

(4) The futures commission merchant, swap dealer, or major swap participant shall promptly furnish an amended annual report if material errors or omissions in the report are identified. An amendment must contain the certification required under paragraph (e)(3) of this section.

(5) A futures commission merchant, swap dealer, or major swap participant may request from the Commission an extension of time to furnish its annual report, provided the registrant's failure to timely furnish the report could not be eliminated by the registrant without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission.

(6) A futures commission merchant, swap dealer, or major swap participant may incorporate by reference sections of an annual report that has been furnished within the current or immediately preceding reporting period to the Commission. If the futures commission merchant, swap dealer, or major swap participant is registered in more than one capacity with the Commission, and must submit more than one annual report, an annual report submitted as one registrant may incorporate by reference sections in the annual report furnished within the current or immediately preceding reporting period as the other registrant.

(f) *Recordkeeping.*

(1) The futures commission merchant, swap dealer, or major swap participant shall maintain:

(i) A copy of the compliance policies, as defined in § 3.1(g), and all other policies and procedures adopted in furtherance of compliance with the Act and Commission regulations;

(ii) Copies of materials, including written reports provided to the board of directors or the senior officer in connection with the review of the annual report under paragraph (d) of this section; and

(iii) Any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are created, sent or received in connection with the annual report and contain conclusions, opinions, analyses, or financial data related to the annual report.

(2) All records or reports that a futures commission merchant, swap dealer, or major swap participant are required to maintain pursuant to this section shall be maintained in accordance with § 1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of

the applicable prudential regulator, as defined in 1a(39) of the Act.

Issued in Washington, DC, on November 10, 2010, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

**Statement of Chairman Gary Gensler**

Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant

I support the proposed rulemaking establishing requirements for the designation, qualifications and duties of a chief compliance officer of swap dealers, major swap participants and futures commission merchants. These rules are intended to ensure that sufficient resources are devoted to compliance with laws and regulations, which is a core component of sound risk management practices. The proposed rules fulfill the Dodd-Frank Act's requirements that intermediaries have chief compliance officers and establish and administer compliance policies, as well as resolve certain conflicts of interest.

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R08-OAR-2010-0909; FRL-9228-9]

**Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Pursuant to sections 110(a)(2)(H) and 110(k)(5) of the Clean Air Act, EPA is proposing to find that the Utah State Implementation Plan (SIP) is substantially inadequate to attain or maintain the national ambient air quality standards or to otherwise comply with the requirements of the Clean Air Act. Specifically, the SIP includes Utah rule R307-107, which exempts emissions during unavoidable breakdowns from compliance with emission limitations. This rule undermines EPA's, Utah's, and citizens' ability to enforce emission limitations that have been relied on to ensure attainment or maintenance of the national ambient air quality standards or meet other Clean Air Act requirements. If EPA finalizes this proposed finding of substantial inadequacy, Utah will be required to revise its SIP to correct this deficiency within 12 months of the effective date

of our final rule. If EPA finds that Utah has failed to submit a complete SIP revision as required by a final rule or if EPA disapproves such a revision, such finding or disapproval would trigger clocks for mandatory sanctions and an obligation for EPA to impose a Federal Implementation Plan. EPA is also proposing that if EPA makes such a finding or disapproval, sanctions would apply consistent with 40 CFR 52.31, such that the offset sanction would apply 18 months after such finding or disapproval and highway funding restrictions would apply six months later unless EPA first takes action to stay the imposition of the sanctions or to stop the sanctions clock based on the State curing the SIP deficiencies. EPA is also requesting comment on whether EPA should exercise its discretionary authority under the Clean Air Act to impose highway funding restrictions in all areas of the State, not just in nonattainment areas.

**DATES:** Comments must be received on or before December 20, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R08-OAR-2010-0909, by one of the following methods:

- <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *E-mail:* [russ.tim@epa.gov](mailto:russ.tim@epa.gov).
- *Mail:* Callie A. Videtich, Director, Air Program, Environmental Protection Agency, Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129.

- *Fax:* (303) 312-6064 (please alert the individual listed in **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).

- *Hand Delivery:* Callie A. Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-R08-OAR-2010-0909. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise

protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an “anonymous access” systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Program, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Tim Russ, Air Program, Mailcode 8P–AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6479, or [russ.tim@epa.gov](mailto:russ.tim@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**Definitions**

For the purpose of this document, the following definitions apply:

- (i) The word *Act* or initials *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.
- (ii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.
- (iii) The initials *NAAQS* mean national ambient air quality standard.
- (iv) The initials *SIP* mean or refer to State Implementation Plan.
- (v) The words *State* or *Utah* mean the State of Utah, unless the context indicates otherwise.

