Startup, Shutdown and Malfunction/State Implementation Plans: Sierra Club Judicial Complaint Alleges U.S. Environmental Protection Agency Violation of the Clean Air Act

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09/14/2021

The Sierra Club, Environmental Integrity Project, and Natural Resources Defense Council (collectively "Sierra Club") filed a September 9th citizen suit Complaint for Injunctive and Declaratory Relief ("Complaint") against the United States Environmental Protection Agency ("EPA") alleging violation of the Clean Air Act.

The Complaint was filed in the United States District Court for the Northern District of California.

Sierra Club alleges that EPA has failed to undertake in a timely manner nondiscretionary duties to correct what it describes as "unlawful loopholes" in the Clean Air Act State Implementation Plans ("SIPs"). The Complaint describes as "loopholes" periods of "startup, shutdown, and malfunction" ("SSM") at stationary sources.

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 promulgated by EPA. The SIPs must include enforceable emission limitations sufficient to meet the Clean Air Act's requirements. The plans also must prohibit the emission of air pollution that contributes to nonattainment or interference with maintenance of the National Ambient Air Quality Standards in other states. 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.

SSM refers to rules or provisions in SIPs that address the status of excess emissions during periods other than "normal" operation. The rationale for a potential exemption, or otherwise treating differently excess emissions during SSM, is a concern that in some instances the prescribed emission control strategies would not work. In other words, the pollutants emitted during SSM would be unrepresentative of the normal process. To invoke an SSM exemption or affirmative defense, the exceedance would generally have to be deemed unavoidable and certain procedural/substantive conditions fulfilled.

EPA began evaluating SIP provisions a number of years ago in various states for consistency with the agency's interpretation of the Clean Air Act. This evaluation began in response to a prior request by the Sierra Club.

The federal agency subsequently issued a finding that certain SSM SIP provisions in a number of states were substantially inadequate to meet Clean Air Act requirements. As a result, EPA issued a SIP call for those states. It established the due date for states subjects to the SIP call to submit what it deemed corrective SIP revisions.

A number of states and various organizations challenged this action. Further, EPA under the Trump Administration had issued an October 9th guidance memorandum titled:

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

The *Memorandum* was intended to supersede and replace EPA policy statements put in place during the Obama Administration addressing SSMs. Prior to the October 9th Trump Administration/EPA Memorandum, two EPA Regions had withdrawn the SIP call as it pertained to two states.

EPA determined during the Trump Administration that Section 110 of the Clean Air Act provides certain latitude to the states and that the goal of attainment and maintenance of a National Ambient Air Quality Standard may be possible regardless of the presence of an SSM exemption.

The Sierra Club's Complaint alleges that EPA has failed to fully remove SSM exemptions from SIPs. It also argues that Federal Appeals Courts have deemed such SSM exemptions illegal in 2008 and 2014 decisions. Also cited is the Obama Administration's decision that directed a number of states to remove SSM exemptions.

A copy of the Complaint can be downloaded here.