COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY REGARDING STATE IMPLEMENTATION PLANS: RESPONSE TO PETITION FOR RULEMAKING; FINDINGS OF SUBSTANTIAL INADEQUACY; AND SIP CALLS TO AMEND PROVISIONS APPLYING TO EXCESS EMISSIONS DURING PERIODS OF STARTUP, SHUTDOWN AND MALFUNCTION; SUPPLEMENTAL PROPOSAL TO ADDRESS AFFIRMATIVE DEFENSE PROVISIONS IN STATES INCLUDED IN THE PETITION FOR RULEMAKING AND IN ADDITIONAL STATES

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I. SUMMARY OF PROPOSED ACTION

On September 17, 2014, the United States Environmental Protection Agency (EPA) published its *Supplemental Proposal to Address Affirmative Defense Provisions in States,*[1] (Supplemental Proposal), expanding the scope of its original Startup, Shutdown, and Malfunction (SSM) SIP Call from 2013.[2] This proposal stems from EPA's interpretation of the D.C. Circuit Court's opinion issued earlier this year, *NRDC v. EPA*,[3] in the Portland Cement National Emission Standard for Hazardous Air Pollutant (NESHAP) challenge that found that the Sections 113 and 304 of the federal Clean Air Act [FCAA][4] do not allow EPA to establish an affirmative defense for penalties that would be binding upon a federal court for violation of this NESHAP. EPA states in its Supplemental Proposal that "the affirmative defense provision at issue in the *NRDC v. EPA* case was essentially equivalent to the type of provision, both conceptually and in terms of specific regulatory language, which the EPA would previously have considered consistent with FCAA requirements for affirmative defense provisions for malfunction events in SIPs."[5]

Therefore, EPA is proposing to now rescind its original affirmative defense policy for SIP violations and establish a new policy to ensure that state rules cannot limit or bar federal court action (including assessment of penalties) for EPA and citizen enforcement cases.

This Supplemental Proposal adds Texas to the SSM SIP Call by proposing to find that the SIP-approved Texas rule, 30 Tex. Admin. Code § 101.222(b) – (e), "impermissibly purport[s] to alter

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[1] 79 *Fed. Reg.* 55920 (September 17, 2014).
[2] 78 *Fed. Reg.* 12459 (February 22, 2013).
[3] *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014).
[4] Citations to the federal Clean Air Act, 42 U.S.C. § 7410, et seq., in these comments are to sections of the Act rather than to the U.S. Code for ease of reading, and use the acronym "FCAA" to distinguish it from the Texas Clean Air Act (TCAA).
[5] 79 *Fed. Reg.* 55920, 55929 (September 17, 2014).

or eliminate the jurisdiction of federal courts to assess penalties for violation of SIP emission limits."[6]

II. BACKGROUND

The history of the Texas Commission on Environmental Quality (TCEQ, or commission) and its predecessor agencies' rules regarding excess emissions has evolved over time, much of it in response to and working with EPA to achieve a SIP that appropriately addresses excess emissions and opacity due to emissions events[7] and unplanned maintenance, startup and shutdown (MSS) activities.[8] This regulatory regime has evolved since 1972,[9] with each iteration bringing a tightening of requirements. This history demonstrates Texas' efforts to reasonably address these emissions in a way that considers air quality, as well as technical issues and the actions of the owner or operator to minimize emissions, culminating in an approved SIP which EPA now proposes to find inadequate without adequate legal basis for doing so.

A. TCEQ's Excess Emissions Rules History

The tracking of unauthorized emissions from malfunctions as a part of Texas' control strategy began with Texas' first SIP in 1972, which included the requirement that "major upsets" and

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[6] *Id.* at 55945.

[7] "*Emissions event*" is defined in 30 Tex. Admin. Code § 101.1(28) as any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity. "*Upset event*" is defined in 30 Tex. Admin. Code § 101.1(110) as an unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under §101.211 of this title ... but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

[8] "*Unplanned maintenance, startup and shutdown activity*" is defined in 30 Tex. Admin. Code § 101.1(109) as activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is: (A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or (B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

[9] 37 *Fed. Reg.* 10841 (May 31, 1972).

planned MSS be reported.[10] The rules also provided that those emissions may not be required to meet the emission levels.[11] In 1991, the upset rule was amended to require the reporting of the date, time and cause of the upset; the equipment involved; and, when requested by the executive director, a technical analysis. Similarly, the maintenance reporting rule was amended to require information about how emissions will be minimized during the maintenance event.

In 1997, the original reporting requirements were replaced with the recording / reporting scheme. This updated scheme was developed by considering the reporting requirements found in other state and federal regulations while also considering how to enhance compliance and best utilize agency resources. This resulted in the commission establishing the "reportable quantity" (RQ).[12]

When the RQ was developed, the rulemaking made use of the same reporting tools as the TCEQ's spill prevention and control rules,[13] which coordinate with the reporting requirements found in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[14] and the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA),[15] and the related regulations implementing these Acts. The reporting requirements under CERCLA, EPCRA, and the spill rules are based on RQs, and require the reporting of any release which equals or exceeds an RQ. The adopted rules for reporting upsets[16] therefore

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[10] Rules 7 and 8, Texas Air Control Board, which can be viewed at: (http://www.tceq.texas.gov/assets/public/implementation/air/sip/sipdocs/1972-SIP/1972_sip_section_xiv.pdf). This initial specific requirement of reporting major upsets was acknowledged by the Fifth Circuit in its opinion upholding EPA's approval of TCEQ's affirmative defense rules in § 101.222(b) – (e). *Luminant Generation Co. LLC et al. v. EPA*, 714 F.3d 841, 847 (5th Cir. 2013).

[11] Rules 12.1 and 12.2, Texas Air Control Board, which can be viewed at: (http://www.tceq.texas.gov/assets/public/implementation/air/sip/sipdocs/1972-SIP/1972_sip_section_xiv.pdf).

[12] 30 Tex. Admin. Code § 101.1 (1997), now 30 Tex. Admin. Code § 101.1 (89).

[13] 30 Tex. Admin. Code Chapter 327.

[14] 42 U.S.C. §§ 9601-9675.

[15] 42 U.S.C. §§ 1001-11050.

[16] This 1997 rulemaking adopted a definition for "upset" as "an unscheduled occurrence or excursion of a process or operation that results in an unauthorized emission of air contaminants."

promoted consistent reporting for state and federal programs. In addition, RQs were established for several air contaminants significant to Texas industries.

Owners and operators whose facilities had emissions from upsets (malfunctions) were required to maintain records of those emissions, and emissions that exceeded an RQ would have to be reported to the TCEQ within 24 hours of discovery of the event.[17] The TCEQ used the reported information to organize potential monitoring of long duration events, provide technical assistance to emergency personnel, and inform the public. In addition, the reported emissions are used to evaluate trends, provide an enforcement perspective, and, since 2003, provide an annual report to the Texas Legislature.

For TCEQ, the recordkeeping requirements replaced the need for reporting of all events and the RQs define what emissions must be reported immediately. The RQs are not intended to represent a judgment as to the specific degree of hazard associated with certain releases, but rather function as a mechanism by which the regulated community will know when to notify the commission of unauthorized emissions from upsets and planned MSS. Adoption of these rules reduced the number of reports received, promoted consistency in reporting and the reporting of more meaningful information for the agency to use in decision-making. It also ensured that valuable facility operation information will be on-site and available during inspections.[18]

In response to EPA concerns, the TCEQ amended its rules in 2000[19] to require an owner or operator to: (a) report the cause of the upset or the type of activity and the reason for MSS if known at the time of notification; (b) submit final records of all upset or maintenance events at or above an RQ no later than two weeks after the end of the event; and (c) report the event as an upset if MSS-related emissions subsequently equaled or exceeded an RQ. The rulemaking also

[17] 30 Tex. Admin. Code §§ 101.6 and 101.7 (1997).
[18] 22 *Tex. Reg.* 7040 (July 29, 1997).
[19] 25 *Tex. Reg.* 6727 (July 14, 2000).

added criteria that an owner or operator of a source must demonstrate that unauthorized emissions from upsets and maintenance were unavoidable, and clearly placed the burden of proof on the owner or operator to demonstrate that unauthorized emissions should be exempt. Later that year, EPA approved this rulemaking as a revision to the Texas SIP.[20]

In 2001, the Texas Legislature amended the Texas Clean Air Act (TCAA) by adding the new term "emissions events," the concepts of excessive and chronic emissions events, and an electronic reporting requirement.[21] The TCEQ implemented these changes by rulemaking in 2002; these changes were not intended to change the intent of the rules previously approved by EPA. The electronic reporting of the RQs allowed the public to have access to this information, once finalized by the owner or operator, as quickly as reported to the agency. In addition, the Legislature provided that the TCEQ may establish by rule an affirmative defense to a commission enforcement action if the emissions event meets criteria defined in commission rule, and those criteria must meet, at a minimum, certain statutorily enumerated criteria.[22] Those criteria for commission consideration are: the frequency of the facility's emissions events; the cause of the emissions event; the quantity and impact on human health or the environment of the emissions event; the duration of the emissions event; the percentage of a facility's total annual operating hours during which emissions events occur; and the need for MSS activities. [23]