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**I. General Information**

*What should I consider as I prepare my comments for EPA?*

1. **Submitting CBI.** Do not submit this information to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. **Tips for Preparing Your Comments.** When submitting comments, remember to:

- a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

**II. Background**

On September 20, 1999, Assistant Administrator for Enforcement and Compliance Assurance, Steven A. Herman, and Assistant Administrator for Air and Radiation, Robert Perciasepe, issued the EPA’s most recent policy on appropriate State Implementation Plan (SIP) provisions addressing excess emissions during periods of startup, shutdown and malfunction (SSM). “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup and Shutdown” (1999 Policy). The 1999 Policy indicated that it was expanding on and clarifying two previous policies issued in 1982 and 1983 by then Assistant Administrator for Air, Noise and Radiation Kathleen Bennett (“1982 Policy” and “1983 Policy”).

In the 1982 and 1983 Policies, Assistant Administrator Bennett enunciated the Agency’s position that SIPs should not be approved if they include exemptions for excess emissions during malfunction events.<sup>1</sup> These policies reflect the Agency’s interpretation that broad exemptions from compliance with emission limitations during periods of malfunction prevent a SIP from adequately ensuring attainment and maintenance of national ambient air quality standards (NAAQS). For purposes of demonstrating attainment and maintenance, states rely on assumed compliance with emission limitations. See, e.g., Clean Air Act (CAA) sections 110(a)(2)(A) and (C); 40 CFR 51.112; *Train v. NRDC*, 421 U.S.

<sup>1</sup> As indicated above, the 1982, 1983, and 1999 Policies also address excess emissions provisions for startup and shutdown events. However, because our proposed action only addresses a malfunction provision—Utah’s unavoidable breakdown rule—we are not including any further discussion of the Policies as they relate to startup and shutdown.

60, 78–79 (1975). Thus, the 1982 and 1983 Policies indicated that, because SIPs must provide for attainment and maintenance of the NAAQS, any SIP provisions addressing malfunctions must be narrowly drawn and should not provide a blanket exemption from compliance with emission limitations; all periods during which emissions exceed emission limitations (“excess emissions”) should constitute violations under the SIP.

The 1982 and 1983 Policies stated that EPA could approve SIP revisions that incorporated an enforcement discretion approach as described in the Policies. This enforcement discretion approach envisioned commencement of a proceeding to notify the source of its violation and a demonstration by the source that the excess emissions, “though constituting a violation,” were due to an unavoidable malfunction. Following the proceeding and consideration of specific criteria, the state agency would decide whether to pursue an enforcement action. The 1982 and 1983 Policies also advised that the state could choose not to include in the SIP any provision on malfunctions, which reflected the fact that the CAA does not require states to include in SIPs any form of relief for violations caused by malfunctions.

EPA understood that some malfunctions are unavoidable: “Generally, EPA agrees that the imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner and/or operator is not appropriate.” (1982 and 1983 Policies). However, EPA was also mindful of its duty under the CAA to protect the NAAQS:

“The rationale for establishing these emissions as violations, as opposed to granting automatic exemptions, is that SIPs are ambient-based standards and any emissions above the allowable may cause or contribute to violations of the national ambient air quality standards. Without clear definitions and limitations, these automatic exemption provisions could effectively shield excess emissions arising from poor operation and maintenance or design, thus precluding attainment. Additionally, by establishing an enforcement discretion approach and by requiring the source to demonstrate the existence of an unavoidable malfunction on the source, good maintenance procedures are indirectly encouraged.” (1982 Policy.)<sup>2</sup>

<sup>2</sup> Even prior to the issuance of the 1982 and 1983 Policies, it was our interpretation that all excess emissions, regardless of cause, should be treated as violations so as to provide sources with the incentive to properly design their facilities in the first instance and to improve their operation and maintenance practices over time. See, e.g., 42 FR 58171 (November 8, 1977).

The 1999 Policy reiterated EPA’s interpretation that all periods of excess emissions should be considered violations. However, the 1999 Policy reflected our interpretation that a state could include a narrowly crafted affirmative defense provision in the SIP as an alternative to an enforcement discretion provision. Under this approach, a SIP could provide an affirmative defense to an enforcement action for penalties, but not to an action for injunctive relief. The Agency explained that because periods of excess emissions could undermine attainment and maintenance of the NAAQS and protection of prevention of significant deterioration (PSD) increments, an affirmative defense to an action for injunctive relief would not be appropriate.<sup>3</sup>

We also indicated in the 1999 Policy that we would not approve a rule that would bar EPA or citizen enforcement based on a state’s decision to exercise its discretion not to pursue an enforcement action. EPA explained that such a rule would be inconsistent with the regulatory scheme established in Title I of the CAA.

