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

DEC 5 2001

OFFICE OF
AIR AND RADIATION

MEMORANDUM

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

FROM: Eric Schaeffer
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TO: Regional Administrators, Regions I - X

This is a re-issuance of "Clarification – State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," which was signed on November 8, 2001. This re-issued form of the Policy excludes a paragraph that was erroneously included in the November 8, 2001, version.

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 rulemaking procedures and existing permit terms 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 the SIP approval process, that EPA will consider the Guidance and the statutory principles on which the Guidance is based.

Questions also have been raised regarding the effect of the September 20, 1999, Guidance as it relates 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 Regions I - X