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Going, going… EPA Eliminates Another Source of Startup, Shutdown and Malfunction Exemptions from Clean Air Act

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36 States Ordered to Remove SSM and Affirmative Defense Provisions from Their Rules

On June 12, EPA published its final regulatory action under the ***Clean Air Act (CAA)*** requiring 36 states to remove provisions from their State Implementation Plans (SIPs) allowing exemptions from emission limitations during startup, shutdown and malfunction (SSM) events. This action also requires 17 states to remove affirmative defenses from the SSM provisions of their SIPs. Affected states must submit their SIP revisions to EPA for approval by Nov. 22, 2016. By removing the long-standing SSM provisions, the revised state provisions may impact the operating burdens of many facilities that have SSM exemptions in their CAA operating permits and may also increase their liability exposure to government and citizen enforcement actions.

As previously reported, EPA first proposed this action (SIP Call) in 2013 as a result of the Sierra Club's June 30, 2011, petition following the environmental organization's successful challenge to EPA's General Provisions regarding SSM exemptions for National Emission Standards for Hazardous Air Pollutants (NESHAPs): *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). EPA supplemented and revised the original proposal in 2014 after the D.C. Circuit Court held that EPA may not create an affirmative defense against civil penalties for toxic air emissions by Portland cement manufacturers, even in the event of an unavoidable malfunction. *NRDC v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014). Although the holding in that case only applied to CAA citizen suits, EPA extended this holding to all SIPs rendering those that contain affirmative defenses in their SSM provisions invalid because they could potentially limit the jurisdiction of federal courts to assess civil penalties under the CAA.

The SIP Call also contained EPA's updated position regarding the use of SSM exemptions and

affirmative defenses. As explained by EPA in the final action, the agency asserts that the CAA prohibits automatic SSM exemptions and affirmative defenses, but does allow enforcement discretion by air agency personnel exercised on a case-by-case basis. It also allows emissions during SSM events to be regulated using alternative numerical limitations or other technological control or work practice requirements.

With the elimination of automatic SSM exemptions and affirmative defenses, sources may consider permit amendments that establish these alternative numerical limits or work practice requirements in their air permits for periods of startup and shutdown to establish normal operating scenarios for these events. EPA also defended its ability to rely on state interpretive letters regarding a state's SIP when taking action on SIP submissions, over the objection raised by the Sierra Club. This allows states to continue clarifying potentially ambiguous provisions in their SIPs with letters instead of having to resubmit the plan for EPA approval through the time-consuming formal administrative process.

As required by CAA Section 110, the final SIP Call specifies the sections of each state plan that EPA found deficient. Every state in EPA Region V, except Wisconsin, is included among the 36 states affected by the SIP Call. These states must amend the following provisions to bring their SIPs into compliance with EPA's revised interpretation of the CAA:

1. Illinois:

- Ill. Admin. Code tit. 35 § 201.261, which allows sources to include during the permit application process "[a] request for permission to continue to operate during a malfunction or breakdown," including when air emissions standards "will be violated during startup[;]"

- Ill. Admin. Code tit. 35 § 201.262, which establishes the criteria a state official must consider before granting that advance permission; and

- Ill. Admin. Code tit. 35 § 201.265, which provides that the "granting of permission to operate during a malfunction or breakdown, or to violate . . . standards . . . during startup" is a "prima facie defense to an enforcement action."

2. Indiana:

- 326 Ind. Admin. Code 1-6-4(a), which allows sources operating under registrations or minor source operating permits to avoid penalties for excess emissions during malfunction periods provided they meet a number of conditions.

3. Michigan:

- Mich. Admin. Code r. 336.1916, which provides an affirmative defense for violations of applicable emission limitations during SSM periods.

4. Minnesota:

- Minn. R. 7011.1415, which provides exemptions for excess emissions due to flared gas from

relief valve leakage at petroleum refineries.

5. Ohio:

- Ohio Admin. Code 3745-15-06(A)(3), which allows owners and operators of air pollution sources to request authorization to continue operating the sources during maintenance of air pollution control equipment “in cases where a complete source shutdown may result in damage to the air pollution sources or is otherwise impossible or impractical[;]”

- Ohio Admin. Code 3745-15-06(C), which grants the director responsibility for determining whether the source meets the requirements to qualify for the SSM exemption;

- Ohio Admin. Code 3745-17-07(A)(3)(c) and 3745-17-07(B)(11)(f), which provide visible particulate emission limit exceptions during SSM periods; and

- Ohio Admin. Code 3745-14-11(D), which provides SSM exemptions for emissions from certain types of Portland cement kilns.

The remaining 31 jurisdictions with SIPs that must be amended as specified in EPA’s final action are: Maine, New Hampshire, Rhode Island, New Jersey, Delaware, Virginia, West Virginia, Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Arkansas, Louisiana, New Mexico, Oklahoma, Iowa, Kansas, Missouri, Colorado, Montana, North Dakota, South Dakota, Wyoming, Arizona, Alaska, Washington, and the District of Columbia.

A copy of the federal register notice of the final EPA SIP Call action is available online here.

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