Finally, the 1999 Policy noted that some SIPs had been approved that appeared to be in conflict with EPA’s SSM policies. The Policy indicated that EPA Regional Offices should work with the states to ensure SIPs were consistent with EPA’s interpretation of the Act’s requirements.

Since the 1999 Policy was issued, EPA Region VIII has worked with states within the Region to ensure that their SIPs are consistent with EPA’s interpretation of the Act as set forth in the 1982, 1983, and 1999 Policies.<sup>4</sup> Shortly after the 1999 Policy was issued, we advised Utah that its unavoidable breakdown rule was inconsistent with the CAA, and since that time, we have asked Utah several times to revise the rule. Among other things, the rule provides that “emissions resulting from

<sup>3</sup> In a 2009 decision, the United States Court of Appeals for the Tenth Circuit held that the policy was a “reasonable interpretation of the Clean Air Act.” *Arizona Public Service Company v. EPA*, 562 F.3d 1116, 1129 (10th Cir. 2009). See also *Michigan Dept. of Environmental Quality v. EPA*, 230 F.3d 181 (6th Cir. 2000).

<sup>4</sup> For example, at our request, the State of Colorado revised its SIP provisions for SSM. We approved revised provisions in 2006 (71 FR 8958, February 22, 2006) and 2008 (73 FR 45879, August 7, 2008). At our request, the State of Wyoming revised its SIP provision for malfunctions. We approved the revised provision on April 16, 2010 (75 FR 19886). At our request, the State of North Dakota revised its SIP provision for malfunctions and submitted the revised provision to us on April 6, 2009. That provision is modeled on the Wyoming provision, and we intend to propose action on it shortly.

an unavoidable breakdown will not be deemed a violation \* \* \*

Some version of the Utah unavoidable breakdown rule has been in the SIP for many years. In 1980, EPA approved a variation of the current Utah unavoidable breakdown rule. In the proposed rulemaking preamble, EPA stated that it could “not fully approve Regulation 4.7 because it exempts certain excess emissions from being violations of the Air Conservation Regulations,” but then proposed to approve Utah’s malfunction procedures because any exemptions granted by the Utah Executive Secretary “are not applicable as a matter of federal law.” 44 FR 28688, 28691 (May 16, 1979). EPA’s final approval of the regulation mirrored this concept. 45 FR 10761, 10763 (February 19, 1980). However, thirty years later, it is not clear how EPA reached the conclusion that exemptions granted by Utah would not apply as a matter of federal law or whether a court would honor EPA’s interpretation; the Utah rule itself makes no reference to a reservation of federal authority. Instead, the rule merely states that information submitted by a source regarding a breakdown event would be “used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action.”

EPA approved a revised version of the rule in 1994 with no preamble discussion, except to say that the Utah air rules had been renumbered and new requirements had been added (59 FR 35036, July 8, 1994; 40 CFR 52.2320(c)(25)(i)(A)). The key aspects of the unavoidable breakdown rule remained the same.

Subsequently, Utah again renumbered its entire SIP regulations, and EPA approved the re-numbered regulations, including the re-numbered unavoidable breakdown rule, to conform the federally-approved SIP to the numbering of Utah’s regulations. (70 FR 59681 (October 13, 2005).) EPA did not consider the substance of the unavoidable breakdown rule in that action. Instead, EPA indicated that it was only approving the renumbering and that attempts to address problems in the rules were ongoing:

“By this action, EPA has reviewed the Utah Department of Air Quality’s (UDAQ) SIP submittals and found that these SIP submittals only renumber and restructure UDAQ’s rules. EPA has not reviewed the substance of these rules as part of this action; EPA approved these state rules into the SIP in previous rulemakings. The EPA is now merely approving the renumbering system submitted by the State. The current version of UDAQ’s rules does not contain substantive changes from the prior codification that we

approved into the SIP. EPA acknowledges that there are ongoing discussions with Utah to address EPA's concerns with some rule language that EPA previously approved into the Utah SIP. In an April 18, 2002 letter from Richard Sprott, Director of Utah's Division of Air Quality, to Richard Long, Director of the Air and Radiation Program in EPA Region 8, UDAQ committed to work with us to address our concerns with the Utah SIP. Because the SIP submittals only restructure and renumber the existing SIP-approved regulations, contain no substantive changes, and UDAQ has committed to address EPA's concerns, we believe it is appropriate to propose to approve the submittal. Approving the restructured and renumbered Utah rules into the SIP will also facilitate future discussions on the rules. EPA will continue to require the State to correct any rule deficiencies despite EPA's approval of this recodification." (70 FR at 59683)

