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EPA'S PROPOSED RULE REGARDING TREATMENT OF STARTUPS, SHUTDOWNS, AND MALFUNCTIONS UNDER THE CLEAN AIR ACT

On February 22, 2013, the U.S. Environmental Protection Agency ("EPA") published a proposed rule entitled *Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction* (the "Proposed Rule"). The Proposed Rule is in response to a Petition for Rulemaking filed with the EPA by the Sierra Club on June 30, 2011 (the "Petition"). The Petition includes numerous requests regarding provisions in previously approved State Implementation Plans ("SIPs") concerning the treatment of excess emissions when industrial facilities are starting up, shutting down, and malfunctioning.

In the Proposed Rule, EPA proposes to find that 36 states have SIPs that contain provisions regarding emissions during periods of startup, shutdown, or malfunction ("SSM") that are inconsistent with the Clean Air Act ("CAA").[1] As detailed below, EPA takes the position that affirmative defenses for emissions during periods of startup and shutdown are impermissible and that only narrowly crafted affirmative defenses from monetary penalties are allowed during periods of malfunction. EPA proposes to use its existing authority to direct affected states to submit, under a so-called "SIP Call," revised SIPs that comport with EPA's interpretation of SSM provisions by as early as February 2015.

If finalized in its current form, the Proposed Rule could have significant impacts on sources that currently rely on legally available defenses during periods of SSM. Although EPA states that it intends the Proposed Rule to apply only to the SIP provisions specifically addressed in the rulemaking, the Proposed Rule signals an overall shift in EPA's position on this issue.

EPA recently again extended the comment period for the Proposed Rule. Comments are now due by May 13, 2013.

STARTUPS AND SHUTDOWNS UNDER THE PROPOSED RULE

In the Proposed Rule, EPA proposes to find that SIPs containing affirmative defenses to enforcement for emissions during planned events, such as startups, shutdowns, maintenance, and load-changes, are "substantially insufficient" to meet the requirements of the CAA. In so doing, EPA takes the position that "[e]xcess emissions during planned and predicted periods should be treated as violations of [] applicable emissions limitations." EPA believes that such events are "phases of normal plant operation" subject to all applicable emissions limitations. EPA, recognizing inconsistencies, proposes to rescind its prior interpretation of the CAA that would allow affirmative defenses during such periods.

Rather than allowing affirmative defenses from emission limits during startups and shutdowns, EPA indicates that the CAA would allow "special emission limitations or other control measures or control techniques that are designed to minimize excess emissions" during these periods. EPA recommends that states consider the following specific criteria, which are outlined in the Agency's 1999 SSM Guidance, in such SIP provisions:

1. Limit to specific, narrowly defined source categories using specific control strategies;
2. Use of a control strategy must be technically infeasible during startup or shutdown periods;
3. The frequency and duration of operation in startup or shutdown mode must be minimized;
4. As part of its justification of a SIP revision, the state should analyze the worst-case emissions that could occur during startup or shutdown;
5. All possible steps must be taken to minimize the impact of emissions during startup and shutdown;
6. At all times, the facility must be operated in a manner consistent with good practice for minimizing emissions, and the source must have used best efforts regarding planning, design, and operating procedures to meet the otherwise applicable emission limitation; and
7. The owner's or operator's actions during startup and shutdown periods must be documented by properly signed, contemporaneous operating logs or other relevant evidence.

MALFUNCTIONS UNDER THE PROPOSED RULE

Unlike its approach to startups and shutdowns, EPA proposes to allow limited affirmative defenses for periods of malfunction. Specifically, EPA proposes that SIPs containing affirmative defenses from *monetary* penalties for excess emissions due to a malfunction that is shown to be "sudden, unavoidable, and unpredictable" will be viewed by the Agency as being consistent with the CAA. In EPA's view, such defenses must be limited to those sources that have been "appropriately designed, operated and maintained" and whose operators "have taken all practicable steps to prevent and to minimize [resulting] excess emissions." EPA proposes to find that SIP provisions containing such defenses are acceptable only to the extent they: (i) provide a defense limited to monetary penalties; injunctive relief and citizen suits cannot be barred; (ii) are narrowly crafted with specified criteria; and (iii) provide that the defendant has the burden of proving all elements of the defense.

