JONES DAY

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COMMENTARY

EPA Proposes to Eliminate Startup, Shutdown, and Malfunction Affirmative Defenses Under Clean Air Act

The United States Environmental Protection Agency ("EPA") proposed on September 5, 2014 to prohibit excess emissions during periods of startup, shutdown, or malfunction ("SSM") in State Implementation Plans ("SIPs") under the Clean Air Act ("CAA"). EPA concluded that a recent court decision did not even allow EPA to approve the narrowly crafted provisions in SIPs allowing for excess emissions during malfunctions allowed by a previous EPA proposal. If finalized, this proposal means that governmental authorities implementing CAA provisions in 37 states and the District of Columbia would be required to revise existing regulations to remove SSM affirmative defenses.[1]

In February 2013, EPA issued a proposed rule finding that in 35 states and the District of Columbia SIPs contained SSM provisions inconsistent with the CAA. This finding was made in response to a Petition for Rulemaking filed with EPA by the Sierra Club on June 30, 2011. The February 2013 proposal concluded that affirmative defenses for emissions during periods of startup and shutdown are impermissible and that only affirmative defenses for emissions during malfunction were permissible, as long as the malfunction affirmative defenses met certain standards outlined in the proposal. The proposal was a significant reversal of nearly 30 years of EPA guidance, which recognized the difficulty of complying with emission standards during startup, shutdown, and malfunction. This previous proposal is discussed in detail in our *Commentary*, "EPA's Proposal Rule Regarding Treatment of Startups, Shutdowns, and Malfunctions under the Clean Air Act."

Before EPA finalized the February 2013 proposed rule, however, the D.C. Circuit issued a decision in *National Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). In this case, the court held that the National Emission Standards for Hazardous Air Pollutant ("NESHAP") standard for Portland cement plants contained an impermissible affirmative defense to citizen suits for excess emissions during periods of unavoidable malfunction. The court reasoned that the affirmative defense provision inappropriately vested EPA with the authority to determine the scope of available remedies when Section 304(a) of the CAA clearly vested such authority in the courts and ultimately vacated the portion of the Portland cement NESHAP containing the affirmative defenses.

The *NRDC v. EPA* decision explicitly noted that the opinion was not addressing an affirmative defense contained within a SIP and therefore is not directly applicable to the limited malfunction affirmative defense in EPA's February 2013 proposed rule.[2] In its

September 2014 proposed rule, however, EPA concluded that the court's reasoning "as logically extended to SIP provisions, indicates that neither states nor the EPA have authority to alter either the rights of other parties to seek relief or the jurisdiction of the federal court to impose relief for violations of CAA requirements in SIPs, including the courts' power to restrain violations, to require compliance, and to assess monetary penalties for any violations in accordance with factors provision in CAA section 113(e)(1)."[3]

EPA reached this conclusion because the court rejected each of the arguments that EPA presented to support EPA's legal authority to create an affirmative defense in the Portland cement NESHAP. For example, the court rejected the argument that the affirmative defense provisions are consistent with the statutory provision that penalties only be imposed as "appropriate." The court determined that it was the court's prerogative, rather than EPA's, to determine when penalties are appropriate. In response to EPA's argument that the affirmative defense provisions were necessary to reflect the tension between the requirement to meet emission limitations and the practical reality that control technology can fail unavoidably, the court agreed that this would be a reasonable argument for a source to make in an enforcement proceeding but noted that the tension itself did not give EPA the legal authority to create affirmative defenses.

The September 2014 proposed rule expanded the scope of jurisdictions that would be subject to the SIP call for their startup, shutdown, and malfunction provisions beyond those indicated in the February 2013 proposal and even the Sierra Club petition. The added jurisdictions are Texas, California (Eastern Kern Air Pollution Control District, Imperial County Air Pollution Control District, and San Joaquin Valley Air Pollution Control District), New Mexico (Albuquerque–Bernalillo County), and Washington (Energy Facility Site Evaluation Council and Southwest Clean Air Agency).

Like EPA's previous proposed rule, the September 2014 proposed rule contemplates that affected jurisdictions will have 18 months after the date of the final rule to correct and submit revised SIP plans. If EPA finalizes the rule by the May 2015 deadline discussed in the proposed rule, the SIP revision deadline would be November 2016. If the deadline for submitting revised SIP plans is not met, EPA will likely issue federal implementation plans to replace the defective SIPs. The deadline for commenting on the proposal rule is November 6, 2014.

If finalized, this proposal could result in additional enforcement actions for violations of emission limitations during periods of malfunction. Even if EPA and state regulatory authorities exercise enforcement discretion in prosecuting such cases or in pursuing penalties for violations, the lack of regulatory standards specifically identifying situations in which the excess emissions during malfunction will be excused will lead to regulatory uncertainty, particularly in citizen suits in which courts will independently determine if there is an adequate defense to the alleged violation.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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Endnotes

1 These jurisdictions are: Maine, New Hampshire, Rhode Island, New Jersey, Delaware, District of Columbia, Virginia, West Virginia, Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Illinois, Indiana, Michigan, Minnesota, Ohio, Arkansas, Louisiana, New Mexico, Oklahoma, Texas, Iowa, Kansas, Missouri, Colorado, Montana, North Dakota, South Dakota, Wyoming, Arizona, California, Alaska, and Washington. Portions of all of these jurisdictions were subject to the February 2013 proposal except for Texas and California.

2 In its footnote regarding this issue, the D.C. Circuit acknowledged that the 5th Circuit had recently upheld malfunction provisions contained in the most recent Texas SIP approved by EPA. *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013). EPA explicitly recognized the inconsistency in its position to defend the Texas SIP SSM provision in the *Luminant* litigation but then include the same provisions in the SIP call currently being proposed. In EPA's view, the *NRDC v. EPA* decision required this reversal of position.

3 Section 113(e)(1) of the CAA identifies the factors that EPA or a court should consider in assessing a penalty for violation of the CAA.