



Air Program Malfunction Exemption Nixed, But Not Agency Discretion

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Virginia's State Air Pollution Control Board ("Board") recently amended its regulations to remove the long-standing malfunction exemption available to regulated sources of air pollution for violations of emission limits and monitoring requirements. Though somewhat perfunctory at this stage, the Board's action is the latest chapter in the long story of the exemption and other defenses to violations relating to start-up, shut-down and malfunctions ("SSM"). The amendment takes effect June 1, 2016.

Virginia's malfunction exemption had been expressly incorporated into the Board's regulations for decades. It reflected practical realities that remain for many industrial and local government entities with manufacturing processes or power or steam generation units. Malfunctions by their very nature disrupt normal fuel-burning and process equipment as well as the ability of air pollution control equipment to meet emission limits. Such events can create emissions in excess of permitted limits or interfere with emission monitoring, even if only for brief periods of time. Depending on the nature of a malfunction, it may not be technologically feasible to prevent excess emissions or monitoring failures, so the defense offered a reasonable and clear pathway to avoid a regulatory or permit violation if certain factors could be demonstrated.

What prompted the Board's action? A petition by the Sierra Club and a court decision led to EPA declaring that most SSM exemptions violated the Clean Air Act. EPA then called on Virginia and other states in June 2015 to amend their State Implementation Plans to remove these exemptions from their respective air programs ("SIP Call"). (A SIP is a state's plan to implement certain Clean Air Act regulatory and permit programs under EPA authorization.) Ironically, SSM exemptions had survived for decades in state SIPs, including Virginia's. Eighteen states and a number of industries have challenged the SIP Call in court, so it may yet be upheld. However, Virginia is not among the challengers, so the Board proceeded with its amendment to comply with the SIP Call.

Still, all is not lost for sources in Virginia. Although the Board struck the malfunction exemption, the amendment still allows sources to demonstrate that a malfunction occurred. Virginia DEQ can then consider this demonstration as a mitigating factor in exercising discretion about whether to bring an enforcement action, discretion recognized by EPA in the SSM SIP Call itself.

The Board's amendment may be the last nail in the coffin for the malfunction exemption, but the exemption's spirit, or at least its logic, lives on. Accordingly, to preserve the opportunity for enforcement discretion by DEQ, it is still critical for sources to document malfunctions carefully and to provide the notice and demonstration of malfunction to DEQ soon after the event occurs.

32 Va. Reg. 2422 (May 2, 2016); 80 Fed. Reg. 33840 (June 12, 2015); *Walter Coke, Inc. v. Environmental Protection Agency*, No. 15-1166 (D.C. Cir).

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