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Policy Implementation Update Regarding Startup, Shutdown, and Malfunction Provisions in State Implementation Plans/Clean Air Act: U.S. EPA Issues Guidance Memorandum

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The United States Environmental Protection Agency ("EPA") issued a September 1st Guidance Memorandum titled:

Policy Implementation Update Regarding Startup, Shutdown, and Malfunction (SSM) Provisions in State Implementation Plans ("Memorandum").

The Memorandum was transmitted from EPA Assistant Administrator for Air and Radiation, Aaron Szabo, to the EPA Regional Administrators.

The Memorandum states that its purpose is to provide updates and clarity to State and local air agencies on how EPA intends to evaluate State Implementation Plan ("SIP") submittals following two decisions from the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"):

- *Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. EPA*, 94 F.4th 77 (D.C. Cir. 2024) ("Florida Electric").
- *SSM Litigation Group v. EPA*, 150 F.4th 593 (D.C. Cir. 2025) ("SSM Litigation Group").

EPA describes the two cases as addressing the following:

- *Florida Electric* is described as addressing SIP provisions pertaining to excess emissions during periods of startup, shutdown, and malfunction ("SSM").
- *SSM Litigation Group* is described as addressing affirmative defense provisions that an air agency may elect to include in its SIP.

SSM provisions might generally be described as follows:

- Startup constitutes setting in operation an affected source or a 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 an air pollution control and monitoring requirement, process equipment, or process to operate in

a normal and unusual manner which causes, or has the potential to cause, the emission limitations in the applicable standard to be exceeded (i.e., it does not constitute scheduled maintenance).

In other words, SSM addressed operational scenarios different from normal, steady-state operations. However, how to address the operational conditions that vary from normal, steady-state industrial operations in the applicable Clean Air Act regulations/programs has been a difficult issue. Therefore, the role of SSM exemptions has been a focus of EPA, states, the regulated community, and environmental organizations for many years.

EPA describes the September 1st Memorandum as clarifying:

... how the agency plans to evaluate State Implementation Plan (SIP) submittals that include provisions pertaining to excess emissions during periods of startup, shutdown, and malfunction (SSM) for stationary sources.

The agency states that doing so will provide State, Tribal, and local air agency partners with clarity about:

- Whether a State requirement during an SSM period must apply continuously in order to meet applicable Clean Air Act requirements.
- How to distinguish between liability for noncompliance generally, and situations where noncompliance occurs because of circumstances beyond a facility's control (stating that "This is in line with the agency's previous actions on affirmative defense").

EPA contends that results flowing from this Memorandum will include:

- Continuing to hold bad actors accountable for enforcement violations but will no longer unjustly punish good faith operators for emissions caused by sudden, unavoidable events.
- Allowance of the complete affirmative defense provisions in SIPs could lead to decreased operating costs, which would be passed on to American families through lower energy and household goods prices.

The Memorandum, by way of background, provides EPA's views addressing:

- General information on SIPs.
- Emission Limitations.
- 2015 SSM SIP Action and SIP Call.
- D.C. CIRCUIT DECISIONS AND IMPACTS TO SIP PROVISIONS.
- *Florida Electric*.
- *SSM Litigation Group*.

The Memorandum then provides the EPA's view/summary of the impacts of these decisions on SIP provisions, addressing:

- Automatic Exemptions, noting in part:
- D.C. Circuit found that, regardless of the labels a State placed on the provisions submitted as part of its SIP, not every SIP provision must necessarily be an "emission limitation" subject to continuous requirement in the definition of "emission limitation" because a provision could potentially qualify instead as "other control measures, means or techniques."
- Only appropriate to issue a SIP call based on an automatic exemption in an SIP provision if the agency first made a determination that it was "necessary or appropriate" to meet applicable CAA requirements for the SIP provision to be considered an "emission limitation."
- Director's Discretion Exemptions, noting in part:
- The D.C. Circuit acknowledged that EPA's concern that a given SIP provision could include such unbounded discretion that it would not meet applicable Clean Air Act requirements.
- Such requirements could be both substantive and procedural.

- Did not foreclose the EPA's authority to disapprove a SIP submission on the basis that the contents include an impermissibly unbounded director's discretion provision, notwithstanding the absence of a broader SIP call being in effect.
- Affirmative Defense, noting in part:
- D.C. Circuit distinguished between two different kinds of affirmative defenses.
- The first provides a complete affirmative defense to an action brought for noncompliance with an emission rule, which creates an exemption from the normal emission rule.
- The second precludes certain remedies after a source has violated an emission rule.
- *SSM Litigation Group* held:
- A complete affirmative defense is permissible because it does not function as an exemption from applicable emission standards.
- A complete affirmative defense to liability does not render an emission limitation non-continuous under 42 U.S.C. 7602(k).

The Memorandum then provides EPA's views on how it will evaluate SIP submittals, stating in part:

- Any SIP provision that is required by law to be an "emission limitation," or that the EPA determines is "necessary or appropriate" for compliance with applicable statutory requirements to be an "emission limitation," must be continuous in accordance with the definition of that term in Clean Air Act section 302(k) (i.e., such an emission limitation may not contain any exemption for emissions during SSM events).
- EPA expects air agencies, in the first instance, to articulate in their SIP submittals their views on whether it is "necessary or appropriate" for the provisions being proposed for inclusion into the SIP to be emission limitations.
- In reviewing an air agency's determination of whether it is "necessary or appropriate" EPA references the following categories of provisions:
- The provision is required to be an emission limitation or emissions standard under a provision of the Clean Air Act other than section 110(a)(2)(A).
- The State is using the provision explicitly to achieve attainment or maintenance of a NAAQS or to meet another comparable requirement in the Clean Air Act.
- EPA will generally presume, given the provision's relationship with a statutory requirement and the likelihood that absent relevant information, such provision relates to such a requirement, that it is "necessary or appropriate" for that provision to meet the definition of emission limitation under section 302(k) of the Clean Air Act and, therefore, must be continuous.

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