As part of the 2002 rulemaking, EPA's comments acknowledged that excess emissions may be caused by circumstances entirely beyond the control of the owner or operator, that the imposition of penalties in these situations may not be appropriate, and that the commission may exercise enforcement discretion in such cases and provide in its rules for an affirmative defense to enforcement actions for civil penalties if the owner or operator can demonstrate that certain

[20] 65 *Fed. Reg.* 70792 (November 28, 2000).
[21] Tex. Health & Safety Code §§ 382.0215 and 382.0216.
[22] Tex. Health & Safety Code § 382.0216(f).
[23] Tex. Health & Safety Code § 382.0216(b).

criteria have been met. EPA recommended that the commission revise the rule to provide an affirmative defense for penalties in § 101.222(b) for claims for civil penalties in enforcement actions for noncompliance with authorized emission limitations, using the same demonstration criteria. However, rather than adopt an affirmative defense in that rulemaking, the TCEQ retained criteria in §101.222(b) and (c) for exemptions of emissions events and MSS activities, stating that its application of the rule operates much like an affirmative defense in enforcement actions. EPA did not approve this rulemaking as a revision to the SIP.

However, in 2003 the word "exempt" was removed and an affirmative defense was added to the rules in a rulemaking and SIP revision performed to satisfy a Notice of Deficiency from EPA for the TCEQ's Federal Operating Permit Program.[24] EPA granted limited approval[25] of the revisions adopted in 2002 and 2003, stating that although the rules improved and strengthened the SIP and were largely consistent with the FCAA only limited approval was appropriate in order to ensure national SIP consistency with EPA's interpretation of the FCAA and policy on excess emissions during SSM activities. Due to an expiration clause in TCEQ rules, this approval was effective for only for a short period of time. [26]

TCEQ conducted its most recent rulemaking in 2005.[27] Among other things, this rulemaking more closely incorporated EPA's policy[28] regarding authorization of routine maintenance, and the criteria for unauthorized emissions from unplanned MSS activities[29] and malfunctions

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[24] 29 *Tex. Reg.* 118 (January 2, 2004).
[25] 70 *Fed. Reg.* 16129 (March 30, 2005); *see also* 70 *Fed. Reg.* 16134.
[26] When the commission amended 30 Tex. Admin. Code §§ 101.221 – 101.223 in December 2003, it placed an expiration date of June 30, 2005 in these sections. On June 3, 2005, the commission extended the expiration date to June 30, 2006, unless the commission submitted a revised version of these sections to the EPA for review and approval into the SIP. Amendments to these rules were subsequently adopted on December 14, 2005 and were submitted to EPA in early 2006. *See also* 75 *Fed. Reg.* at 68997 (November 10, 2010).
[27] 30 *Tex. Reg.* 8884 (December 30, 2005).
[28] EPA's policy regarding use of an affirmative defense for certain unauthorized emissions is documented in several memos which are listed on page 68992 of the TCEQ SIP approval (75 *Fed. Reg.* 68989 (November 10, 2010)).
[29] Because the TCAA defines "unscheduled" MSS activities different from EPA , the commission adopted the concepts of "unplanned" and "planned" MSS.

known as upsets in TCEQ's rules[30]). During this rulemaking, there were extensive negotiations between TCEQ, EPA and a representative of environmental groups regarding the affirmative defense criteria in §§ 101.222(b) – (e), resulting in numerous, stringent criteria that addressed both EPA policy and concerns of the commission. In addition, as part of this rulemaking, EPA commented, and TCEQ agreed, that assertion of an affirmative defense to an enforcement action does not relieve the source from liability for a violation of the SIP, but instead allows the source in a judicial or administrative enforcement action to avoid civil penalties when certain criteria are met.[31] Further, the TCEQ's rules include a prerequisite not found in EPA's policy memos regarding the affirmative defense. Specifically, an affirmative defense is not available unless the owner or operator fully complies with the applicable reporting requirements in TCEQ rules.[32]

B. EPA's SIP Approval and Defense of TCEQ's Affirmative Defense Rules

1. EPA approved TCEQ's Affirmative Defense for Excess Emissions from Emissions Events and Unplanned MSS

EPA did not take final action on the 2005 SIP revision until November 10, 2010.[33] Among other rules, EPA approved §§ 101.222(b) – (e), the rule for which EPA is proposing to find as inadequate in its Supplemental Proposal, as discussed below.

EPA's notice approving Texas' affirmative defense includes a detailed discussion of EPA's policy[34] regarding excess emissions. EPA's policy recognizes that despite good practices, sources may be unable to meet emission limitations during periods of startup and shutdown and may

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[30] 30 Tex. Admin. Code § 101.1(110). Texas' unplanned MSS is the functional equivalent to malfunctions. *See* 75 *Fed. Reg.* 26892, 26896 (May 10, 2010).
[31] 30 *Tex. Reg.* at 8922 (December 30, 2005).
[32] 30 Tex. Admin. Code §§ 101.201 and 101.211.
[33] 75 *Fed. Reg.* 68989 (November 10, 2010).
[34] *See* footnote 28.

suffer a malfunction due to events beyond their control.[35] In those cases, relief from penalties for certain MSS activities is appropriate and necessary. To obtain such relief, narrowly tailored criteria must be met – it is a practice that places specific requirements on the owner or operator to prove certain mitigation efforts were made.

With this as part of the basis for reviewing Texas' SIP submittal, EPA found that the affirmative defense provisions in the TCEQ's rule are consistent with both the requirements of the FCAA and the interpretation of the FCAA set forth in EPA's guidance documents.[36] EPA's approval emphasized that the TCEQ's rules clarify existing reporting requirements; clarify that the rules do not allow exemptions from compliance with federal requirements, including any requirements in the federally-approved SIP; provide for an affirmative defense[37] from unplanned MSS, consistent with the FCAA as interpreted by EPA; and provide for a corrective action plan and written notification concerning excessive emissions events.[38] EPA found that TCEQ's affirmative defense is consistent with the penalty assessment provisions in FCAA § 113(e), which allows some discretion in determining a penalty, specifically noting that "the Administrator or the Court has broad discretion in the factors to consider in determining whether to assess a penalty, and if so, how much that penalty should be."[39] The EPA stated in its approval of the revised SIP that while civil penalties could be avoided, injunctive relief cannot be avoided if the criteria for an affirmative defense are not met.[40]

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[35] 75 *Fed. Reg.* at 68989 and 68991.
[36] *Id.* at 68990.
[37] EPA defines an affirmative defense, in the context of an enforcement proceeding, as a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. By demonstrating that the elements of an affirmative defense have been met, a source may avoid a civil penalty, but not injunctive relief. 75 *Fed. Reg.* 68989, 68991, Footnote 4.
[38] 75 *Fed. Reg.* 68989, 68991.
[39] *Id.* at 68999.
[40] *Id.*

In response to comments, EPA disagreed that approval of the affirmative defense would "impermissibly limit the penalty assessment criteria and citizen suit provisions" in the FCAA,[41] noting that FCAA § 113(e) provides factors that can be considered by the EPA Administrator or the court when determining whether to assess a penalty, and, if so, how much the penalty should be. Therefore, "the existence of an affirmative defense does not automatically preclude the assessment of civil penalties."[42]

2. EPA Successfully Defended its Approval of the Texas Affirmative Defense SIP in the Fifth Circuit

In January 2011, Sierra Club and others challenged EPA's approval of § 101.222(b) – (e) as a revision to the Texas SIP in the U.S. Court of Appeals for the Fifth Circuit.[43] In that case, EPA defended its approval of § 101.222(b) – (e), the same rule that EPA now proposes to find inadequate.

As EPA made clear in the underlying proposal and final actions on TCEQ's rules, EPA again took the position that the approval of the Texas affirmative defense was based on EPA's longstanding interpretation of the FCAA that SIPs may provide a limited affirmative defense for upsets during periods of startup, shutdown or malfunction (SSM).[44] States, through their SIPs, are authorized under FCAA § 110 to determine what constitutes a violation, and therefore they also have the ability to determine to what extent, if any, a penalty should be assessed for a violation, thus allowing for avoidance of penalties if certain, narrowly tailored criteria are met. EPA defended its approval of the TCEQ's rules, whose criteria were sufficiently tailored to meet the FCAA and

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[41] *Id.*
[42] *Id.*
[43] EPA also approved other rules, which were not challenged. Those rules are not relevant here and therefore are not discussed further. *See also* text accompanying footnote 47.
[44] Brief of Respondent EPA, *Luminant Generation Co. LLC et al. v. EPA*, No. 10-60934, 2011 WL 2828227, at *27 (5th Cir. July 12, 2011).

