

COMMENTARY



EPA Takes Final Action Requiring Revision of Startup, Shutdown, and Malfunction Air Regulations in 36 States

On May 22, 2015, the United States Environmental Protection Agency (“EPA”) took a [final action](#) on a petition filed by the Sierra Club that will require revision of existing air regulations governing emissions during periods of startup, shutdown, and malfunction (“SSM”) in [36 states and the District of Columbia](#).¹ Those states are required to submit revisions to their state implementation plans (“SIPs”) that meet the requirements of a newly restated EPA SSM policy included in the final action no later than November 22, 2016.

Although specific SSM regulations vary by state, they are intended to address the practical reality that meeting emission limitations applicable during periods of normal operation can be difficult or impossible while starting up or shutting down an emission unit or during periods when the unit is malfunctioning. The provisions generally provide the owner or operator of the emission unit with an affirmative defense to enforcement actions for violations of emission limitation during periods of SSM, although some state provisions exempt excess emissions caused by SSM events,

provided certain continuously applied work practice standards to minimize emissions are followed. Through both guidance and approval of relevant state regulations, EPA permitted the use of such affirmative defenses during SSM for more than 30 years.

The Sierra Club filed [a petition](#) asking EPA to address SSM provisions in various state regulations in 2011. In response to that petition, EPA published [a proposed rule](#) on February 22, 2013, that would have required revision of regulations in 35 states and the District of Columbia to remove affirmative defenses to emission limit violations during periods of startup and shutdown, although limited affirmative defenses meeting specified requirements would still have been permissible during periods of malfunctions under this proposal. In September 2014, EPA issued [a supplemental finding](#) reversing its position that affirmative defenses for malfunctions may be permissible in response to [a subsequent court decision](#) (holding that such a defense was impermissible in an unrelated regulation for cement plants).

¹ The jurisdictions required to revise their regulations include the District of Columbia and all or portions of the following states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and West Virginia.

In its SSM policy, EPA starts from the requirement of [Section 302\(k\) of the Clean Air Act](#) that an emission limitation must limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis. EPA believes that any SIP provision, such as an SSM affirmative defense, that specifies a period of time when the source is not subject to any requirement that limits emissions means that there is effectively no emission limit because there is no continuous compliance. Applying this reasoning, EPA concludes that any SIP provision that includes an automatic exemption from emission limits during specified periods, such as startup, shutdown, or malfunction, are impermissible because they do not meet the definition of an appropriate emission limit.

EPA clearly states that emission limits do not need to be in numerical format and that the same limitation (such as a numerical limit) does not have to apply at all times, although EPA admits that numerical limits may be the easiest way to meet the requirement that an emission limit be legally and practically enforceable. Alternatives to numerical limits suggested by EPA include specific technological control requirements and/or work practice requirements.

For SIP revisions addressing startup, shutdown, or malfunction² emission limits, EPA recommends that the following criteria be considered:

- 1 The revisions are limited to specific, narrowly defined source categories using specific control strategies;
 - 2 Use of the control strategy for this source category is technically infeasible during startup or shutdown periods;
 - 3 The alternative emission limitation requires that the frequency and duration of operation in startup or shutdown mode are minimized to the greatest extent practicable;
 - 4 As part of its justification of the SIP revision, the state analyzes the potential worst-case emissions that could occur during startup and shutdown based on the applicable alternative emission limitation;
 - 5 The alternative emission limitation requires that all possible steps are taken to minimize the impact of emissions during startup and shutdown on ambient air quality;
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2. EPA believes that alternative emission limitations for malfunctions are "problematic" since malfunctions generally, by definition, are unpredictable. In "rare instances," EPA indicates that malfunctions are foreseeable and thus can be an expected mode of operation subject to an alternative emission limitation.

- 6 The alternative emission limitation requires that, at all times, the facility is operated in a manner consistent with good practice for minimizing emissions and the source uses best efforts regarding planning, design, and operating procedures; and
- 7 The alternative emission limitation requires that the owner's or operator's actions during startup and shutdown periods are documented by properly signed, contemporaneous operating logs or other relevant evidence.

EPA states that a numerical emission limit that is so inappropriately high as to constitute unlimited or uncontrolled levels of emissions would constitute an impermissible exemption for emissions during the designated modes of operation.

Another way that EPA identifies to address SSM emissions is either state regulations or policies that outline enforcement discretion that the state will exercise in seeking penalties for violation of emission limits during startup, shutdown, or malfunction. According to the SSM policy, these enforcement discretion provisions cannot limit the enforcement authority of either EPA or a private citizen through the Clean Air Act citizen suit provisions. In addition, EPA does not believe that this enforcement discretion can unduly limit even a state's enforcement authority. Finally, EPA indicates that affirmative defense provisions cannot be approved as part of a SIP if it functions to alter the jurisdiction or discretion of federal courts to enforce the Clean Air Act.

As noted above, the affected jurisdictions have 18 months to submit revised SIP provisions. Failure to submit the SIP revisions could allow EPA to impose a federal implementation plan in that jurisdiction. Until such time that the SIP revisions are approved, the existing SSM provisions remain effective in the affected jurisdictions, although state regulations may need to be preemptively revised as part of a state's SIP revision submittal package. EPA recognizes that certain existing EPA new source performance standards ("NSPS") and national emission standards for hazardous air pollutants ("NESHAP") regulations contain SSM provisions that are inconsistent with the revised SSM policy. EPA claims that it is working to revise

these existing regulations and ensure that new standards are consistent with the SSM policy. EPA states that it will not approve any SIP revisions adopting existing NSPS or NESHAP provisions unless the offending SSM provision is removed.

Sources that rely on or use SSM provisions as part of their approach to compliance should review EPA's final action to determine whether their state(s) are affected by the final action. If sources have operations in affected states, they should consider conferring with their state regulators to determine how the state(s) will respond to EPA's action and how states will address facilities in the future that cannot always meet operational limits during periods of SSM. Sources may also want to consider whether challenges to EPA's action are appropriate.

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/contactus/.

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