Startup, Shutdown, and Malfunctions/State Implementation Plans: October 9th U.S. Environmental Protection Agency Memorandum

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United States Environmental Protection Agency ("EPA") Administrator Andrew R. Wheeler ("Administrator") issued an October 9th guidance memorandum titled:

Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans ("Memorandum")

The *Memorandum* was transmitted to EPA's Regional Administrators.

The Administrator states in the opening paragraph of the *Memorandum* that it is intended to address the:

. . .question of whether and when it may be permissible for a state to include certain types of provisions governing periods of startup, shutdown, and malfunction (SSM) in state implementation plans developed pursuant to section 110 of the Clean Air Act (CAA or Act).

Further, the *Memorandum* is intended to supersede and replace EPA policy statements found in the 2015 Startup, Shutdown, and Malfunctions ("SSM") State Implementation Plan ("SIP") action issued during the Obama Administration.

SSM might generally be described as follows:

- Startup constitutes setting in operation an affected source or portion of an affected source
- Shutdown generally connotates the cessation of operation of an affected source or portion of an affected source
- Malfunction is generally described as any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or process to operate in a normal or usual manner which causes, or has to the potential to cause the emission limitations in an applicable standard to be exceeded (i.e., it does not constitute scheduled maintenance)

Section 110 of the Clean Air Act requires states to 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 contributes to nonattainment or interference with maintenance of the NAAQS in other states. In addition, states must have adequate authority to carry out their SIPs.

The role of SSM exemptions and their relationship with SIPs has been a focus of EPA, states, the regulated community and environmental organizations for many years. Various existing state air rules had historically allowed some excess emissions during SSM events if certain procedural requirements were met.

During the Obama Administration EPA published a "SIP call" on June 12, 2015, in response to a Sierra Club petition pertaining to certain SSM provisions in a number of states' SIPs. See 80 Fed. Reg. 33840. Sierra Club had argued that certain provisions in these state SIPs were inconsistent with EPA's interpretation of Clean Air Act requirements for excess emissions during period of startup, shutdown, and malfunctions.

The 2015 action required various states to remove relevant SSM provisions from their SIPs and delete related affirmative defenses. Note that the State of Arkansas was one of the 36 states required to submit corrective SIP revisions.

A lawsuit was subsequently filed by 17 State Attorney Generals (including the Arkansas Attorney General) challenging the EPA Startup, Shutdown, and Malfunction SIP call.

Prior to the Administrator's October 9th *Memorandum*, at least two EPA regions had withdrawn the 2015 Startup, Shutdown, and Malfunction SIP call as it pertained to two states. For example, EPA Region 6 announced on February 7th that it was finalizing action to withdraw the 2015 SSM SIP call as it related to Texas. Region 6 stated that it determined that the Texas SIP provisions regarding excess emissions that occur during certain upset events and unplanned maintenance, startup, and shutdown activities were consistent with the Clean Air Act. The Region made a determination that the SSM provisions in the Texas SIP were narrowly tailored and limited to ensure protection of the NAAQS and other Clean Air Act requirements.

Similarly, EPA Region 4 proposed to withdraw the SSM SIP call for the State of North Carolina in late Spring of 2019. Region 4 argued in its proposal that SSM exemptions may not be inherently inconsistent with the Clean Air Act. The Region's rationale was that such exemptions were lawful if the remaining state air rules provided sufficient protection to maintain compliance with NAAQS. It also argued that EPA's statement in 2015 that all emission limitations must be continuous could have different meanings depending on the relevant section of the Clean Air Act.

Administrator Wheeler's October 9th *Memorandum* initially provides a review of case law addressing SIPs and prior EPA guidance. He then outlines EPA's current views under the heading of "Exemption Provisions," noting that:

. . . both those referred to as "automatic exemptions" and those termed "director discretion provisions" in the 2015 SSM SIP Action – may be permissible in SIPs under certain circumstances.

The *Memorandum* further states that the Section 110 Clean Air Act requirement that a SIP attain and maintain the NAAQS provides certain latitude to states. In other words, it is argued that the SIP development process provides a framework in which a state can reach this goal (i.e., ensure attainment and maintenance of the NAAQS) regardless of the presence of SSM exemptions in the SIP.

A caveat is provided stating that such provisions are only permissible:

. . . for limited periods applicable to discrete standards, only if the SIP is composed of numerous planning requirements that are collectively NAAQS-protective by design.

Administrator Wheeler states that EPA's evaluation of such provisions will include an analysis of whether:

. . . requirements of a SIP are collectively NAAQS protective despite the inclusion of an SSM exemption provision. . .

The *Memorandum* states that EPA will conduct an in-depth analysis of the SIP. The analysis will include a "multifactor, weight-of-the-evidence exercise that balances many considerations."

Administrator Wheeler states that the *Memorandum* constitutes "guidance." He provides the standard caveat that it does not "bind states, EPA, or other parties, but it does reflect EPA's current understanding of the statutory requirements of the Clean Air Act."

A number of environmental organizations, states, and other parties will certainly oppose the conclusions found in this *Memorandum*. This will likely include litigation.

A copy of the *Memorandum* can be downloaded here.