EPA's policy. With regard to TCEQ's affirmative defense rules in particular, EPA concluded that they do not alter the jurisdiction of the federal courts, noting that a party who raises an affirmative defense has the burden of proving the defense, and, even if successful with regard to assessment of penalties, the court may still award other relief, including "injunctive relief or a requirement to mitigate past harm or to correct the non-compliance at issue.[45]

In March 2013, the Fifth Circuit issued its final opinion agreeing with EPA, holding that the affirmative defense in TCEQ's rule is consistent with the FCAA and in particular the penalty criteria in FCAA § 113(e), and do not alter the jurisdiction of the federal courts.[46] The court agreed with EPA's interpretation that § 113(e) allows an affirmative defense against civil penalties, if narrowly tailored, to address unavoidable, excess emissions is consistent with the statutory penalty assessment criteria. The court held that EPA is "entitled to *Chevron* deference" in the determination that Texas' affirmative defense is consistent with the penalty criteria in § 113(e). The court also agreed with EPA's disapproval of TCEQ's rules that allowed for an affirmative defense for planned MSS that would be phased out over a period of about eight years, the time allowed by TCEQ for owners and operators to seek authorization for these activities.[47]

With regard to the jurisdiction of federal courts, the Fifth Circuit held that "the availability of the affirmative defenses does not negate the district court's jurisdiction to assess civil penalties, it simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed."[48]

EPA continued to defend the policy in response to petitions filed for rehearing in the case, which were ultimately not granted.

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[45] 79 *Fed. Reg.*at 68999.
[46] *Luminant Generation Co. LLC,* 714 F.3d at 852-53.
[47] 30 Tex. Admin. Code § 101.222(h) – (j).
[48] *Luminant Generation Co. LLC,* 714 F.3d at 853.

C. EPA's Original Proposed SSM SIP Call

On February 22, 2013, EPA published its proposed SIP call (Original Proposal) for 36 of the 39 states which Sierra Club named in a petition to the Administrator targeting rules regarding treatment of excess emissions during periods of SSM. In that proposal, EPA specifically proposed to revise its longstanding SSM policy, ensuring that it would be consistent with EPA's approval of Texas' affirmative defenses and the holding of the Fifth Circuit, and to apply the revised policy to specific rules identified in each of these states, each of which would be subject to a SIP Call. Sierra Club did not include Texas in its original petition (filed in 2011, approximately seven months after EPA's approval of TCEQ's rules).

In the Original Proposal, EPA's proposed policy change is to rescind only the portion of its policy that allows for affirmative defenses to excess emissions from *planned startups and shutdowns*. With regard to the Sierra Club's petition, EPA proposed to deny the portion that requests EPA to "rescind its interpretation of the [F]CAA expressed in the SSM Policy that allows appropriately drawn affirmative defense provisions in SIPs."[49] EPA expressly stated that it "does not agree with the Petitioner that appropriately drawn affirmative defense provisions for violations due to excess emissions that result from malfunctions are contrary to the [F]CAA, and thus EPA is proposing to deny the request to revise its interpretation of the [F]CAA concerning affirmative defenses for malfunctions."[50] In fact, EPA cited to the Texas affirmative defenses and the Fifth Circuit's decision upholding EPA's approval of those defenses as its basis for revising its SSM policy.[51]

And, consistent with the Texas SIP approval, EPA further rejected Sierra Club's arguments that affirmative defenses to penalties for SSM events purport to "remove the discretion and authority

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[49] 78 *Fed. Reg.* at 12464.
[50] *Id.* at 12465.
[51] *Id.* at 12464, footnote 24.

of the federal courts to assess monetary penalties for violations" and are inconsistent with the penalty factors in FCAA § 113(e).[52]

EPA invited comments on its proposed policy change, as well as on other topics that were included in the Sierra Club's Petition. Texas was not directly affected by the SIP Call for the treatment of unauthorized emissions and understood that TCEQ's rules can be a model for other states. Therefore, TCEQ did not submit comment on that portion of the Original Proposal, choosing instead to file comments on other topics.[53]

D. EPA's Supplemental Proposal to its SSM SIP Call

Less than two months before EPA's agreed-to deadline with Sierra Club to take final action on the Original Proposal, the D.C. Circuit Court issued its opinion in *NRDC v. EPA*, a challenge of EPA's Portland Cement NESHAP rule[54] And, less than five months after the opinion was issued, EPA issued a Supplemental Proposal.[55]

In the Supplemental Proposal, EPA incredibly takes the new position that it lacks authority to approve *any* affirmative defense provision in a SIP, even if narrowly drawn,[56] including an affirmative defense for excess emissions from *malfunctions*. This necessarily would now apply to Texas. Even more surprising is EPA's assertion that is has "newly identified" the Texas affirmative defense provisions,[57] which are the same rules it approved and defended in court within the last four years.

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[52] 78 *Fed. Reg.* at 12469-12470.
[53] EPA-HQ-OAR-2012-0322-0487.
[54] 749 F.3d 1055.
[55] 79 *Fed. Reg.* 55919.
[56] 75 *Fed. Reg.* at 68992.
[57] 79 *Fed. Reg.* at 55924.

This complete reversal in policy and interpretation from EPA's defense of its approval of the affirmative defense in the Texas SIP, upheld by the Fifth Circuit, is based solely on the opinion in *NRDC v. EPA*[58] regarding the affirmative defense included in EPA's rules under FCAA § 112.[59] This NESHAP rule "created an affirmative defense that sources could assert in judicial enforcement proceedings for violations due to excess emissions that occur during qualifying malfunction events. The affirmative defense provision in the Portland Cement NESHAP rule required the source to prove, by a preponderance of the evidence in an enforcement proceeding, that the source met specific criteria concerning the nature of the event and the source's conduct before, during and after the event. The EPA notes that these specific criteria required to establish the affirmative defense in the Portland Cement NESHAP are functionally the same as the criteria that the EPA previously recommended to states for SIP provisions in the 1999 SSM Guidance and that the EPA explicitly repeated these same recommended criteria to states in the February 2013 proposal notice."[60]

EPA "believes that the court's decision in *NRDC v. EPA* compels the Agency to reevaluate its interpretation of the [F]CAA and its proposed action on the [Sierra Club's] Petition concerning affirmative defense provisions in SIPs."[61] EPA states the "reasoning of the court's decision [in *NRDC*] is more broadly applicable" and therefore "would apply with equal weight to SIP provisions."[62] EPA also notes that the *NRDC* decision is more recent than that of the Fifth Circuit.

EPA takes this new position despite both (a) acknowledging the statement by the D.C. Circuit that it was expressly not deciding the question of whether an affirmative defense may be

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[58] 749 F.3d 1055.
[59] 79 *Fed. Reg.* at 55931-55934.
[60] *Id.* at 55929.
[61] *Id.* at 55930.
[62] 79 *Fed. Reg.* at 55931.

appropriate in a SIP, citing to the Fifth Circuit's opinion in *Luminant*,[63] and (b) that the *NRDC v. EPA*[64] opinion addressed an affirmative defense only in the context of citizen suit enforcement and not in the context of enforcement by a state or EPA. Despite these acknowledged differences, EPA concludes that it "believes the logic of the court's decision in *NRDC v. EPA* would extend to SIP provisions."[65]

Based on this perceived logical extension argument, EPA added Texas and other states to the SIP Call "to avoid confusion that may arise due to recent court decisions relevant to such provisions under the [F]CAA."[66]

It is against this backdrop of TCEQ rule and SIP approval history, with current rules affirmed by the Fifth Circuit Court of Appeals, and EPA's proposal of a legally insufficient and unsupported proposed policy change and SIP Call, that TCEQ responds to the Supplemental Proposal.

III. COMMENTS

The TCEQ strongly opposes EPA's proposal to change its policy regarding treatment of certain excess emissions and to find that the Texas SIP is inadequate. The following comments are submitted in support of this position in response to EPA's Supplemental Proposal.

A. EPA's Supplemental Proposal is Unlawful with Regard to the Texas SIP

1. The Supplemental Proposal Ignores the Holding of the U. S. Court of Appeals for the Fifth Circuit Affirming EPA's Approval of the Affirmative

[63] "We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan." *NRDC v. EPA*, 749 F.3d at 1063 (D.C. Cir. 2014).
[64] 749 F.3d 1055.
[65] 79 *Fed. Reg.* at 55929.
[66] *Id.* at 55936.

