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Client Alert

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EPA Acts to Limit Startup, Shutdown and Malfunction Defense

On February 22, 2013, US EPA (EPA) proposed a rule that will require 36 states to eliminate an exemption to Clean Air Act (the Act) emission requirements for exceedances that occur during periods of startup, shutdown or malfunction (SSM). 78 Fed. Reg. 12459 (Feb. 22, 2013). The proposed rule (SSM Rule) will have a significant impact across numerous industries, including electric utilities, oil and gas operations, and industrial and manufacturing facilities where emission units such as boilers are used and permitted under the Act.

For decades, facilities have used the SSM defense in reporting emissions exceedances to permit authorities, and in response to enforcement actions by EPA, states and citizen groups. During periods of startup and shutdown, certain factors such as temperature and combustion efficiency can lead to emission exceedances, particularly for opacity, at coal- and oil-fired boilers and other emission units. Similarly, many control devices, such as selective catalytic reduction (SCR), require elevated temperature and a supply of steam before they operate properly to "control" the emission of nitrogen oxide (NOx). During periods of startup or shutdown, the control devices are simply not operable. Given these technical realities, many state implementation plans (SIPs) expressly provide an affirmative defense or some other form of protection for SSM exceedances, including five of the six EPA Region 5 states — Illinois, Indiana, Michigan, Minnesota and Ohio.

However, citizen groups like Sierra Club kept the pressure on EPA, and the SSM rule responds to a 2011 petition for rulemaking by Sierra Club and a successful challenge to EPA's SSM rules for hazardous air pollutants. *See, Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008).

If finalized as proposed, EPA's SSM rule will require 36 states to revise their SIPs under a "SIP call." In statutory terms, EPA's Administrator may issue a "SIP call" where EPA determines that a SIP is "substantially inadequate" to meet the requirements of the Act. *See*, 42 U.S.C. § 7410(k)(5). Under the SSM Rule, EPA argues that the Act requires SIPs to contain "emission limitations" to meet the requirements of the Act, and that "emission limitations" are defined as "continuous." *See 78 FR 12484-85.* The use of an "automatic" exemption for SSM events, EPA argues, is contrary to a fundamental requirement of the Act, and any SIP utilizing the automatic SSM exemption is therefore "substantially inadequate." *Id.*

The 36 states subject to the SIP call will have 18 months from promulgation of the final rule to remove exemptions for SSM events, remove affirmative defenses for startup and shutdown events, and modify malfunction affirmative defenses so that they are consistent with EPA guidance on malfunctions. An

affirmative defense for "malfunctions" can remain in the SIP provided the excess emissions occur when a facility is experiencing "an unplanned event" but not for excess emissions that occur when a facility is operating in a "planned" startup or shutdown mode. *See, 78 FR 12469-70. See also, Luminant Generation v. EPA*, 42 ELR 20163. No. 10-60934, (5th Cir. July 30, 2012). While the affirmative defense for "malfunctions" may provide for a shield from monetary penalties, it may not prevent injunctive relief (*i.e.*, the requirement to take some action) to limit or prevent future problems.

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