Over the years Utah personnel acknowledged that the unavoidable breakdown rule should be revised and committed to do so. For example, in a January 17, 2001 letter to EPA, Rick Sprott, then the Executive Director of the Utah Division of Air Quality (UDAQ), wrote the following:

"With respect to EPA's concern with the breakdown rule currently approved into Utah's SIP, UDAQ agrees that the rule would benefit from clarification."

Later, in an April 18, 2002 letter,<sup>5</sup> Mr. Sprott wrote the following:

"The Utah Division of Air Quality commits to work with EPA in good faith to develop approvable SIP revisions, which address the following issues:

\* \* \*

8. Unavoidable breakdown rules and consistency with the EPA September 20, 1999 policy regarding such breakdowns."

In 2004, UDAQ staff drafted replacement rule language for the breakdown rule, consulted with EPA and other stakeholders, and initiated the State's public process for SIP revisions. EPA provided detailed comments regarding draft rule language and in January 2005 traveled to Utah to provide a detailed presentation to UDAQ and industry stakeholders regarding EPA's interpretations of the CAA and concerns regarding UDAQ's proposed replacement rule language.

Following the January 2005 meeting, Fred Nelson of the Utah Attorney General's Office prepared another draft of possible replacement rule language, which he shared with EPA and industry representatives. In May 2005, in an attempt to ensure that any rule revision could ultimately be approved by EPA, EPA provided specific comments and suggestions to Mr. Nelson regarding this

draft. However, UDAQ did not pursue further rulemaking action at that time.

During the August 2, 2006 midyear review between UDAQ and EPA, the unavoidable breakdown rule was again discussed. Mr. Sprott indicated that he did not want to pursue further action on the unavoidable breakdown rule given the disagreement between Utah industry and EPA. However, he said he was aware that Colorado was in the process of revising its malfunction rule, that he would be happy to benefit from the Colorado process, and that if it concluded successfully, he would lead the effort to adopt a new rule in Utah. Mr. Sprott also said that while he wanted to complete a rule revision through a cooperative process, if it couldn't be done that way, EPA should do a SIP call. Although Colorado subsequently adopted a revised malfunction rule and we approved it into the SIP without challenge (73 FR 45879, August 7, 2008), we are unaware of any further steps taken by Utah to revise its unavoidable breakdown rule.

To assure that a state's SIP provides for attainment and maintenance of the NAAQS, and compliance with other CAA requirements, sections 110(a)(2)(H) and 110(k)(5) of the CAA authorize EPA to find that a SIP is substantially inadequate to attain or maintain a NAAQS, or comply with other CAA requirements, and to require ("call for") the state to submit, within a specified time period, a SIP revision to correct the inadequacy. This CAA requirement for a SIP revision is known as a "SIP call." The CAA authorizes EPA to allow a state up to 18 months to respond to a SIP call.

On September 3, 2009, WildEarth Guardians (WEG) filed a complaint against EPA in the U.S. District Court for the District of Colorado (Civil Action No. 09-cv-02109-MSK-KLM) seeking, among other things, an injunction requiring EPA to issue a SIP call to Utah to revise the unavoidable breakdown rule. On November 23, 2009, we entered into a Consent Decree with WEG that requires us to sign a notice of final rulemaking action by February 28, 2011. In that final rulemaking action we must determine whether the Utah breakdown provision (Utah Regulations 307-107-1 through 307-107-5) renders the Utah SIP "substantially inadequate" within the meaning of section 110(k)(5) of the CAA, 42 U.S.C. 7410(k)(5), and, if EPA determines that the SIP is substantially inadequate, require the State to revise the SIP as it relates to the Utah breakdown provision. We intend to meet the requirements of the Consent Decree through the rulemaking action we are initiating today.

### III. Why is EPA proposing a SIP call?

Utah rule R307-107 contains various provisions that are inconsistent with EPA's interpretations regarding the appropriate treatment of malfunction events in SIPs and which render the Utah SIP substantially inadequate. As a result, we are calling for a SIP revision.

#### A. Deficiencies in R307-107-1

R307-107-1 indicates it applies to all regulated pollutants including those for which there are NAAQS and states that "emissions resulting from unavoidable breakdown will not be deemed a violation of these regulations." As described above, our interpretation of the CAA as expressed in our various policy statements since the early 1980s is that SIP provisions may not provide that periods of excess emissions are not violations.