Defense for Certain Excess Emissions that Exceed Limits in the Texas SIP, and as such is Contrary to Law

As discussed above, EPA is proposing to rely on the *NRDC v. EPA*[67] decision to change its policy to eliminate an affirmative defense for malfunctions and find that 17 states' SIPs, including Texas' SIP, are inadequate. EPA did not entirely overlook its previous position that TCEQ's narrowly tailored affirmative defense is consistent with EPA's interpretation of the FCAA, but *merely concludes* that this previous position is now unacceptable because it is now both "inconsistent with the fundamental enforcement structure" of the FCAA and "not consistent with the [F]CAA requirements for SIP provisions."[68]

EPA's mere nod to the Fifth Circuit is insufficient to reach the conclusion that the *Luminant*[69] decision can be discarded in favor of the proposed preferred interpretation based solely on the Portland Cement NESHAP opinion. EPA's failure to address how the holdings in *Luminant* will no longer apply, and how EPA is exempt from the court's mandate render the Supplemental Proposal unsupported as a basis for the Texas SIP Call. An agency "cannot . . . choose to ignore the decision [of a court] as if it had no force or effect. Absent reversal, that decision is the law which the [agency] must follow."[70]

Further, the Fifth Circuit's decision is binding on EPA through application of the mandate rule, not only for the specific matter considered by the court in which a mandate has issued, but extended to all expressly decided or by necessary implication.[71]

In the Supplemental Proposal, EPA states it believes that the reasoning of the D.C. Circuit Court in *NRDC v. EPA*[72] "logically extends" to affirmative defense provisions created by states in SIPs,

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[67] 749 F.3d 1055.
[68] 79 *Fed. Reg.* at 55945.
[69] 714 F.3d 841.
[70] *Ithaca College v. N.L.R.B.*, 623 F.2d 224, 228 (2nd Cir. 1980).
[71] *City of Cleveland v. FPC*, 561 F.2d at 347-48 (D.C. Cir. 1977)

as well as to such provisions created by the EPA in its own regulations. EPA reasons that "[g]iven that [FCAA] sections 113 and 304 functionally bar any affirmative defense that purports to alter or to eliminate the jurisdiction of federal courts to assess penalties for violations of [F]CAA requirements or to impose the other remedies listed in section 113(b), this principle applies to SIP provisions as well." EPA goes on to say that it "sees no reason why the same logic would not apply to any SIP provision that purported to alter or eliminate the jurisdiction of the federal courts to exercise their authority in the event of violations as provided in CAA section 113(b) . . ."[73]

Whether EPA's "logical extension" argument is adequate is legally irrelevant to Texas because the Fifth Circuit has directly held that a court's ability to assess penalties is not affected when an affirmative defense has been raised.[74] In EPA's opinion, a proposal for a further-revised policy and SIP Call for Texas is necessary because, after the Portland Cement NESHAP decision, the TCEQ's affirmative defense rules now will "impermissibly purport to alter or eliminate the jurisdiction of the federal courts to assess penalties for violations of SIP emission limits."[75] EPA fails to explain how it reached this conclusion that directly contradicts the holding of the Fifth Circuit that the "availability of the affirmative defenses does not negate the district court's jurisdiction to assess civil penalties using the criteria outlined in [FCAA § 113(e)], or the state permitting authority's power to recover civil penalties."[76]

2. The Texas SIP Does Not Limit the Authority of Federal Courts in Enforcement Cases

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[72] 749 F.3d 1055.
[73] 79 *Fed. Reg.* at 55934.
[74] *Luminant Generation Co. LLC*, 714 F.3d 841.
[75] 79 *Fed. Reg.* at 55945.
[76] *Luminant Generation Co. LLC*, 714 F.3d at 853.

In response to a comment made during TCEQ's 2005 rulemaking stating that TCEQ's authority to adopt an affirmative defense should be limited only to TCEQ enforcement action, the TCEQ declined to make that change, responding that its rules are not intended to nor do they impact citizens' legal rights to bring enforcement actions under the FCAA.[77] TCEQ does not have the authority to limit the rights of either the EPA or citizens except as allowed by the FCAA, which allows the use of an affirmative defense for certain unauthorized emissions. Texas intends for its affirmative defense rule to be federally enforceable and supports EPA's application of the rule in federal enforcement actions brought by EPA or a citizen.[78] Nothing in the rule limits a federal court from assessing penalties.

EPA agreed in its approval of § 101.222(b) - (e) into the Texas SIP, stating that the affirmative defense "does not preclude citizen suits under the [FCAA]. Rather, the affirmative defense may be raised in defense of a claim brought by EPA, the State or a private citizen.[79] EPA confirmed that the TCEQ's affirmative defense provides the owner or operator of a source to assert an affirmative defense for certain periods of excess emissions in an enforcement action brought against it by EPA or a citizen in federal court.[80]

Upon appeal of EPA's approval of Texas' affirmative defense, the Fifth Circuit agreed with EPA's position that the penalty provisions in FCAA § 113 as "reasonably construed" do not "override a state's choice in its SIP to establish a lesser category of violations that simply are not subject to penalties."[81] The court specifically held that Texas' affirmative defense is consistent with the penalty criteria in § 113(e)[82] and that the affirmative defense does not alter the jurisdiction of

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[77] 30 *Tex. Reg.* 8884, 8922 (December 30, 2005).
[78] Brief of the State of Texas as Amicus Curiae in Support of Neither Party, *Luminant Generation Co. LLC et al. v. EPA*, No. 10-60934, Document: 00511482201 (5th Cir. May 18, 2011).
[79] 75 *Fed. Reg.* at 68999.
[80] *Id.*
[81] Brief of Respondent EPA, *Luminant Generation Co. LLC et al. v. EPA*, No. 10-60934, 2011 WL 2828227, at *30 (5th Cir. July 12, 2011).
[82] *Luminant Generation Co. LLC et al. v. EPA*, 714 F.3d 841, 852-53 (5th Cir. 2013).

the federal courts.[83] Specifically, the court held that "the availability of the affirmative defenses does not negate the district court's jurisdiction to assess civil penalties using the criteria outlined in [FCAA § 113(e)], or the state permitting authority's power to recover civil penalties, it simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed."[84]

3. The D.C. Circuit Court's Opinion in *NRDC v. EPA* is a Legally Insufficient Basis for EPA's Proposed Change in Interpretation

The subject matter of the case in the D.C. Circuit was EPA's rule promulgating emission standards for hazardous air pollutants for manufacturers of Portland Cement, adopted under FCAA § 112. The rule grants discretion to the Administrator "to deal with uncertainty" in section 112 for setting emission standards for hazardous air pollutants.[85] Specifically, it includes an affirmative defense, which the court found is inconsistent with the statutory requirements in FCAA §§ 113 and 304 for enforcement of the Portland Cement NESHAP rule.[86] The case did not concern SIPs, any state rules in a SIP, nor affirmative defenses in SIPs. Further, the Court noted that the Fifth Circuit recently upheld EPA's partial approval of an affirmative defense in the Texas SIP and stated that "[w]e do not here confront the question whether an affirmative defense may be appropriate in a [SIP]".[87]

In contrast, FCAA §§ 107(a) and 110 require *states* to adopt and implement SIPs for the purpose of ensuring that air quality in general and specifically that the National Ambient Air Quality Standards (NAAQS) are attained and maintained through various control strategies. While EPA

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[83] *Id.* at 853, footnote 9.
[84] *Id.*
[85] *NRDC v. EPA*, 824 F.2d 1146, 1153–54 (D.C. Cir. 1987) (stating that by using the phrase "in his judgment", Congress chose to grant the Administrator with "discretion."
[86] 749 F.3d at 1063.
[87] *Id.*

has adopted detailed rules for certain requirements, e.g., major source permitting,[88] and the FCAA prescribes certain requirements for emissions in areas designated as nonattainment of the NAAQS,[89] it is well settled that states are afforded wide discretion in how to develop their SIPs.[90] A state may include an affirmative defense as part of its control measures[91] "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air," then "the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."[92] And, in a case involving the Texas SIP, the Fifth Circuit held that the FCAA "supplies the goals and basic requirements of [SIPs], but the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements."[93] Under *Train* and its progeny, the State's statutory authority to develop SIP limits extends to ameliorative provisions, like affirmative defenses.[94]

Therefore, the EPA's rule establishing an emission standard under FCAA § 112 with an affirmative defense is distinguishable from Texas' affirmative defense in its SIP, adopted pursuant to the requirements of FCAA § 110, and as such the D.C. Circuit Court's ruling that EPA exceeded its authority to establish an affirmative defense under § 112 cannot serve as a legal basis for EPA ignoring the Fifth Circuit's holding regarding a SIP rule.

