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Startup Shutdown Malfunction/Texas State Implementation Plan Revisions: U.S. EPA Region 6 Proposed Withdrawal of Finding of Substantial Inadequacy

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The United States Environmental Protection Agency (“EPA”) published an April 29th Federal Register Notice stating it was considering alternative interpretations regarding affirmative defenses in Clean Air Act State Implementation Plans (“SIPs”) of states in Region 6 that depart from the federal agency’s 2015 policy addressing these issues. See 84 Fed. Reg. 17986.

EPA Region 6 proposes a finding that the affirmative defense provisions in the Texas SIP applicable to excess emissions that occurred during certain upset events and unplanned maintenance, startup, or shutdown would be consistent with a revised agency alternative interpretation.

The acronym “SSM” is commonly used to denote startup, shutdown, and malfunction (as opposed to scheduled maintenance). “Malfunction” has been defined by EPA as the “sudden and unavoidable breakdown of a process or control equipment.”

Section 110 of the Clean Air Act requires states to submit SIPs to ensure that each state attains and maintains compliance with each of the National Ambient Air Quality Standards (“NAAQS”) promulgated by EPA. The SIPs must include “enforceable emission limitations” sufficient to meet the Clean Air Act’s requirements. The plans must also prohibit the emission of air pollution that contribute to nonattainment or interference with maintenance of the NAAQS in any other states. In addition, states must have adequate authority to carry out their implementation plans.

The role of SSM exemptions and their relationship with SIPs has been a focus of EPA, the regulated community, and environmental organizations for many years.

EPA Region 6 would make a determination that the SSM (i.e., affirmative defense) provisions in the Texas SIP are narrowly tailored and limited to ensure protection of the NAAQS and other Clean Air Act requirements. The basis for this determination would be consistency with recent alternative EPA interpretations. As a result, EPA Region 6 is also proposing to withdraw the SIP call issued to Texas published on June 12, 2015.

The June 12, 2015, determination had been based on EPA’s determination that the Texas SIP was substantially inadequate because of the presence of certain provisions that established an affirmative

defense as to civil penalties for sources with emission upsets and unplanned maintenance, startup, and shutdown activities that exceed otherwise applicable admission limitations.

EPA Region 6 states that the federal agency's position on affirmative defense SIP provisions as upheld by Fifth Circuit Court of Appeals decision (Luminant) should be maintained. Further, the agency states it is not appropriate to extend the NRDC Decision by the DC Circuit to the affirmative defense provisions in the Texas SIP. The agency's position is now that the Clean Air Act does not speak directly to the question of whether affirmative defense provisions are permissible in Section 110 SIPs.

A copy of the Federal Register notice can be found [here](#).