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Start Up/Shut Down/Malfunction/Clean Air Act: U.S. Court of Appeals for the D.C. Circuit Addresses U.S. Environmental Protection Agency's SIP Call

03/12/2024

The United States Court of Appeals for the D.C. Circuit (“Court”) addressed in a March 1st Opinion an issue addressing start up, shut down and malfunction (“SSM”) provisions. See *Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. Environmental Protection Agency*.

The Court addressed a challenge to the United States Environmental Protection Agency’s (“EPA”) requirement that a number of states (including Arkansas) remove SSM provisions from their Clean Air Act State Implementation Plans (“SIPs”).

SSM provisions might generally be described as follows:

- Start up constitutes setting an operation and affected source or a portion of an affected source
- Shut down generally connotes the cessation of operation of an affected source or portion of an affected source
- Malfunction is generally described as any sudden, infrequent, and not reasonably preventable failure of an air pollution control and monitoring requirement, process equipment, or process to operate in a normal and usual manner which causes, or has the potential to cause the emission limitations in an applicable standard to be exceeded (i.e., it does not constitute scheduled maintenance)

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 an air pollution that contributes to nonattainment or interference with the maintenance of the NAAQS in other states. In addition, states must have adequate authority to carry out their SIPs.

The role of SSM exemptions and their relationship with SIPs has been a focus of EPA, states, the regulated community, and environmental organizations for many years. Various existing state air rules have historically allowed some excess emissions during SSM events if certain procedural requirements were met.

During the O’Bama Administration EPA published a “SIP Call” in 2015 in response to a Sierra Club petition pertaining to certain SSM provisions in a number of states’ SIPs. See 80 Fed. Reg. 33840. The Sierra Club

argued that certain provisions in these state SIPs were inconsistent with EPA's interpretation of the Clean Air Act requirements for excess emissions during periods of SSM.

A June 2011 Sierra Club Petition for Rulemaking requested that EPA address 39 state SIPs that included SSM provisions that the organization argued should be removed. Subsequent EPA rulemakings determined that certain SSM SIP provisions in various states were "substantially inadequate" to meet the Clean Air Act requirements. As a result, the agency issued a "SIP Call" for those states. This established a due date for states subject to the SIP call to submit corrective SIP provisions.

Certain industrial organizations and states challenged EPA's SIP Call in the United States Court of Appeals for the D.C. Circuit.

The Court's Opinion provides an overview of the relevant Clean Air Act provisions including SIP Calls and the type of SSM provisions being addressed.

The Court describes four types of SSM provisions at issue that include:

1. Some SIPs include "automatic exemptions," which exclude SSM periods from otherwise applicable emission rules.
2. Other SIPs include "director's discretion" provisions, which allow state officials to independently and conclusively decide that excess emissions are not violations during SSM periods.
3. At least one SIP (Tennessee) includes provisions that EPA believes could be read to allow state officials to excuse emission violations during SSM periods in a way that forecloses EPA or citizen-suit enforcement. EPA called those "overbroad enforcement discretion" provisions. Unlike director's discretion provisions—which let state officials determine that there is no violation—overbroad enforcement discretion provisions let state officials recognize that a violation happened but bar enforcement.
4. Many SIPs include affirmative defenses for excess emissions that occur during SSM periods. Some affirmative defenses protect sources against all liability, while others protect only against certain forms of relief. E.g., 118-01-19 ARK. CODE § 602 (all liability); ARIZ. ADMIN. CODE § 18-2-310(B)-(C) (providing an affirmative defense except in a "judicial action seeking injunctive relief").

Stated summarily, the Court addressed the four SSM provisions as follows:

1. Automatic exemptions (Rejects SIP Call regarding automatic exemptions but decision stated to be confined to the particular "grounds on which the agency acted"/does not address whether the called SIPs' relevant emission restrictions amount (or must amount) to emission limitations per the statutory definition.)
2. Director's discretion provisions (Director's discretion provisions set aside for similar reasons to automatic exemption/before concluding that emission restrictions in a SIP must apply continuously [including during SSM periods] EPA failed to determine that it is "necessary or appropriate" that the restrictions be continuous to enable the state to meet the Clean Air Act's applicable requirements.) See 42 U.S.C. § 7410(a)(2)(A).
3. Overbroad enforcement discretion provisions (SIP Call upheld because argument rejected that overbroad enforcement discretion provision [solely limited to Tennessee] that EPA could not invalidate a SIP provision for being ambiguous/ambiguity was whether the provisions limited only Tennessee or included EPA enforcement discretion.)
4. Affirmative defense provisions (Two kinds of affirmative defenses addressed [complete affirmative defense/precludes certain remedies]/[previous automatic exemption analysis

applies to complete affirmative defense] therefore state use upheld while exemption limiting remedies is deemed invalid.)

A copy of the Opinion can be downloaded [here](#).