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[88] 40 CFR § 52.21.
[89] FCAA § 182.
[90] *See Luminant Generation Co. v. EPA*, 675 F.3d 917 (5th Cir. 2012) ("The states have 'wide discretion in formulating [their] plan[s].'" (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976)).
[91] EPA defines "control measure" as: equipment, processes or actions used to reduce air pollution at the source. "*Vocabulary Catalog List Detail - Improving Air Quality in Your Community Glossary*," located at: http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=Improving%20Air%20Quality.
[92] *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975); *see also CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008) which holds that the "EPA has no authority to question the wisdom of a State's choices of emission limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2)".
[93] *BCCA Appeal Grp.*, 355 F.3d 817, 822 (5th Cir. 2003).
[94] *See Fla. Power & Light Co.*, 650 F.2d at 587 ("Under the Act, therefore, states may provide for 'ameliorative revisions' of an established pollution control scheme as long as national clean air standards are not compromised.").

4. EPA Cannot Require all State SIPs to Conform to a Broad Policy Preference that is not Evaluated in the Context of Each State's SIP

EPA fails to explain how its proposed call for full removal of affirmative defense provisions in SIPs is reconciled with well-established judicial precedent that states have broad discretion in developing SIP controls. "The states have wide discretion in formulating their SIPs, including the broad authority to determine the methods and particular control strategies that they will use to achieve the statutory requirements."[95]

EPA's role in this scheme is to review SIPs to determine if they comply with the FCAA; it is not to impose or predetermine the control measures selected by each state. EPA is "plainly . . . relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations."[96]

The effect of EPA's proposal is that once a state decides to regulate a source, the state must establish specific emission control requirements during all periods of operation of that source without exception, including during unavoidable malfunctions. However, the courts have held that the FCAA does not provide EPA with the authority to make "a wholesale revision of its entire plan".[97] EPA can "call only for revisions 'as necessary' to achieve the NAAQS."[98] The EPA has failed to demonstrate that it is necessary to include specific emission control requirements during all periods of operation of any regulated source under the Texas SIP for demonstrating attainment with the NAAQS. Further, as discussed above, the EPA's argument that the TCEQ's affirmative defense methodology does not meet FCAA requirements is faulty. By prohibiting a particular methodology without justification, the EPA's proposal arbitrarily denies Texas the

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[95] *Luminant Generation Co. LLC, et al. v. EPA*, 714 F.3d 841, 847 (5th Cir. 2013).
[96] *Train*, 421 U.S. at 79; *see also Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) ("The [CAA] envisions extensive cooperation between federal and state authorities, generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain") (internal citations omitted).
[97] *See Virginia v. EPA*, 108 F.3d 1973, 1410, modified on other grounds, 116 F.3d 499 (Cir. 1997)
[98] *Id.*

broad discretion in establishing methods and control measures to which it is entitled. As discussed below, the TCEQ's affirmative defense control measure is an important and effective part of the enforcement component of the Texas SIP that incentivizes proactive and responsive actions upon discovery of excess emissions, rather than solely relying on a punitive control strategy via enforcement and penalties. For this reason, TCEQ opposes the sweeping removal of an affirmative defense for malfunctions.

5. EPA Cannot Merely Change Its Policy and Legal Interpretation Based on a Preferred Outcome

EPA is allowed to make changes in its interpretation and application of the law, but is constrained in the scope of such an action. In this case, EPA is judicially estopped from reversing its position regarding Texas' affirmative defenses for excess emissions from malfunction. EPA is bound by its prior statements to the Fifth Circuit as to the legality of those defenses. The Fifth Circuit will apply judicial estoppel if the position of the party against which estoppel is sought is plainly inconsistent with its prior legal position. [99] Here, EPA has not argued that its proposed policy change is required by the opinion of the D.C. Circuit Court, and, as discussed earlier, has acknowledged that the Court expressly was not deciding the legality of an affirmative defense in SIPs. Rather, EPA has elected to follow that opinion because it "believes that its prior interpretation of the [F]CAA with respect to the approvability of affirmative defense provisions in SIPs is no longer the best reading of the statute."[100] A "change in belief," or a preference, does not trump the Fifth Circuit's holding applicable to TCEQ's SIP approved rule.

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[99] *Jethro v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005).
[100] 79 *Fed. Reg.* at 55931.

6. EPA's Supplemental Proposal Ignores the Purpose of FCAA Section 110

EPA's role in evaluating each SIP revision is to ensure that the SIP provides for attainment and maintenance of the NAAQS – the purpose of FCAA § 110. EPA's affirmative defense criteria, and TCEQ's, require that excess emissions from malfunctions be reviewed as to whether those emissions could cause a violation of the NAAQS. Further, § 110(l) requires states to demonstrate that revisions to the SIPs will not violate the NAAQS or any other requirement of the FCAA.

EPA ignores the NAAQS in two ways in the Supplemental Proposal. First, while it is eager to apply the D.C. Circuit Court's holding to SIPs, it acknowledges that the case "*did not* condition its decision on considerations such as whether the use of the affirmative defense provision in the Portland Cement NESHAP would have a demonstrated causal connection to a given environmental impact (or undermine a specific enforcement action); the court decided the question based solely on the fundamental legal requirements of the [F]CAA, which apply equally to SIPs." (emphasis added)[101]

Second, EPA then applies the holding in *NRDC v. EPA*[102] to the SIP affirmative defenses by saying that "[t]his potential for interference with the intended enforcement structure of the [F]CAA is sufficient to establish that such an affirmative defense provision is substantially inadequate to meet [F]CAA requirements, and there is no need to demonstrate that the use of the affirmative defense would be causally connected to any particular impact (*e.g.*, a specific violation of a NAAQS at a particular monitor on a particular day, or the undermining of effective enforcement for a particular violation by a particular source). By specifying that parties have the right to seek relief for violations and that courts have jurisdiction to impose relief for such violations, the EPA believes, Congress has already made the determination that SIP provisions

[101] 79 *Fed. Reg.* at 55935.
[102] 749 F.3d 1055.

have to be consistent with the requirements of [F]CAA sections 113 and 304 without regard to impact on other [F]CAA requirements such as demonstrating attainment."[103] EPA's dismissal of the opportunity for asserting an affirmative defense reduces the incentives for owners and operators to minimize emissions during malfunctions, which could affect compliance with the NAAQS. Evaluation of NAAQS compliance is part of the TCEQ's affirmative defense demonstration criteria, as well as for permitting. EPA cannot also ignore the substantive purpose and requirements of § 110 and how that has been interpreted by the Fifth Circuit, which has held that an affirmative defense is consistent with FCAA § 113(e).

B. The TCEQ's Rules Contain Appropriate Criteria for an Affirmative Defense and as such are an Effective Control Measure and Use of TCEQ's Resources

To be consistent with the FCAA, an affirmative defense must be narrowly tailored in order not to undermine the enforceability of the SIP.[104] And, narrowly tailored criteria for successfully proving an affirmative defense leads to consistent and meaningful enforcement of unauthorized emissions due to circumstances beyond the control of the owner or operator.

As noted above, TCEQ engaged in negotiations with EPA and at least one representative of environmental groups during its most recent rulemaking regarding, in particular, the criteria for the affirmative defense in of § 101.222(b) – (e). EPA approved these subsections, stating that the" affirmative defense neither authorizes nor condones such events and it is narrowly tailored consistent with our interpretation that such a defense not undermine the enforcement or attainment provisions of the [FCAA]."[105] When this approval was challenged, EPA vigorously defended its approval, stating "[e]ven if a source proves all nine required criteria and establishes

[103] 79 *Fed. Reg.* at 55935.
[104] 75 *Fed. Reg.* at 68992.
[105] *Id.* at 68994.

the applicability of the approved affirmative defense, the violator is still subject to injunctive relief – thus where any citizen is concerned that emissions might contribute to a violation of the NAAQS, that party can seek an abatement order. EPA believes that such injunctive relief is "the most effective means to ensure limited harm to ambient air quality. EPA's partial approval of the Texas SIP was reasonable, given the appropriately narrow nature of the affirmative defense created by Texas."[106]

Not only has EPA approved the Texas affirmative defense control measure, there is no affirmative defense for noncompliance due to intentional or negligent acts, and therefore it has effectively endorsed the additional review of violations that are beyond the control of the operator. FCAA §110(a)(2)(C) requires states to have programs that provide for the enforcement of the emission limitations. Because TCEQ provides for an affirmative defense that is based on proactive and reactive demonstrations, owners and operators are paying greater attention to preventing and responding to emission events.

The TCEQ's affirmative defense rule is not an exemption, instead it is an enforcement discretion tool for the TCEQ. TCEQ supports a structured and earlier review of the more significant excess emissions from malfunctions that the inclusion of an affirmative defense with narrowly tailored criteria and the accompanying reporting requirements which promote greater attention to emissions events by owners and operators.

