emission limitations or restrictions at all times, except where federal regulations provide exceptions. In its 40-plus year existence, South Dakota's visible emission exception has not interfered with meeting or

plainly "requirement[s] relating to the operation or maintenance of a source" that, in conjunction with other provisions of the SIP, continuously limit emissions, albeit "without necessarily applying a single standard." *Sierra Club*, 551 F.3d at 1027.

EPA claims that general-duty provisions cannot be considered part of an emission limitation because they "are often located in different parts of the SIP and often not cross-referenced or otherwise identified as part of the putative continuously applicable emission limitation." 80 Fed. Reg. at 33,903, JA __. But EPA identifies no statutory basis for requiring Tennessee or any other State to cross-reference all applicable requirements that form a continuous emission limitation or collect them in any other manner EPA prefers. On the contrary, it acknowledges elsewhere that the Act specifies no "specific regulatory terminology, phraseology, or format." 80 Fed. Reg. at 33, 885, JA __. Because EPA can point to nothing in the Act that requires States to include all facets of a limitation in the same "part" of the SIP, or to cross-reference all applicable provisions, its cannot dictate to States that their SIPs be worded or structured in a particular manner. *See Texas v. EPA*, 690 F.3d 670, 679 (5th Cir. 2012) (noting that a "state's 'broad responsibility regarding the means' to achieve better air quality" includes the ability to choose "its own sentence structure"). Nothing in the Act permits EPA to ignore general-duty provisions.

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maintaining compliance with the NAAQS., and the State is in attainment for all of the NAAQS. *See* S.D. Comment, JA __.

B. EPA Incorrectly Interpreted SIPs As Containing Automatic Exemptions During SSM Periods.

The first category EPA faults is so-called "automatic exemptions" from otherwise-applicable requirements.[9] Assuming that merely containing a provision that provides a limited automatic exemption renders a SIP "substantially inadequate," *but see supra* pp. 12-22, EPA errs both in its interpretation of the CAA and its reading of the SIPs. In rejecting comments that the provisions are "enforceable emission limitations" under CAA § 110(a)(2)(A), EPA has ignored that the provisions set enforceable requirements, which is all the Act requires.

Under the CAA, an emission limitation is any "requirement" that "limits the quantity, rate, or concentration of emissions . . . on a continuous basis." CAA § 302(k). The requirement need not be numerical; it includes any "requirement relating to the operation or maintenance of a source" and "any design, equipment, work practice or operational standard." *Id.* This "broad phrase" means that an emission limitation can "'assure continuous emission reduction' without necessarily continuously applying a single standard." *Sierra Club*, 551 F.3d at 1027 (quoting CAA

[9] Eleven State Petitioners' SIPs were called on this basis. *See* 80 Fed. Reg. at 33,960 (Delaware), 33,961-62 (West Virginia), 33,962 (Florida), 33,962-63 (Georgia), 33,964 (North Carolina and South Carolina), 33,966-67 (Ohio), 33,967 (Arkansas), 33,967-68 (Louisiana), 33,969 (Kansas), 33,971 (South Dakota). Delaware's SIP was not called for malfunction provisions, and Delaware does not join arguments concerning malfunction periods.

§ 302(k)).[10] All Congress sought to do in requiring continuity was "exclude intermittent control technologies from the definition of emission limitations." *Id.*

EPA claims to share this understanding. In the SIP Calls, it "wishe[d] to be very clear" that emission limitations "may be composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements." 80 Fed. Reg. at 33,889, JA __. Specifically, EPA contemplates that SIPs "may include alternative emission limitations" for SSM periods, substituting for "otherwise applicable emission limitations." *Id.* at 33,913, JA __. Moreover, EPA recognizes that States have "considerable discretion in how they elect to structure or word their state regulations" to provide enforceable emission limitations. *Id.* at 33,886. In the SIP Calls, however, EPA failed to apply this understanding, and instead called SIPs based on formal requirements for SIP drafting invented out of whole cloth.

