



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Startup, Shutdown, and Malfunctions/State Implementation Plans: U.S. Environmental Protection Agency Withdrawal of October 9, 2020, Memorandum

10/05/2021

The United States Environmental Protection Agency ("EPA") issued on September 30th a memorandum ("2021 Memorandum") titled:

Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy

The 2021 Memorandum is transmitted from Deputy Administrator Janet McCabe to the Regional Administrators.

The 2021 Memorandum withdraws the policy that had been issued by former EPA Administrator Wheeler during the Trump Administration addressing startup, shutdown, and malfunctions ("SSM") on October 9, 2020 ("2020 Memorandum").

The 2020 Memorandum had been issued to supersede and replace policy statements found in a 2015 SSM State Implementation Plan ("SIP") action issued during the O'Bama Administration.

By way of background, SSM might generally be described as follows:

- Startup constitutes setting in operation an affected source or portion of an affected source
- Shutdown generally connotes 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 and monitoring equipment, process equipment, or process to operate in a normal or usual manner which causes, or has 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 O’Bama Administration in 2015 EPA published a “SIP Call” in response to a Sierra Club petition pertaining to certain SSM provisions in a number of state SIPs. The organization argued that certain provisions in these SIPs were inconsistent with EPA’s interpretation of Clean Air Act requirements for excess emissions during periods of SSM.

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

EPA in the 2020 Memorandum determined that Section 110 of the Clean Air Act provided certain latitude to states and could utilize SSM exemptions that could be determined that the NAAQS would be attained and maintained.

The 2021 Memorandum reverses this policy and states that SIP provisions providing exemptions from air emission limits during periods of SSM or that provide affirmative defense provisions are not consistent with the Clean Air Act and would not generally be approvable by the agency. In other words, the agency is reverting to its 2015 position. Further, EPA states that it plans to “revisit” the three related state-specific SIP actions finalized in 2020 that withdrew SIP Calls previously issued to Texas, North Carolina, and Iowa.

Deputy Administrator McCabe’s 2021 Memorandum addresses:

- General Background on SSM Provisions and SIPs
- 2015 Policy and SIP Call
- SSM SIP Call Withdrawals for North Carolina, Texas, and Iowa
- 2020 Memorandum
- Withdrawal of the 2020 Memorandum
- Revisiting the 2020 State-Specific SSM SIP Call Withdrawals
- Future Implementation of the 2015 SSM Policy and SIP Call

A copy of the 2021 Memorandum can be downloaded [here](#).