We believe the Utah rule's broad exemption undermines the ability to protect the NAAQS, PSD increments, and visibility through enforcement of emission limits contained in the SIP. The Utah SIP contains generic emission limits that help areas maintain the NAAQS as well as emission limits specifically modeled and relied on to bring areas not attaining the NAAQS into attainment. *See, e.g.*, Utah rule R307-201 ("General Emission Standards") and Section IX.H.1 of the Utah SIP (contains emission limits for the Utah County PM10 nonattainment area SIP). Because the NAAQS are not directly enforceable against individual sources,<sup>6</sup> SIPs rely on the adoption and enforcement of these generic and specific emission limits to attain and maintain the NAAQS, as well as to protect PSD increments and meet other CAA requirements, such as protection of visibility in Class I areas.

In the case of an unavoidable breakdown, the rule's exemption eliminates any opportunity to obtain injunctive relief that may be needed to protect the NAAQS, increments, and visibility. Thus, the rule impedes the ability to protect public health and the environment. Furthermore, the rule's exemption reduces a source's incentive to design, operate, and maintain its facility to meet emission limits at all times.

We expect some commenters may assert that we need to show a direct causal link between unavoidable breakdown excess emissions and specific threats to or violations of the

<sup>6</sup> *See, e.g., Coalition Against Columbus Ctr. v. New York*, 967 F.2d 764, 769 (2d Cir. 1992); *League to Save Lake Tahoe, Inc. v. Trounaday*, 598 F.2d 1164, 1173 (9th Cir. 1979); 57 FR 32276, July 21, 1992.

<sup>5</sup> April 18, 2002 letter from Rick Sprott, UDAQ to Richard Long, EPA referred to as 15-point commitment letter.

NAAQS to conclude that the SIP is substantially inadequate. We do not agree. It is our interpretation that the fundamental integrity of the CAA's SIP process and structure are undermined if emission limits relied on to meet CAA requirements related to protection of public health and the environment can be violated without potential recourse. We do not believe we are restricted to issuing SIP calls only after a violation of the NAAQS has occurred or only where a violation can be directly linked to specific excess emissions. It is sufficient that emissions limits to which the unavoidable breakdown exemption applies have been, are being, and will be relied on to attain and maintain the NAAQS and meet other CAA requirements.<sup>7</sup>

Our interpretation of the CAA is supported by sections 110 and 302 of the CAA. Section 110(a)(2)(A) requires each SIP to include enforceable emission limitations necessary or appropriate to meet the CAA's applicable requirements. As noted above, these applicable requirements include attainment and maintenance of the NAAQS, prevention of significant deterioration, and improvement and protection of visibility in national parks and wilderness areas. Section 302(k) defines emission limitation as a requirement established by a state or EPA that "limits the quantity, rate, or concentration of emissions of air pollutants **on a continuous basis.**" (Emphasis added.) Because of the exemption in R307-107-1, emission limits in the Utah SIP that have been relied on by the State to demonstrate attainment and maintenance of the NAAQS and meet other CAA requirements do not limit emissions on a continuous basis and are not fully enforceable.

R307-107-1 is also substantially inadequate because it applies to all regulated pollutants, not just NAAQS pollutants, and because it indicates that excess emissions from an unavoidable breakdown are not deemed a violation of "these regulations." "These regulations" includes the totality of Utah's air pollution control regulations, which include the regulations Utah has incorporated by reference to receive

<sup>7</sup> The U.S. Court of Appeals for the Eleventh Circuit has recognized that a SIP call under CAA section 110(k)(5) is the appropriate mechanism for EPA to require a change to an existing SSM provision in a SIP: "EPA policy guidance cannot trump the SSM Rule adopted by Georgia and approved formally by the EPA \* \* \* If the EPA believes that its current interpretation of the Clean Air Act requires Georgia to modify its SSM Rule, the EPA should require the state to revise its SIP to conform to EPA policy" (citing CAA section 110(k)(5)).

delegation of federal authority—for example, New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS). See Utah rules R307-210 and R307-214. To the extent any exemptions with respect to malfunctions from these technology-based standards are warranted, the federal standards contained in EPA's regulations already specify the appropriate exemptions. See, e.g., 40 CFR 60.48Da(c). No additional exemptions are warranted or appropriate. See, e.g., 40 CFR 60.10(a); 40 CFR 63.12(a)(1); and the 1999 Policy, Attachment, page 3. Thus, R307-107-1 is substantially inadequate because it improperly provides an exemption not contained in and not sanctioned by the delegated federal standards.