Georgia's SIP well illustrates the problems with EPA's approach. EPA claims that Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)7 provides an automatic exemption during SSM periods. 80 Fed. Reg. at 33,963, JA __. EPA ignores that Rule 391-3-1.02(2)(a)7 itself requires sources to use "best operational practices to minimize emissions," and "minimize[]" the duration of excess emissions to avoid a violation, and it specifically does not allow excess emissions due to "poor maintenance, poor operation, or any other equipment or process failure which may reasonably be

[10] As the Industry Petitioners' brief explains, EPA has incorrectly interpreted the emissions limitation requirement of continuity. As explained here, even if EPA's interpretation were correct, it has incorrectly applied it to SIPs.

prevented." Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)7. The provision is an "emission limitation" because it is a "requirement relating to the operation . . . of a source" that "assure[s] continuous emission reduction," CAA § 302(k)—i.e., a requirement to use "best operational practices to minimize emissions," even during SSM periods.[11]

EPA focuses on form, not substance. It faults provisions like Georgia's for not being independently enforceable. According to EPA, if the duties in Rule 391-3-1.02(2)(a)7 "were independent parts of an emission limitation (rather than merely preconditions for an exemption), then one would expect that periods of time could exist when the source was liable for violating those general duties rather than the default emission limitation." *See* 80 Fed. Reg. at 33,904, JA __. In other words, the problem appears to be that when EPA or someone else seeks to assert a violation, the plaintiff will claim the default limitation has been violated, not Rule 391-3-1.02(2)(a)7. What EPA does *not* assert is that Georgia has no "requirement" that "assures continuous emission reduction" during SSM periods. *See* CAA § 302(k). Although Rule 391-3-1.02(2)(a)7 provides that "excess emissions shall be allowed" if the provision's conditions are met, failing to meet those conditions means the source is subject to penalties for violating the otherwise-applicable limitation. As with EPA's

[11] Moreover, like many other SIPs, Georgia's SIP imposes duties to avoid causing NAAQS violations, Ga. Comp. R. & Regs. § 391-3-1.02(4)(a); not to construct or operate a source in a manner that violates permit restrictions, PSD requirements or applicable increments, *id.* § 391-3-1.02(1)(c); and to report certain emissions due to malfunctions or breakdowns at major sources, facilitating enforcement *id.* § 391-3-1.02(6)(b)(1)(iv); *see also supra* pp. 22-23 (explaining why EPA's failure to consider general duties requires remand).

rejection of general duty provisions, EPA's inadequacy determination for so-called "automatic exemptions" improperly rests on word choice, not the substance of what the SIPs require.

EPA's treatment of Georgia is not unique. Florida similarly requires "best operational practices to minimize emissions [to be] adhered to" during SSM periods, requires that such periods constitute no more than two hours of any twenty-four hour period, and prohibits emissions resulting from "poor maintenance, poor operation, or any other equipment or process failure which may reasonably be prevented." Fla. Admin Code § 62-210.700.[12] Similarly, Delaware sources are not in violation when "emissions from [a source] during start-up and shutdown are governed by an operation permit,"*e.g.*, 7 Del. Admin. Code 1104, § 1.5. Arkansas provides an alternative limitation when increased emissions result from a "sudden and unavoidable breakdown, malfunction or upset of process or emission control equipment, or sudden and unavoidable upset of operation," provided that the increase is "not the result of negligence." Ark. Code Reg. § 19.1004(H). West Virginia requires that sources "[a]t all times, including periods of start-ups, shutdowns and malfunctions," be operated "in a manner consistent with good air pollution control practice for minimizing emissions," W. Va. Code St. R. § 45-2-9.2, and the same

[12] As EPA itself recognized when it approved Florida's SSM provision, "[i]n effect, the upset and startup rule revision recognizes the occurrence of unavoidable malfunctions and provides a definite control rule to deal with them." 47 Fed. Reg. 3,111, 3,111 (Jan 2, 1982).

standard applies to maintenance periods, *id.* § 45-7-10.3. EPA repeatedly ignores these limitations with no statutory basis.

