Startup, Shutdown, and Malfunction/Texas: U.S. Environmental Protection Agency Announces Withdrawal of 2015 Finding of Substantial Inadequacy of Texas State Plan

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Region 6 of the United States Environmental Protection Agency ("EPA", collectively "EPA Region 6") announced in a February 7, 2020 Federal Register that it was finalizing action to withdraw the 2015 Startup, Shutdown and Malfunction ("SSM") state implementation plan ("SIP") call as it pertains to Texas.

EPA Region 6 determined that the Texas SIP provisions regarding excess emissions that occur during certain upset events and unplanned maintenance, startup, and shutdown activities are consistent with the Clean Air Act.

The acronym "SSM" is commonly used to denote startup, shutdown, and malfunction (as opposed to scheduled maintenance). "Malfunction" has been defined by EPA as the "sudden and unavoidable breakdown of a process or control equipment."

Section 110 of the Clean Air Act requires that states submit SIPs to ensure that each state attains and maintains compliance with each of the National Ambient Air Quality Standards ("NAAQS") promulgated by EPA. The SIPs must include "enforceable emission limitations" sufficient to meet the Clean Air Act's requirements. The plans must also prohibit the emission of air pollution that contribute to nonattainment or interference with maintenance of the NAAQS in any other states. In addition, states must have adequate authority to carry out their implementation plans.

The role of SSM exemptions and their relationship with SIPs has been a focus of EPA, the regulated community, and environmental organizations for many years.

In its February 7th approval, EPA Region 6 made a determination that the SSM (i.e., affirmative defense) provisions in the Texas SIP are narrowly tailored and limited to ensure protection of the NAAQS and other Clean Air Act requirements. The basis for this determination is consistent with recent alternative EPA interpretations.

The June 12, 2015 SIP call determination had been based on EPA's determination that the Texas SIP was substantially inadequate because of the presence of certain provisions that established an affirmative

defense as to civil penalties for sources with emission upsets and unplanned maintenance, startup, and shutdown activities that exceed otherwise applicable admission limitations.

EPA Region 6 cited to the Fifth Circuit Court of Appeals Luminant case for its position on affirmative defense SIP provisions. Further, the agency found it is not appropriate to extend the NRDC decision by the DC Circuit to the affirmative defense provisions in the Texas SIP. The agency's position is that the Clean Air Act does not speak directly to the question of whether affirmative defense provisions are permissible in Section 110 SIPs.

A copy of the Federal Register notice can be found here.