Our interpretation, as it applies to both technology-based standards and SIP limits, is further supported by a 2008 U.S. Court of Appeals decision that vacated EPA's general malfunction exemption from CAA section 112(d) maximum achievable control technology (MACT) standards. *Sierra Club v. EPA*, 551 F.3d 1019 (DC Cir. 2008), cert. denied. The court vacated the exemption because it was inconsistent with the CAA's requirement that emission standards—such as the 112(d) MACT standards—must apply continuously, as expressed in section 302(k) of the CAA. The court specifically held that a regulatory provision establishing a general duty to minimize hazardous air pollutant (HAP) emissions during malfunctions was not an emission standard under CAA section 112. Although the decision addressed the HAP program and not the SIP program, it carries significant weight for the SIP program as well because section 302(k) is equally relevant for the SIP program. R307-107-1's broad malfunction exemption from "these regulations" is inconsistent with section 302(k) as interpreted by the Court in *Sierra Club*.

As referenced in R307-107-1, "these regulations" would also include Utah's PSD and nonattainment major new source review (NSR) requirements. This means a source could use the provisions of R307-107 to claim an exemption from best available control technology (BACT) or lowest achievable emission rate (LAER) limits in a major source permit for excess emissions resulting from an unavoidable breakdown. We have consistently interpreted the Act to not allow for outright exemptions from BACT limits, and the same logic applies to LAER limits. See, e.g., 1977 memorandum entitled "Contingency Plan for FGD Systems During Downtime

as a Function of PSD," from Edward E. Reich to G.T. Helms and January 28, 1993 memorandum entitled "Automatic or Blanket Exemptions for Excess Emissions During Startup and Shutdowns under PSD," from John B. Rasnic to Linda M. Murphy. As noted, in order to ensure non-degradation of air quality at all times under the PSD program and protection of the NAAQS at all times, it is necessary for a source to comply with its permit limits at all times. This is another reason R307-107's exemption renders the Utah SIP substantially inadequate.

#### B. Deficiencies in R307-107-2

R307-107-2 requires the source to submit information regarding an unavoidable breakdown to the executive secretary of Utah's Air Quality Board (UAQB) and indicates that the information "shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action." In other words, the executive secretary shall determine whether the excess emissions were caused by an unavoidable breakdown and, thus, whether the excess emissions constitute a violation or not. This rule provision appears to give the executive secretary exclusive authority to determine whether excess emissions constitute a violation.<sup>8</sup> We believe this is inconsistent with the enforcement structure contemplated by the CAA. Specifically, the CAA provides authority to enforce violations of SIP and other CAA emission limits to EPA and citizens as well as to the states. Thus, the CAA provides EPA and citizens with authority to pursue a violation even if a state chooses not to. See sections 113 and 304 of the CAA. It is our interpretation, expressed in our 1999 Policy, that SIP provisions that give exclusive authority to a state to determine whether an enforcement action can be pursued for an exceedance of an emission limit are inconsistent

<sup>8</sup> As we noted earlier, in a 1980 approval of a predecessor to the current unavoidable breakdown rule, EPA indicated that EPA might not approve exemptions granted by the State and that the State's exemption would not apply as a matter of federal law. Thirty years later, we are not sanguine that a court would uphold our interpretation, or that five years from now, anyone will remember that interpretation. See, e.g., *U.S. v. Ford Motor Co.*, 736 F.Supp. 1539 (W.D. Mo. 1990) and *U.S. v. General Motors Corp.*, 702 F.Supp. 133 (N.D. Texas 1988) (EPA could not pursue enforcement of SIP emission limits where states had approved alternative limits under procedures EPA had approved into the SIP.) While we do not agree with the holdings of these cases, we think the reasonable course is to eliminate any uncertainty about reserved enforcement authority by requiring the State to revise or remove the unavoidable breakdown rule from the SIP.

with the CAA's regulatory scheme. EPA and citizens, and any court in which they seek to file an enforcement claim, must retain the authority to independently evaluate whether a source's exceedance of an emission limit warrants enforcement action. Because a court could interpret section R307-107-2 as undermining the ability of EPA and citizens to independently exercise enforcement discretion granted by the CAA, it is substantially inadequate to comply with CAA requirements related to enforcement. Because it undermines the envisioned enforcement structure, attainment and maintenance of the NAAQS and compliance with other CAA requirements related to PSD, visibility, NSPS, and NESHAPS is less certain. Potential EPA and citizen enforcement provides an important safeguard in the event a state lacks resources or appropriate intention to enforce CAA violations. Thus, R307-107-2 renders the SIP substantially inadequate to attain or maintain the NAAQS or otherwise comply with the CAA.