Because EPA's decision to call SIPs for containing automatic exemptions lacks any basis in the Act's legal requirements, vacatur is required.

C. EPA Incorrectly Determined That Director's Discretion Provisions Violate the Act.

In the SIP Call, EPA directed many States to revise what it terms "director's discretion provisions."[13] The U.S. Court of Appeals for the Fifth Circuit has held that director's discretion provisions comply with the CAA. *See Texas v. EPA*, 690 F.3d 670, 682-84 (5th Cir. 2012); *Luminant Generation Co. v. EPA*, 675 F.3d 917, 930-32 (5th Cir. 2012). Because EPA has yet again failed to show that such provisions are inconsistent with the CAA, this Court should do so as well. EPA's analysis of these provisions contains three kinds of error.

First, EPA mischaracterized provisions as giving States' air pollution control agency directors "unbounded" discretion to grant "complete exemptions" from all SIP emission limitations. 80 Fed. Reg. 33,917, JA __. In reality, these provisions allow exemptions from numerical emission limitations only if the source has complied with alternative emission standards. In other words, as with its automatic exemption

[13] Eleven State Petitioners' SIPs were called on this basis. *See* 80 Fed. Reg. at 33,960 (Delaware), 33,961-62 (West Virginia), 33,962 (Alabama), 33,963 (Kentucky), 33,964 (North Carolina), 33,965 (Tennessee), 33,966-67 (Ohio), 33,967-68 (Louisiana), 33,968 (Oklahoma), 33,969 (Kansas and Missouri), JA __.

determinations, *supra* pp. 25-26, EPA has failed to recognize that these exemptions themselves contain non-numerical limitations. Kentucky's SIP illustrates the problem. Kentucky's SIP provides that "[e]missions which, due to shutdown or malfunctions, temporarily exceed" otherwise applicable emission standards "shall be deemed in violation of such standards unless" the source shows—and the State enforcement agency's director determines—that the source has complied with several work-practice and operational standards. 401 Ky. Admin. Reg. 50:055 § 1(1). Among other things, the source must establish that "[a]ll reasonable steps were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the standards, including the use of off-shift labor and overtime if necessary," "all reasonable steps were taken to minimize the emissions and their effect on air quality resulting from the occurrence," and the SSM event "was not caused entirely or in part by poor maintenance, careless operation or any other preventable upset conditions or equipment breakdown." *Id.* § 1(4). *See also, e.g.*, W. Va. Comment 11-12 (explaining a similar error with respect to West Virginia's SIP).

Second, EPA also argued that director's discretion provisions empower State enforcement agencies to unilaterally revise their SIPs without undergoing the procedure that the CAA requires for SIP revisions. *See* 80 Fed. Reg. at 33,918-19. Like its continuity objection, this argument rests on a misunderstanding of the SIPs. It is true that states generally may not suspend or otherwise modify SIP requirements with respect to any stationary source, *see* CAA § 110(i), and they may revise their SIPs only

through the procedure established in the CAA, *see id.* § 110(*l*). But the director's exercise of discretion according to established criteria does not revise a SIP or suspend or otherwise modify a SIP's provisions—it merely *applies* them.

EPA's assertion to the contrary defies common sense. Under EPA's reasoning, EPA "revises" the CAA whenever it exercises discretion that the Act confers to choose between a default and alternative manner of regulating emissions. For example, the CAA tasks EPA with the development of "standards of performance" for new stationary sources, as well as "emission standards" for control of hazardous air pollutants. CAA §§ 111(b)(1)(B), 112(d)(1). However, "if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance" or an emission standard, a "design, equipment, work practice, or operational standard" may be appropriate. *Id.* § 111(h)(1); *see also id.* § 112(h)(1).[14] EPA surely would not contend that its exercise of discretion to promulgate alternative standards according to criteria outlined in the CAA is an amendment of the CAA, rather than just an application of it. Why, then, should a state director's exercise of discretion to apply an alternative standard according to criteria established in a SIP be treated differently? This Court should reject EPA's unfounded characterization of director's discretion provisions.