With regard to permitting, TCEQ does not authorize malfunctions. However, if TCEQ does not utilize a reasonable enforcement discretion option (such as an affirmative defense) for unavoidable emissions, higher estimates and calculations for emissions that are not routine or normal (i.e., appropriate for permitting) may be included in permit applications. This situation would require air permitting staff to provide even more scrutiny and take more time to review

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[106] Brief of Respondent U.S. EPA, *Luminant Generation Co. LLC et al. v. EPA,* No. 10-60934, Document: 00511537716 at *38 (5th Cir. July 12, 2011). (Internal citations omitted.]

and validate calculations while ultimately providing no environmental benefit, clearly an inefficient use of permitting resources.

C. TCEQ's Affirmative Defense Rule Provides for an Expedited and Enhanced Review for the Most Significant Excess Emissions

1. The Affirmative Defense Allows the Prioritization of Enforcement Activities

The affirmative defense allows for the prioritization of enforcement actions following the review of the emissions events, and promotes preventive measures, proper monitoring and reporting, and prompt corrective actions as a response to those events. Even with optimal preventative maintenance, operations will not function perfectly at all times. The affirmative defense, as approved by the EPA, provides limited relief to sources that demonstrate certain criteria have been met for unavoidable excess emissions. These criteria provide the TCEQ narrowly tailored enforcement discretion and allow the state to more efficiently direct its investigation and enforcement resources.

The prioritization of enforcement activities is consistent with EPA's recent High Priority Violation (HPV) policy change that streamlines what is reported to and tracked by the EPA. The 2014 policy revision states, "[t]he EPA considers all [F]CAA violations important. HPVs, however, warrant additional scrutiny to ensure that enforcement agencies respond to such violations in an appropriate manner and have access to federal assistance if need be. . . . First and foremost, this revision contains refined criteria of what constitutes an HPV to sharpen our focus on [F]CAA violations that experience shows are the most likely to be significant for human health and the environment or for maintenance of important programs."[107] The result of

[107] "Revision of U.S. Environmental Protection Agency's Enforcement Response Policy for High Priority Violations of the Clean Air Act: *Timely and Appropriate Enforcement Response to High Priority Violations – 2014*" pages 1-2,

removing the affirmative defense demonstration criteria from the Texas SIP would be to require the TCEQ to issue and track violations that are not high priority in nature, per the EPA's HPV criteria. Less than ten percent of emissions events investigated in Fiscal Year 2014 lasted longer than seven days, which is the threshold for qualifying as a high priority violation.

2. The Affirmative Defense Provides a Structured Approach to Enforcement Discretion

The affirmative defense provides certainty to the regulated community by providing structure to granting enforcement discretion. TCEQ rules require owners and operators to demonstrate the absence of a pattern of excess emissions which calls for a wider scope of evaluation. The owner or operator's implementation of a preventative maintenance program is considered. The evaluation is systemic as opposed to a determination being made on one compliance element. This review is more extensive than only reviewing an owner or operator's full compliance history,[108] because past emissions events in which the TCEQ did not pursue enforcement after determining the affirmative defense demonstration criteria were met are also reviewed. It is also as extensive, if not more so, than the penalty criteria in FCAA § 113(e), which EPA compared to TCEQ's affirmative defense criteria.[109] This includes the review of events that did not exceed an RQ. The seriousness of the violation is assessed as part of the affirmative defense evaluation as well. The unauthorized emissions could not have exceeded the NAAQS, Prevention of Significant Deterioration (PSD) increments, or created a condition of air pollution. Timely

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attached to Memorandum from Phillip A. Brooks, Director, EPA Air Enforcement Division, to EPA Regional Air Enforcement Division Directors and Branch Chiefs and Regional Counsels, Regions 1-10, (August 25, 2014).

[108] As required by statute, TCEQ is required to adopt rules that establish standards for the classification of a person's compliance history as a means of evaluating and using compliance history. Tex. Water Code §§ 5.753 and 5.754. A compliance history includes both positive and negative factors related to a person's environmental performance at a site over the past five years, including but not limited to violations, investigation results and voluntary compliance efforts, and is used in enforcement and permitting actions. 30 Tex. Admin. Code Chapter 60. Although these rules are not in the Texas SIP, their use, together with the affirmative defense criteria, demonstrate that TCEQ's practice is to consider information that the Petitioner viewed as missing from EPA's affirmative defense policy. 79 *Fed. Reg.* at 55931. As discussed herein, the TCEQ's enforcement practice with regard to emissions events meets or exceeds EPA's adopted policy for these excess emissions.

[109] *See also* 75 *Fed. Reg.* at 68999.

reporting is required, which gives the program integrity. The timeliness and immediate nature of the review provides a conclusion to investigative activity by the state. Without the affirmative defense, not only is there uncertainty for the regulated community, but there's also less of an incentive to promptly make repairs and submit reports.

3. TCEQ Staff Review Each Emissions Event and Scheduled MSS Activity Reported

As discussed above, Texas law requires the owner or operator of regulated entities to report to the TCEQ emissions events that exceed an RQ within 24 hours of discovery. Many of the RQs are based on EPA rules (40 CFR 302, Table 302.4 and 40 CFR 355, Appendix A). The reporting elements include details such as duration, quantity and cause. This report must be finalized within two weeks of the end of the event. This prompt reporting allows TCEQ investigators to respond quickly and thoroughly review each event. These requirements apply across the board, regardless of a source's Title V status. Minor or area sources are required to report just as promptly as major sources. The TCEQ's expedited review of reported emissions events is much faster as compared to the reporting frequency of Title V sources' semi-annual deviation reports and annual compliance certifications. Instead of investigators reviewing incidents that occurred several months earlier, investigators are reviewing incidents that are contemporary. Communication with the owner or operator is initiated and involves a series of questions, such as: frequency of emissions events; maintenance history of air pollution control equipment or processes; action taken to achieve compliance once the emission limitations were exceeded; how the amount and duration was minimized; functioning of monitoring systems; similar incidents; and off-site impacts. The review is thorough, and owners or operators have the burden of proof to demonstrate each established criteria has been met. In this structured

approach, the TCEQ exercises enforcement discretion only in the cases in which it determines each affirmative defense criterion is met.

4. Elimination of the Affirmative Defense Will Increase TCEQ Enforcement without Benefit of Rigorous Criteria

The elimination of the affirmative defense from the approved Texas SIP would cause a burden to the TCEQ due to resource constraints, related to an increase of unavoidable emissions being cited as violations and added to the TCEQ's enforcement processes. The table below shows the number of incidents reported to the TCEQ for past fiscal years (September 1 – August 31) for which an affirmative defense is available. The types of incidents include emissions events, scheduled MSS activities and excess opacity events.

Incidents Reported

FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
4,766	4,469	4,290	4,533	4,987

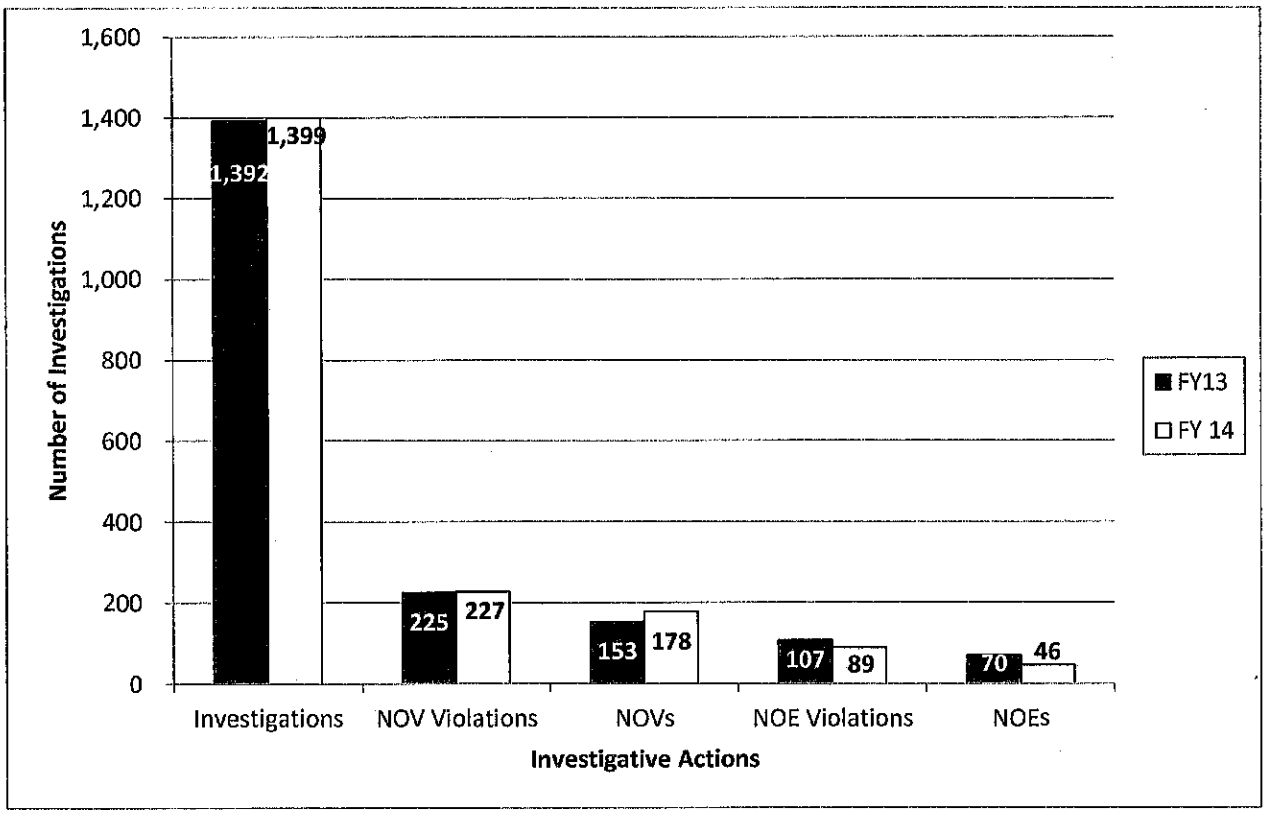
Currently, the review of an emissions event that exceeds an RQ takes approximately 5- 10 hours. Without the affirmative defense, these initial investigative hours would still be required for field staff to categorize, classify, quantify, and issue violations. In addition to the initial investigative activity, additional hours would be required to track violations through resolution. For those violations which require formal enforcement or litigation, additional other TCEQ divisions would have an increase in their workload.

