



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

Startup/Shutdown and Malfunction/Clean Air Act: Environmental Intervenor's D.C. Circuit Brief

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Several environmental groups ("Environmental Intervenor's") filed an August 29th brief opposing a Petition for Review ("Petition") in the United States Court of Appeals for the District of Columbia Circuit in which a number of states and organizations have challenged the United States Environmental Protection Agency ("EPA") Startup, Shutdown and Malfunction ("SSM") state implementation plan ("SIP") call.

The Environmental Intervenor's include:

- Sierra Club
- Earthjustice
- Environmental Integrity Project
- Natural Resources Defense Council

Seventeen Attorney Generals (including the Arkansas Attorney General), along with other organizations had filed a Petition challenging EPA's decision to require a number of states to revise their Clean Air Act SIPs in regards to SSM provisions.

SSM refers to rules or provisions in SIPs that address the status of excess emissions during periods other than "normal" operation. The rationale for potential exemption or otherwise treating differently excess emissions during SSM is a concern that in many 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 in a number of states for consistency with the agency's interpretation of Clean Air Act 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 are "substantially inadequate" to meet Clean Air Act requirements. As a result, the agency issued a "SIP" call for those states. It established the due date for states subject to the SIP call to submit what it deemed corrective SIP revisions.

The Environmental Intervenor's brief supports EPA's action stating in part:

Because many state implementation plans – the judicially enforceable, state-created, federally approved plans for satisfying many Clean Air Act requirements – contain unlawful exemptions and affirmative defense provisions, states have allowed large polluters to violate Clean Air Act emission limitations and pollute surrounding communities during SSM events with impunity. To rectify this longstanding problem,

EPA took the action at issue in this case, 80 Fed. Reg. 33,840 (June 12, 2015), that requires the states to eliminate these unlawful provisions. EPA's actions was not only reasonable, it was compelled under the Clean Air Act.

[A link to the Environmental Intervenors brief can be found here.](#)