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[14] The CAA also gives EPA discretion to exempt sources from certain CAA requirements altogether. *See, e.g.*, CAA § 361a(a) (exemption of source categories from permitting requirements).

Third, EPA offered enforcement-related objections. Specifically, EPA asserted that certain director's discretion provisions prevent EPA and private citizens from enforcing emission limitations. *See* CAA §§ 113, 304. This claim suffers from a variety of errors, differing from State to State.

To start, at least one of the provisions does not involve enforcement discretion at all. Ohio Admin. Code 3745-15-06(A)(3) merely allows the State to approve requests to continue source operations while conducting maintenance of pollution control equipment—it plainly does not allow exceeding applicable emission limitations. Ohio Comment 3-4, JA __. Indeed, Ohio has always interpreted this provision not to exempt emissions from applicable limitations or bar EPA or citizens from enforcing violations. In keeping with this understanding, Ohio instructs sources when it approves maintenance requests that all excess emissions are violations, and that its approval does not excuse them. *Id.* EPA declared the provision deficient anyway, complaining only that it was not as clearly worded as EPA would like: "The state official's grant of permission to continue to operate during the period of maintenance *could be* interpreted to excuse excess emissions . . . and *could* thus be read to preclude enforcement by the EPA or citizens." Comment Response 70, JA __ (emphasis added). *But see supra* pp. 19-21 (explaining that potential inadequacy is not substantial inadequacy). Because the plain language of Ohio Admin. Code 3745-15-06(A)(3) does not permit EPA's strained interpretation, the interpretation is arbitrary and capricious.

Furthermore, even where a director's discretion provision does relate to exceedances of numerical emission limitations, EPA acknowledges that such provisions are proper if they merely guide the State's exercise of its own enforcement. 80 Fed. Reg. at 33,919, JA __. For example, North Carolina's SIP provides that excess SSM emissions "are considered a violation of the appropriate rule" unless the source demonstrates compliance with alternative standards to the director. 15A N.C. Admin. Code 2D0535(c), (g). As North Carolina explained, the provision governs only the director's exercise of enforcement discretion: "Nothing in the existing SIP provisions prohibits or restricts in any way the ability of the EPA and/or a citizen to file an action in federal court seeking enforcement of the SIP provisions," including "the state developed emission standards . . . and general and specific SSM provisions." N.C. Comment 3, JA __. Similarly, EPA called Tennessee SIP provisions after concluding that they "could reasonably be construed" to preclude EPA and citizen enforcement, notwithstanding that Tennessee explained that the provisions guide only the State's own enforcement discretion. *See* Comment Response 64, JA __; *see also* Tenn. Comp. R. & Regs. § 1200-03-20-.07 (setting out procedure for responding to an administrative "notice of violation," including factors similar to those in the 1999 Memo).[15] EPA's decision to call these SIP provisions unlawfully exceeds its SIP call authority by conflating potential inadequacy with substantial inadequacy and arbitrarily

[15] Moreover, sources must always avoid emissions that cause NAAQS exceedances, and the State remains free to pursue violations of any other SIP provision. Tenn. Comp. R. & Regs. § 1200-03-20-.09.

refusing to defer to State constructions of their SIPs that would render them consistent with EPA's understanding of the Act's requirements. *See supra* pp. 19-21.