EPA also specifically addresses startups and shutdowns that occur in connection with a malfunction in the Proposed Rule. EPA states that with respect to malfunctions that occur during planned startup or shutdown, excess emissions may be addressed by an affirmative defense that meets the criteria recommended by EPA. With respect to emissions occurring during a shutdown that is necessitated by a malfunction, EPA believes that a determination as to whether the resulting emissions would be subject to an affirmative defense would need to be made on a case-by-case basis. With respect to emissions associated with a startup after a malfunction, however, EPA takes the position that such an event would not be considered part of the malfunction, and, as such, any associated emissions would be deemed a violation.[2]

EPA recommends that states adopt the following criteria (as outlined in the Agency's 1999 guidance) for establishing an affirmative defense for excess emissions during a malfunction:

1. The excess emissions were caused by a sudden, unavoidable breakdown of technology, beyond the control of the owner or operator;

2. The excess emissions did not stem from any activity that could have been foreseen and avoided, or planned for, and could not have been avoided by better operation and maintenance practices;
3. To the maximum extent practicable, the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;
4. Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded (off-shift labor must have been utilized to the extent practicable);
5. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
6. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
7. All emission monitoring systems were kept in operation if at all possible;
8. The owner's or operator's actions in response to the excess emissions were adequately documented;
9. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and
10. The owner or operator properly and promptly notified the appropriate regulatory authority.

In addition to the above, EPA suggests (but does not require) that states also include provisions for a written root cause analysis and a written report documenting that the source met all elements of an affirmative defense.

OTHER RELEVANT PROVISIONS

In the Proposed Rule, EPA also addresses SIP provisions that leave SSM penalty decisions to the discretion of state air directors as well as defenses that apply to federal technology-based emission limitations (such as New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants).

EPA states that "director discretion" provisions in SIPs are impermissible to the extent they provide "unbounded discretion to allow what would amount to a case-specific revision of the SIP without meeting the statutory requirements of the CAA for SIP revisions." EPA clarifies, however, that SIPs may contain provisions concerning "enforcement discretion" by the state provided that they do not bar enforcement by EPA or through a citizen suit. EPA also states that a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations.

TIMING

EPA proposes to give the 36 affected states 18 months from the effective date of the final rule to submit revised SIPs. If EPA issues a final rule by August 27, 2013, states could be required to submit revised SIPs by as early as February 2015. If states do not meet the deadline ultimately set by EPA, the Agency will likely issue federal implementation plans to replace defective SIPs.

EPA does not intend the issuance of a SIP Call to have "automatic impacts" on the terms of any existing permit. Rather, any necessary revisions to existing permits will be accomplished in the ordinary course after states have participated in the administrative process.

IMPLICATIONS

The proposed rule is consistent with recent findings regarding SSM events under the general provisions of the National Emission Standards for Hazardous Air Pollutants ("NESHAP"). The general NESHAP provisions previously required that facilities minimize emissions during SSM events but did not mandate that sources meet applicable emission standards during such periods. In October 2009, the U.S. District of Columbia Circuit Court vacated the provisions of the NESHAP that exempted sources from compliance with emissions standards during periods of SSM. *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). Similarly, the Fifth Circuit Court of Appeals recently upheld EPA's denial of specific portions of a Texas SIP that contained affirmative defenses during periods of planned startup and shutdown events. *Luminant Generation Co. LLC, et al. v. US EPA*, 674 F.3d 917 (5th Cir. 2012).

That said, the Proposed Rule is inconsistent with existing EPA rules and, if finalized, could face legal challenges. For example, current New Source Performance Standards ("NSPS") provide that "emissions in excess of the applicable level of the applicable emissions limit during periods of startup, shutdown and malfunction [shall not] be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard." 40 C.F.R. § 60.8(c). Similar exemptions apply with respect to NSPS opacity standards. See 40 C.F.R. § 60.11(c). Further, affected states and/or sources could challenge, *inter alia*, EPA's determination that periods of startup and shutdown, even if planned, represent "normal" plant operations subject to emission standards. *See, e.g., Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 430 (D.C. Cir. 1979).

The position that EPA takes in the Proposed Rule nonetheless embodies a significant departure from nearly 30 years of guidance issued by the Agency, which has recognized the both practical and technical difficulties of complying with emission standards during periods of startup and shutdown. If finalized, the Proposed Rule could lead to increased enforcement action against sources that had relied on previously available affirmative defenses and require the installation of pollution control equipment on such sources.

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 The 36 states subject to the Proposed Rule 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, Iowa, Kansas, Missouri, Colorado, Montana, North Dakota, South Dakota, Wyoming, Arizona, Alaska, and Washington. Although included in the Sierra Club Petition, EPA did not propose to take action on Nebraska, Idaho, and Oregon's SIPs.

2 EPA is seeking comment on whether there could be circumstances that would justify different treatment in this specific situation.