The narrowly defined and tailored affirmative defense provides an incentive for voluntary, proactive compliance. If the affirmative defense were not an option, the incentive to meet the affirmative defense criteria—reporting quickly and satisfactorily addressing each element—

would diminish. The motivation for compliance would be based on violations issued, the TCEQ's penalty policy, and compliance history impacts.

For example, the figure below shows the TCEQ's response to incidents reported over the last two fiscal years, the most recent complete data available. The number of investigations are listed as well as Notices of Violation (NOV) and Notices of Enforcement (NOE). Following an inspection by the TCEQ, if an owner or operator is found to be in violation, they receive written notice in the form of an NOV and/or NOE. These notices document and communicate the violations and their status. An NOE is a written notification that the TCEQ is initiating formal enforcement action for violations, the process in which the TCEQ responds to serious or continuing environmental violations by requiring corrective actions to be taken and/or by assessing monetary penalties against businesses or individuals in Texas for those violations. These notices may include multiple issued violations.

Incidents Investigated



The table below lists the types of incidents investigated. Some investigations and violations include multiple incidents.

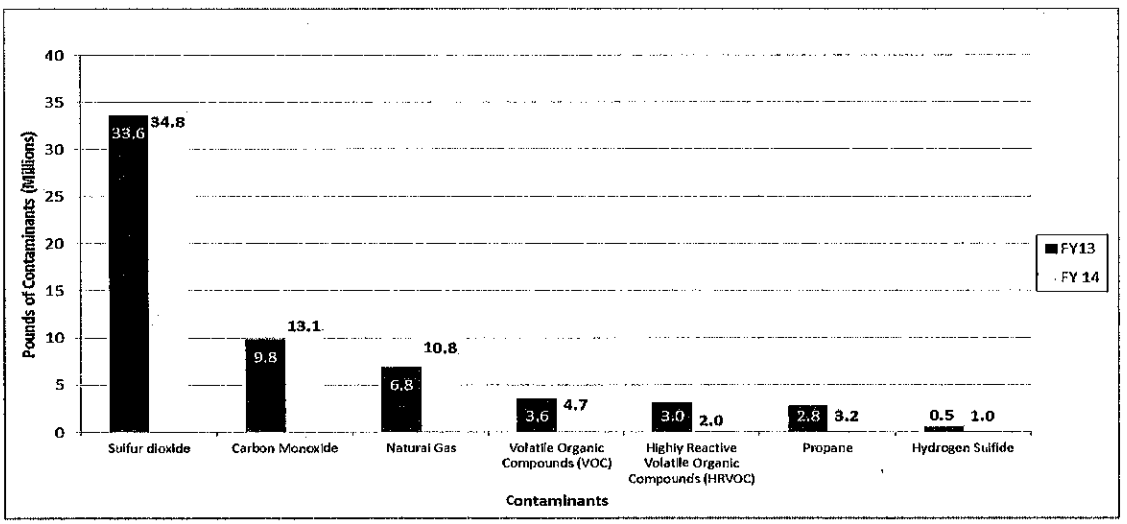
TCEQ Response to Incidents Reported under 30 Tex. Admin. Code Chapter 101, Subchapter F

Incident Type	Investigations	NOV Violations	NOVs	NOE Violations	NOEs
Maintenance	104	2	2	1	1
Scheduled Shutdown	15	0	0	0	0
Scheduled Startup	28	0	0	2	1
Emissions Events	1,146	189	146	86	44
Excess Opacity	106	36	30	0	0
Total	**1,399**	**227**	**178**	**89**	**46**

5. Air Quality Impacts

Of all the contaminants reported released during emissions events, scheduled MSS and excess opacity events in FY 2014, sulfur dioxide (SO_2) and carbon monoxide (CO) account for 60 percent of the quantity released. Texas is in attainment of the SO_2 and CO NAAQS. See the table below for emission totals for listed air contaminants for the last two fiscal years.

Top Contributing Air Contaminants Reported Statewide



A criticism of the use of an affirmative defense is that it excuses excess emissions that occur during periods of SSM, especially those that result in lengthy flaring with visible, toxic emissions that affect nearby residents. The TCEQ is proactive in evaluating excess emissions and the performance of control devices. There are two occasions that draw particular attention from those that may live near or drive by stationary sources of air emissions: flaring and smoke. The EPA cited TCEQ's 2010 Flare Study in the August 2012 Enforcement Alert.[110] The TCEQ and EPA agree that a visible flame indicates proper combustion. This counters the perception that seeing a flare in operation always indicates a problem. On the contrary, this indicates proper combustion. The TCEQ has created a publication and performed outreach activities to educate industry and the public on the presence of flames on flares. For some facilities, flaring is routine and does not indicate excess emissions. As for smoke, TCEQ rules have specific provisions for opacity over 15 percent above an applicable limit, averaged over a 6-minute period.

As demonstrated by the above discussion, TCEQ carefully considers the particular facts of incidents of excess emissions when responding to citizen inquiries and complaints, and in evaluating events that are reported. This results in prompt and efficient enforcement actions, transparency to the public and progress towards the ultimate goal of attainment of the NAAQS.

D. EPA's Supplemental Proposal Does Not Meet the Procedural Requirements of the FCAA

EPA's notices of proposed rulemaking are governed by FCAA § 307(d)(3). That subsection includes several requirements.[111] EPA's efforts to comply with those requirements in its Supplemental Proposal, to the extent that EPA proposed to apply the new rule to the Texas SIP,

[110] Vol. 10, Number 5.
[111] These are in addition to the requirements that TCEQ agrees have been met, which are to publish the notice in the *Federal Register*; specify the comment period; provide the docket number; the location of the docket and when it is available for public inspection.

are simply inadequate. Specifically, EPA failed to adequately address the requirements for a statement of the basis and purpose of the rule and also for a summary of the major legal interpretations and policy considerations underlying the proposed rule.

EPA states its basis of the rulemaking is made in light of the more recent decision in *NRDC v. EPA*[112], and its broader applicability therefore necessarily supports an extension of the opinion to SIPs. Then EPA proceeds to give five reasons why the *NRDC v. EPA* opinion[113] should govern EPA's policy choice.[114] However, other than acknowledging that EPA's current policy and interpretation of the FCAA was upheld by the Fifth Circuit in *Luminant*,[115] EPA does not explain why and how the *Luminant* opinion would no longer apply to the Texas SIP and be a basis for interpretation of enforcement criteria in FCAA § 113(e); how and why the *NRDC v. EPA*[116] opinion would govern the Texas SIP; and how EPA is not judicially estopped from changing its position on the Texas SIP's affirmative defenses. Without this information, the notice is deficient and EPA must withdraw its Supplemental Proposal as to the SIP Call for Texas.

FCAA § 307(d)(3) also requires EPA to include a summary of the factual data on which the proposed rule is based and the methodology used in obtaining the data and in analyzing the data. In this rulemaking, EPA does not mention whether it relied on any particular data for this rulemaking. EPA could have obtained data to identify whether enforcement programs with SIP approved affirmative defenses, such as Texas' which has a reporting prerequisite, support retention of or change in policy.

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[112] 749 F.3d 1055.
[113] *Id.*
[114] 79 *Fed. Reg.* at 55931 – 55934.
[115] 714 F.3d 841, 847 (5th Cir. 2013).
[116] 749 F.3d 1055.

