



EPA Issues SIP Call to Eliminate SSM Defense

06.09.2015

EPA has issued a final rule that requires 36 states to revise their State Implementation Plans to eliminate a well-known and often-used Clean Air Act defense for excess emissions. While specific elements of the defense differ from state-to-state, the defense generally offers protection from enforcement when manufacturers and other sources exceed emission limits during periods of startup, shutdown, or malfunction (?SSM?). The idea behind the defense is that excess emissions during these periods are often unavoidable, and it would be unfair to impose penalties under such circumstances. Virginia, South Carolina and North Carolina have long had such a defense in their air regulations and their approved SIPs.

Enter the Sierra Club. It filed a petition for rulemaking with EPA in 2011 alleging that SSM provisions were inconsistent with the Clean Air Act and asking that all SSM provisions be removed from all state SIPs that had them. In response, EPA issued a proposed rule in 2013 that would require states to remove all SSM provisions, *except for* provisions providing an affirmative defense for excess emissions during periods of malfunction. EPA reasoned that even properly designed, maintained and operated sources would sometimes have difficulty meeting emission limits during malfunctions due to circumstances beyond their control. As long as the source was required to prove the malfunction was beyond its control and that it acted expeditiously and reasonably to minimize emissions and correct it, then EPA was ok with the defense.

Enter the United States Court of Appeals for the D.C. Circuit. In 2014, that Court struck down an affirmative SSM defense contained in EPA's National Emission Standard for Hazardous Air Pollutants (?NESHAP?) for Portland Cement Plants. See *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). Although that case dealt with a NESHAP, not the National Ambient Air Quality Standards encompassed by SIPs, EPA seized on it in the final rule as the basis for changing its mind and determining that all SSM provisions must go.

Among other states, EPA's SIP call requires Virginia, South Carolina and North Carolina (including the local air jurisdiction in Forsyth County) to remove their SSM provisions and to submit a revised SIP without them. The deadline for all 36 states to comply is November 22, 2016. But wait ? you guessed it. Litigation over the proposed rule is inevitable, and simply because EPA says SSM provisions must

be shelved does not mean the courts will agree. We will keep you advised.

The final rule was issued May 22, 2015 but has not yet been published in the Federal Register.

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