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See the Dec. 5, 2001 version  
for guidance on this issue.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

NOV 8, 2001

## MEMORANDUM

SUBJECT: Clarification - State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown

FROM: Eric Schaeffer  
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Office of Enforcement and Compliance Assurance

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Office of Air and Radiation

TO: Regional Administrators, Regions I - X

On September 20, 1999, EPA issued a guidance memorandum discussing the types of State Implementation Plan (SIP) provisions addressing excess emissions during malfunctions, startups, and shutdowns that EPA believes may appropriately be approved as part of a SIP - State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown ("September 20, 1999 Guidance"). Certain questions have recently been raised concerning the intended effect of the September 20, 1999 Guidance. The purpose of this Memorandum is to provide clarification with regard to these questions.

This Memorandum confirms that the September 20, 1999, Guidance provides guidance to States and EPA regarding SIP provisions related to excess emissions during malfunctions, startups, and shutdowns. It was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA. Similarly, the Guidance was not intended to affect existing permit terms or conditions regarding malfunctions, startups and shutdowns that reflect approved SIP provisions, including opacity provisions, or to alter the emergency defense provisions at 40 C.F.R. § 70.6(g). Existing SIP rules and 40 C.F.R. § 70.6(g) may only be changed through established permitting processes. Thus, EPA did not intend the September 20, 1999, Guidance to be legally dispositive with respect to any particular proceedings in which a violation is alleged to have occurred. Rather, it is in the context of future rulemaking actions, such as SIP approval process, that EPA will consider the Guidance and the statutory principles on which the Guidance is based.

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The September 20, 1999, Guidance provides a list of elements that EPA believes a State affirmative defense for malfunctions should incorporate in order for EPA to approve such a provision into a SIP. One element provides “that the amount and duration of excess emissions (including any bypass) were ‘minimized to the maximum extent practicable.’” This Memorandum confirms that this element does not contemplate redundant control technology where such controls would be technically and economically infeasible.

Questions also have been raised regarding the effect of the September 20, 1999, Guidance as it related to enforcement discretion and affirmative defenses. The Guidance confirms that EPA and States may always exercise enforcement discretion with respect to excess emissions that occur during malfunctions, startups or shutdowns. The Guidance further confirms that States may provide in SIPs appropriately tailored affirmative defenses, consistent with the September 20, 1999, Guidance, that would be available in enforcement actions brought by States, EPA, or citizens.

cc: Air Directors Regions I - X  
Regional Counsels Region I - X

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