Finally, regardless of their scope, director's discretion provisions do not immunize SSM emissions from enforcement under separate general-duty standards in a SIP, or from enforcement of standards contained in operating permits. EPA and citizens always may seek enforcement of a SIP's generally-applicable design, equipment, work practice, or operational standards. *E.g.*, 401 Ky. Admin. Reg. 50:055, § 5 (categorically prohibiting "air pollution" as defined by statute). They also may seek enforcement of standards contained in operating permits issued pursuant to the SIP. *See* 40 C.F.R. § 70.6(a)(1) (requiring that operating permits contain "[e]missions limitations and standards"); *id.* § 70.6(b) (providing for enforcement of operating permits' terms and conditions by EPA and citizens). Furthermore, EPA and citizens may bring suit under SIP provisions that allow for direct enforcement of the NAAQS. *E.g.* 7 Del. Admin. Code 1103-2.0; La. Admin. Code tit. 33, pt. III, § 929; 15A N.C. Admin. Code 02D.0501(c). Because all of these provisions remain fully enforceable by EPA and others, and because nothing in the CAA requires that every emission limitation be applicable (much less enforceable) at all times, these provisions satisfy the CAA's requirements that SIPs provide for enforcement of the NAAQS, include enforceable emission limitations, and include a program that provides for enforcement of those limitations. *See* CAA §§ 110(a)(1), 110(a)(2)(A), 110(a)(2)(C); *cf.*

Sierra Club, 551 F.3d at 1027 (recognizing that the CAA does not require continuous application of a single standard).

For these reasons, the SIP Calls are unlawful as to director's discretion provisions.

D. The Act Permits States to Include Affirmative Defenses in SIPs.

EPA also called SIPs that contained affirmative defenses.[16] These SIPs fall into two categories: (1) SIPs that offer defenses to violations subject to certain criteria and (2) SIPs that offer defenses to monetary penalties only, allowing injunctive relief for the violation, subject to certain criteria. Both fall within States' power to determine the "manner in which the [NAAQS] will be achieved," which includes designing a "program to provide for the enforcement" of emission limitations. CAA §§ 107(a), 110(a)(2)(C). Calling both was error.

First, SIPs that offer defenses to violations are permissible for the same reasons that so-called "automatic exemptions" are. If there are simultaneously operating general duties or a defense itself contains emission limitations, then the provisions would be consistent with EPA's continuous-limitation requirement. *See supra* pp. 22-23, 25-27. A State's decision to allocate the burden of proof to the operator to

[16] Seven State Petitioners' SIPs were called on this basis. *See* 80 Fed. Reg. at 33,962 (West Virginia), 33,962-63 (Georgia), 33,963-64 (Mississippi), 33,964 (South Carolina), 33,967 (Arkansas), 33,968-69 (Texas), 33,971-72 (Arizona), JA__. Delaware's SIP was not called on this basis, and Delaware does not join this argument.

demonstrate a non-violation by meeting established criteria is a permissible State decision about how to design an enforcement program, CAA § 110(a)(2)(C), and EPA has identified nothing in the Act that specifically prohibits this regime. As explained below, this Court's decision in *NRDC v. EPA* concerns only EPA's authority to include an affirmative defense in a nationally-applicable emission standard; it does not impinge on States' ability to define a violation in the first instance or to design an enforcement program for SIP limits.

Second, EPA called SIPs that contained affirmative defenses to monetary penalties, notwithstanding the Fifth Circuit's prior holding that States have the discretion to include such provisions in their SIPs. *Luminant Generation Co. v. EPA*, 714 F.3d 841, 853 n.9 (5th Cir. 2013) (holding that affirmative defenses to monetary penalties do "not negate the district court's jurisdiction to assess civil penalties" under section 113(e)(1)). These affirmative defenses differ from the first category, because they treat the emissions as a violation subject to injunction, but if certain criteria are met, the source is protected from monetary penalties. EPA's change of policy is based on this Court's decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). *NRDC* holds that EPA does not have the authority to provide an affirmative defense to monetary penalties for violations of hazardous air pollutant standards promulgated under CAA § 112, because the Act assigns courts the jurisdiction to determine whether monetary penalties are appropriate once a violation is found. *Id.* at 1063 (citing CAA §§ 113(e)(1), 304(a)). *NRDC* did not address whether SIPs could contain

such affirmative defenses, and the case explicitly acknowledged the Fifth Circuit's holding in *Luminant* that it was permissible for States to include affirmative defenses in SIPs. *Id.* at 1064 n.2. Notably, the *NRDC* court did not see anything in *Luminant* that required either distinction or disagreement; rather, it treated the case as addressing a fundamentally different question, and in fact, it is.