E. EPA's SIP Call for the Texas Affirmative Defense Illegally Predetermines SIP Inadequacy and Erroneously Concludes the Texas SIP is of National Scope

EPA proposes to find that the Texas affirmative defense is substantially inadequate under FCAA § 110(k)(5) and to issue a SIP Call for removal of specific Texas affirmative defense provisions.[117] FCAA § 110(k)(5) provides that if the EPA Administrator finds that a SIP is substantially inadequate to attain or maintain the relevant NAAQS, to mitigate adequately the interstate pollutant transport described in FCAA §§ 176A or 184, or to otherwise comply with any requirement the FCAA, then the Administrator shall require the state to revise the plan as necessary to correct such inadequacies.[118] Further, if EPA is required to rely on data and evidence in evaluating SIP revisions, it follows that EPA should be held to producing *at least* the same level of data and evidence, *if not more*, to support a mandated SIP Call that is based on the more stringent substantial inadequacy standard.[119]

EPA has failed to provide any basis for its proposed finding that a SIP Call under FCAA § 110(k)(5) is necessary. EPA has not provided any technical or other data or analysis that links the use of an affirmative defense to violations of the NAAQS, inadequate mitigation of transport emissions, or any other FCAA requirement, except for its illegal application of the *NRDC v. EPA* opinion to the Texas SIP. The notice simply does not explain how EPA defines "substantially inadequate," nor how the Texas SIP meets that undefined standard. It is clear that in making this proposed finding EPA fails to consider not only its long standing policy with regard to use of an affirmative defense for certain excess emissions, but also especially in light of EPA's recent approval and defense of the same in the Texas SIP in the Fifth Circuit, as discussed above, under

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[117] 79 *Fed. Reg.* at 55,945.
[118] FCAA § 110(k)(5).
[119] *State of Texas v. EPA*, 690 F.3d at 677–78 (5th Cir. 2012) "The standard for disapproving a SIP revision—that the revision would interfere with the CAA—surely requires more than the EPA's bare conclusion."

the specific requirements of FCAA § 110(k)(5). Based on the holding in *Luminant*,[120] EPA lacks authority to make this substantial inadequacy finding.

In proposing the finding that the Texas SIP is inadequate, EPA has put the cart before the horse by predetermining that its final rule will be applicable to Texas -- and that's after the giant leap EPA has already made by determining that the action proposed for Texas is somehow made in response to Sierra Club's petition which never included Texas, the state with what appeared in the Original Petition to be the model SIP affirmative defense program.[121] Although EPA may be trying to achieve national consistency, it should conclude the rulemaking and then determine – rather than predetermine – which states' SIPs, if any, are inadequate.

And, this predetermination ignores the possibility that adverse comments and legal arguments can support a revision to, or even a withdrawal of, EPA's SIP Call. EPA is required to consider all timely comments as part of the rulemaking process.

Next, after claiming that SIPs in Texas and other states are inadequate, requiring individual action by each state, EPA wants to apply its findings on all SIPs at once by concluding that "[t]his rule responding to the Petition is 'nationally applicable' within the meaning of [FCAA] section 307(b)(1)."[122] EPA reaches this conclusion on the basis that it is responding to a petition that concerns more than two-thirds of the states and the SIPs in those states are located in all ten EPA regions. In determining whether a final action is a locally or regionally applicable action, a court "need look only to the face of the rulemaking, rather than to its practical

[120] 714 F.3d 841.
[121] 78 Fed. Reg. at 12470 and 12471.
[122] 79 *Fed. Reg.* at 55,955.

effects."[123] EPA wants it both ways – to find that the local or regional area SIP is inadequate but is also nationally applicable.

With regard to Texas in particular, EPA has provided no legal basis to support that its affirmative defense rules are of "nationwide scope or effect." And, the Texas rules cannot be and are not of "nationwide scope or effect" because they apply only in Texas.

Finally, in its haste to resolve the petition from Sierra Club, EPA's choice to try to accomplish two steps in one rulemaking also ignores established law that the States are given wide latitude in developing their SIPs. [124]

F. Venue for Judicial Review

EPA further asserts that "[t]hus, any petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit."[125] This, too, is a leap by EPA, who has thrown Texas into the mix of states who have SIPs that EPA proposes to find, on an aggregate basis, are inadequate. As noted above, rather than conduct rulemaking to determine whether the change in interpretation of the FCAA is necessarily and legally supportable, followed by any necessary SIP revisions, EPA lumps together a total of 38 states for its Original Proposal, its Supplemental Proposal, or both, to try to accomplish a variety of actions in one fell swoop. In doing so, EPA is obviously strategically attempting to minimize its presence in only one Court of Appeals.

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[123] *Am. Road & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013).

[124] [EPA] is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations .... [EPA] is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies [the Act's] other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations ..... * * * [S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. *Train v. NRDC, Inc.*, 421 U.S. 60, 79 (1975). *See also, BCCA Appeal Group v. EPA*, 355 F.3d 817, 826 (5th Cir. 2004) ("EPA's role in approving air pollution control plans is limited. The EPA must approve a plan if it meets minimum statutory requirements ....");

[125] 79 *Fed. Reg.* at 55,955.

FCAA § 307(b)(1) provides that a petition for review of any "nationally applicable regulations promulgated, or final action taken" may be filed only in the D.C. Circuit. A petition for review of any final action taken which is "locally or regionally applicable" may be filed only in the appropriate regional circuit. However, a petition for review of a locally or regionally applicable final action may be filed only in the D.C. Circuit "if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

Texas disagrees with EPA's conclusory determination that the current proposal is a single nationally applicable action and of nationwide scope or effect.[126] Review of all affected SIP provisions in a single action in the D.C. Circuit would inappropriately limit the scope of review by obscuring distinctions between the various states' regulatory programs, regional differences, and practical concerns.

Even if EPA proceeds with the SIP Call for Texas, it is a locally or regionally applicable action for which the proper venue[127] is the Fifth Circuit, not the D.C. Circuit. And, if review of the Texas SIP Call involves issues common with other states subject to EPA's final rule, venue in the Fifth Circuit would still be appropriate for the Texas SIP.[128]

In support of its position for D.C. Circuit venue, EPA cites *Texas v. EPA*[129] as an example where the Fifth Circuit has found that a rulemaking was of nationwide scope and effect.[130] However,

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[126] *See* 79 Fed. Reg. at 55,955-56. EPA asserts both that the action is "nationally applicable" within the meaning of CAA section 307(b)(1) and of "nationwide scope or effect," without drawing a distinction between the two types of actions. *See* 79 Fed. Reg. at 55,956.

[127] *See Tex. Municipal Power Agency v. EPA*, 89 F.3d 858, 862 (D.C. Cir. 1996) ("We conclude that § 7607(b)(1) is a matter of venue, not jurisdiction[.]").

[128] *See Madison Gas & Elec. Co.*, 4 F.3d at 531 ("No doubt the separate review proceedings [of allowances under EPA's national acid rain program] will involve a number of common issues, but that is equally true of the separate proceedings that section 307(b)(1) incontestably requires when state plans implementing the Clean Air Act are challenged. Congress could have channeled all Clean Air Act cases to the D.C. Circuit but obviously decided not to.").

[129] No. 10-60961, 2011 WL 710598 (5th Cir. Feb. 24, 2011).

the Fifth Circuit never reached the issue of nationwide scope and effect.[131] Instead, the court found that EPA's SIP call to 13 states for greenhouse gas permitting was a nationally applicable regulation for which venue was proper in the D.C. Circuit.[132] Although Texas argued its challenge implicated only a local aspect of the rule, the court found that Texas challenged "only national features of the rulemaking."[133] Because "[n]one of these issues turn on the particulars of the SIP Call's impact within this Circuit," and because the issues are all "matters on which national uniformity is desirable" and "implicate not only the lawfulness of the SIP Call, but also the entire [regulatory] scheme," the Fifth Circuit found that transfer to the D.C. Circuit was appropriate.[134] Texas affirmative defense rules are applicable only in Texas and not to any other state and thus are clearly distinct from the greenhouse gas rules at issue in *Texas v. EPA.*

Finally, EPA's determinations that the portion of the Supplemental Proposal at it relates to TCEQ's affirmative defense rules are "nationally applicable" or are of "nationwide scope or effect" ignore the fact that venue for the TCEQ's affirmative defense rules is already established in the Fifth Circuit. EPA's attempt at an end run to establish venue for the Texas SIP in the D.C. Circuit ignores established law, as discussed above.

IV. CONCLUSION

Based on the comments above, EPA must withdraw and must not finalize its proposed finding of inadequacy of the Texas SIP.

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[130] 79 *Fed. Reg.* at 55,956, n.69.
[131] *Texas v. EPA*, No. 10-60961 at * 3, n.29.
[132] *Id.* at * 3-4.
[133] *Id.* at *4.
[134] *Id.*