### C. Conclusion

For the reasons stated above, EPA is proposing to find, pursuant to sections 110(a)(2)(H) and 110(k)(5) of the CAA, that the Utah SIP is substantially inadequate to attain or maintain the NAAQS or to otherwise comply with the requirements of the CAA. Utah rule R307-107 improperly undermines EPA's, Utah's, and citizens' ability to enforce emission limitations that have been relied on in the SIP to ensure attainment and maintenance of the NAAQS or meet other CAA requirements. Pursuant to sections 110(a)(2)(H) and 110(k)(5) of the CAA, we are proposing to call for Utah to remove R307-107 from the SIP or revise it to be consistent with CAA requirements.

We are proposing that Utah must respond to our SIP call within 12 months of the effective date of a final rule issuing a SIP call. We think this is a reasonable amount of time for several reasons. First, Utah has been aware of our concerns for years. Utah previously initiated the State rulemaking process to address the SIP deficiencies but dropped its efforts when it couldn't achieve consensus. Second, industry and WildEarth Guardians' predecessor had extensive involvement in the development of the Colorado malfunction rule, which, as noted above, we approved in 2008. The Colorado malfunction rule is readily available online, and use of the Colorado rule as a template would give the UAQB a substantial head start in

addressing the SIP deficiencies. Other examples of provisions that have been approved or promulgated by EPA for areas within the Region are also available. *See, e.g., https://yosemite.epa.gov/R8/R8Sips.nsf/641057911f6bd13987256b5f0054f380/722dcc2462e7856a87256ef3005f6d4f/\$FILE/Ch%201%20Sect%205.pdf* (Wyoming air rules, Chapter 1, Section 5, approved at 75 FR 19886, April 16, 2010); 73 FR 21418, 21464, April 21, 2008. Third, another option to address the deficiencies is to simply remove R307-107 from the SIP. Under this option, no time would be needed to develop replacement SIP rule language.

### IV. What happens if EPA issues a final SIP call and the State of Utah does not submit a complete SIP revision that responds to the SIP call or if EPA disapproves a SIP revision that responds to the SIP call?

If Utah fails to submit a complete SIP revision that responds to a final SIP call, CAA section 179(a) provides for EPA to issue a finding of State failure. Such a finding starts mandatory 18-month and 24-month sanctions clocks and a 24-month clock for promulgation of a federal implementation plan (FIP) by EPA. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program and restrictions on highway funding. However, section 179 leaves it up to the Administrator to decide the order in which these sanctions apply. EPA issued an order of sanctions rule in 1994 (59 FR 39832, August 4, 1994, codified at 40 CFR 52.31) but did not specify the order of sanctions where a state fails to submit or submits a deficient SIP in response to a SIP call. However, the order of sanctions specified in that rule (40 CFR 52.31) should apply here for the same reasons discussed in the preamble to that rule. Thus, if EPA issues a final SIP call and Utah fails to submit the required SIP revision, or submits a revision that EPA determines is incomplete or that EPA disapproves, EPA proposes that the 2-to-1 emission offset requirement will apply for all new sources subject to the nonattainment new source review program 18 months following such finding or disapproval unless the State corrects the deficiency before that date. EPA proposes that the highway funding restrictions sanction will also apply 24 months following such finding or disapproval unless the State corrects the deficiency before that date. EPA is also proposing that the provisions in 52.31 regarding staying the sanctions clock

and deferring the imposition of sanctions would also apply.

Mandatory sanctions under section 179 generally apply only in nonattainment areas. By its definition, the emission offset sanction applies only in areas required to have a part D NSR program, typically areas designated nonattainment.<sup>9</sup> Section 179(b)(1) expressly limits the highway funding restriction to nonattainment areas. Additionally, EPA interprets the section 179 sanctions to apply only in the area or areas of the State that are subject to or required to have in place the deficient SIP and for the pollutant or pollutants the specific SIP element addresses. In this case, mandatory sanctions would apply in all areas designated nonattainment for a NAAQS within the State because Utah rule R307-107 applies statewide and applies for all NAAQS pollutants.