EPA's argument in *NRDC* failed not just because of sections 113(e)(1) and 304(a), but because EPA failed to identify any textual authority to create an affirmative defense. It could only identify language in CAA § 301(a)(1) allowing it to "'prescribe such regulations as are necessary to carry out [its] functions under' the Act," a general assignment of authority that was not sufficiently specific to allow EPA to create affirmative defenses. *NRDC*, 749 F.3d at 1063. Congress, however, specifically tasked States with providing "a program to provide for the enforcement of" emission limitations. CAA § 110(a)(2)(C). Allowing States to create defenses to monetary penalties is consistent with the text of both section 113(e)(1) and section 304(a), which authorizes citizen suits. Section 304(a) allows a court to "apply any appropriate civil penalties" in a citizen suit, and section 113(e)(1) speaks to how a court should "determin[e] the amount of any penalty to be assessed." Neither provision speaks to how to determine whether monetary penalties are "appropriate," as distinct from the "amount" of penalties if a monetary penalty is appropriate, or more specifically, whether a State can determine that monetary penalties are not appropriate for certain SIP violations. Accordingly, contrary to EPA's interpretation

of *NRDC*, including affirmative defenses in SIPs "does not negate the district court's jurisdiction to assess civil penalties" in an enforcement action. *Luminant*, 714 F.3d at 853 n.9.

III. EPA CANNOT CALL SIPS FOR REASONS IT DID NOT CLAIM CONSTITUTED SUBSTANTIAL INADEQUACIES.

The SIP Call must also be vacated and remanded to the extent that EPA calls SIPs based on factors other than those on which it made findings of substantial inadequacy. It is unclear whether or to what extent EPA actually did this, but EPA should not be allowed to urge additional bases for finding substantial inadequacy here. *See Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015) (court cannot affirm administrative action by substituting a "more adequate or proper basis"). Moreover, to the extent those factors are without basis in CAA requirements, they are unlawful. *Texas*, 690 F.3d at 682 (EPA cannot insist on "a standard that the CAA does not empower the EPA to enforce"). For example, EPA claims that even if Fla. Admin. Code § 62-210.700 were an alternative emission limitation, it is nonetheless problematic because it does "not apply only to 'specific, narrowly-defined source categories using specific control strategies.'" 78 Fed. Reg. at 12,503, JA __ (quoting EPA's revised SSM policy); *see also* 80 Fed. Reg. at 33,961 (asserting a similar flaw in West Virginia's SIP). But EPA never determined that absolute compliance with its revised SSM policy was required to avoid substantial inadequacy—only that automatic exemptions, affirmative defenses and the like created substantial

inadequacies. *See* 80 Fed. Reg. at 33,927-29, JA __ (explaining EPA's substantial inadequacy determinations). Moreover, finding substantial inadequacy would have been arbitrary, as EPA simultaneously decided to "remov[e] the word 'must' from the criteria" for properly designed alternative emission limitations, as the criteria were merely "recommendations to states." 80 Fed. Reg. 33,913, JA __; *see also id.* ("A state *may* choose to consider these criteria in developing such a SIP provision." (emphasis added)).

To the extent EPA relied on such considerations in the SIP Calls, EPA's action must be vacated.

CONCLUSION

The SIP Calls should be vacated as to the State Petitioners' SIPs.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I certify that the foregoing brief contains 9,433 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

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CERTIFICATE OF SERVICE

I certify that, on this 16th day of March, 2016, a copy of the foregoing Opening Brief of State Petitioners was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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