EPA has additional authority to impose discretionary sanctions under CAA section 110(m). EPA's authority to impose sanctions under section 110(m) is triggered by the same findings that trigger the mandatory imposition of sanctions. However, under section 110(m), EPA may impose sanctions more quickly than provided under the mandatory sanction provision and may also impose them in a broader area. Specifically, under section 110(m), EPA may impose sanctions "any time" after it has made a finding of deficiency or disapproved a SIP. In addition, EPA may impose the sanctions with respect to "any portion of the State the Administrator determines reasonable and appropriate." Finally, although imposition of the 2-to-1 offset sanction is still limited by its terms to areas with part D NSR programs, the highway funding restrictions can be applied in areas designated as attainment or unclassifiable as well as those designated nonattainment. *See* 59 FR 1476 (January 11, 1994); 40 CFR 52.30(d)(2). EPA may determine whether or not to use this authority in response to a SIP failure, and, thus, they are termed discretionary sanctions.

Because only limited portions of the State are designated nonattainment, the mandatory sanctions would not be applicable in all areas of the State that are covered by the rule we have proposed is deficient. EPA is requesting comment on whether to exercise its discretionary authority to impose the highway funding restrictions sanction in all areas of the State, regardless of

<sup>9</sup> An exception to this, not relevant here, is areas located in the Ozone Transport Region, which are required to have a part D NSR program regardless of the area's designation. *See* CAA section 184(b)(2).

designation, if it finalizes this proposed SIP call and the State fails to submit a complete SIP revision or EPA disapproves such revision. If EPA were to impose discretionary sanctions, EPA proposes that the same 24-month clock would apply to the highway funding sanction as would apply under the mandatory sanctions.

In addition to sanctions, if EPA finalizes this SIP call and then finds that the State failed to submit a complete SIP revision that responds to the SIP call or disapproves such revision, the requirement under section 110(c) would be triggered that EPA promulgate a FIP no later than two years from the date of the finding or the disapproval if the deficiency has not been corrected.

## V. Proposed Action

EPA is proposing that the Utah SIP is substantially inadequate to attain or maintain the NAAQS or to otherwise comply with requirements of the CAA due to significant deficiencies created by Utah's unavoidable breakdown rule, R307-107. Pursuant to CAA sections 110(a)(2)(H) and 110(k)(5), EPA is proposing to require that Utah revise the SIP to correct the inadequacies and submit the revised SIP to EPA within 12 months of the effective date of a final rule finding the SIP substantially inadequate. EPA is proposing that mandatory sanctions under CAA section 179 would apply as provided in 40 CFR 50.31 should Utah not submit a complete SIP consistent with a final SIP call requirement or should EPA disapprove any such submission. EPA is also requesting comment on whether EPA should exercise its discretionary authority under section 110(m) to impose highway funding restrictions in all areas of the State if 24 months after a sanctions clock has been triggered, the State has still not corrected the deficiency that triggered the sanctions clock.

We are soliciting comments on these proposed actions. Final rulemaking will occur after consideration of any comments.

## VI. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply,

Distribution, or Use" (66 FR 28355, May 22, 2001).

This proposed action would only require the State of Utah to revise UAC R307-107 to address requirements of the CAA. Accordingly, the Administrator certifies that this proposed action would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because this proposed action would not impose any requirements on small entities.

Since the only costs of this action would be those associated with preparation and submission of the SIP revision, EPA has determined that this proposed action would not include a Federal mandate that may result in expenditures of \$100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector in any one year. Accordingly, this proposed action is not subject to the requirements of sections 202 or 205 of the unfunded mandates reform act (UMRA).

In addition, since the only regulatory requirements of this proposed action would apply solely to the State of Utah, this action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

Since this proposed action would impose requirements only on the State of Utah, it also does not have tribal implications. It would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

This proposed action also does not have Federalism implications because it would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it would simply maintain the relationship and the distribution of power and responsibilities between EPA and the states as established by the CAA. This proposed SIP call is required by the CAA because EPA believes the current SIP is substantially inadequate to attain or maintain the NAAQS or comply with other CAA requirements. Utah's direct

compliance costs would not be substantial because the proposed SIP call would require Utah to submit only those revisions necessary to address the SIP deficiencies and applicable CAA requirements.

EPA interprets Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it would not establish an environmental standard, but instead would require Utah to revise a state rule to address requirements of the CAA.

Section 12 of the National Technology Transfer and Advancement Act of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with the National Technology Transfer and Advancement Act, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. In making a finding of a SIP deficiency, EPA's role is to review existing information against previously established standards. In this context, there is no opportunity to use VCS. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

This proposed action would not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), since it would only require the State of Utah to revise UAC R307-107 to address requirements of the CAA.

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: November 10, 2010.

**James B. Martin,**

*Regional Administrator, Region 8.*

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