

## EPA Reverses Course on Malfunctions

### ***EPA proposes eliminating all startup, shutdown and malfunction affirmative defense provisions from SIPs.***

On September 17, 2014, the United States Environmental Protection Agency (EPA) issued a supplemental notice of proposed rulemaking (SNPR) in which it partially reversed course on its proposed revisions to its startup, shutdown and malfunction policy (SSM policy) for facilities subject to state implementation plans (SIPs) under the Clean Air Act.<sup>1</sup> In February 2013, EPA proposed a SIP rule in which it announced that it was modifying its SSM policy to eliminate affirmative defenses for emissions exceedances occurring during the startup and shutdown of facilities, but would continue to permit affirmative defenses for malfunctions.<sup>2</sup> Following the D.C. Court of Appeals' (hereinafter D.C. Circuit) decision in *NRDC v. EPA*, EPA has now eliminated the affirmative defense for excess emissions that occur during malfunctions. EPA now proposes to require an additional 17 states (including 23 air districts) to eliminate startup, shutdown and malfunction affirmative defense provisions from their SIPs and re-submit them to EPA for approval within the next 18 months. EPA accepted public comments on the SNPR until November 6, 2014.

The SNPR supplements and revises EPA's February 2013 proposed rule regarding the availability of affirmative defenses for emissions exceedances that occur during startups, shutdowns and malfunctions. The SNPR grants the Sierra Club's 2011 petition challenging affirmative defense provisions in SIPs, eliminates the affirmative defense in SIPs for malfunctions, identifies additional SIPs that require revision because they contain affirmative defense provisions for malfunctions,<sup>3</sup> and requires all of the SIP provisions to be revised and re-submitted for EPA approval within 18 months (a SIP call). The SNPR provides that EPA's "past guidance to states in the SSM policy is flawed," because neither EPA nor the states have the authority to create an affirmative defense for malfunctions.<sup>4</sup>

### **Rulemaking History**

However, only eighteen months before, in its February 2013 proposed rule, EPA sought to eliminate affirmative defenses for excess emissions during startups and shutdowns, but preserved affirmative defenses for malfunctions.<sup>5</sup> (Our [March 2013 Client Alert](#) examines this proposed rule in detail.)<sup>6</sup> In a memo accompanying its February 2013 proposed rule, EPA explained: "[T]he practical realities of controlling source emissions continuously – even for sources that are designed, maintained and operated well – may create difficulty in meeting a legally required emission limitation 100 percent of the time."<sup>7</sup> EPA noted the long-standing tension between continuous compliance with the Clean Air Act and malfunctions beyond a source's control.<sup>8</sup> In revising its SSM policy, but continuing to permit a limited exception for malfunctions, EPA stated: "It is important to emphasize that an affirmative defense provision does not negate the fact that excess emissions during a qualifying event are a violation of the applicable emission limitations of the SIP ... An affirmative defense provision merely provides a source the opportunity to assert in an enforcement proceeding, and to prove with requisite facts, that the source should not be subject to monetary penalties for violations under certain narrow circumstances."<sup>9</sup>

## EPA's Rationale for Departing From Previous Proposed Rule

EPA's departure from the 2013 proposed rule is based almost entirely on the D.C. Circuit's April 2014 decision in *NRDC v. EPA*, in which the D.C. Circuit struck down EPA's proposed National Emission Standard for Hazardous Air Pollutants (NESHAP) rule for Portland Cement Plants, a regulation that permitted an affirmative defense for emissions violations caused by "unavoidable malfunctions." The D.C. Circuit held that EPA does not have the authority to create an affirmative defense that impinges on the authority of the courts to consider Clean Air Act violations and impose civil penalties in cases brought by private parties.<sup>10</sup> EPA interpreted this decision to mean it had no choice but to modify its February 2013 proposed rule for SIPs and eliminate the affirmative defense for malfunctions.<sup>11</sup>

Contrary to EPA's claim that it was forced to amend its February 2013 SIP rule following the *NRDC* decision, EPA's hands were – and are – not necessarily tied. First, and foremost, the D.C. Circuit expressly held that its decision *does not apply* to SIPs.<sup>12</sup> The D.C. Circuit sought to avoid a conflict with the Fifth Circuit's decision in *Luminant Generation Co. v. EPA*, in which the Fifth Circuit upheld the inclusion of an affirmative defense provision in the Texas SIP.<sup>13</sup>

Second, EPA was not bound to follow the D.C. Circuit decision and could have waited to see if a different panel of judges on the D.C. Circuit ruled similarly in the context of the February 2013 SIP rule. If EPA disagreed with the *NRDC* decision, EPA also could have sought *en banc* review of the decision by the D.C. Circuit or filed a petition for *certiorari* and sought Supreme Court review of the decision.<sup>14</sup>

Third, in defending its February 2013 proposed rule, EPA also could have distinguished the D.C. Circuit's holding in *NRDC*. One key difference between the Portland Cement Rule and the SIP rule is that the SIP rule is far broader and primarily involves the exercise of state authority with EPA oversight, a regulatory approach described as "cooperative federalism." Unlike the hazardous air emission regulation at issue in *NRDC*, which is subject to the most stringent control standard available (maximum achievable control technology) and is coordinated nationally by EPA, SIPs are individually tailored to meet the needs of states.<sup>15</sup> States have broad discretion to formulate their own SIPs and "determine the methods and particular control strategies they will use to achieve the statutory requirements."<sup>16</sup> EPA can only disapprove a SIP revision if the revision would interfere with the NAAQS or "any other applicable requirement" of the Act.<sup>17</sup>

## Potential Criticisms of New SSM Policy

EPA's decision to dramatically alter its SSM policy and then impose this new policy on the states with little input may be viewed by some states as an abandonment of the principles of cooperative federalism and an impingement on their right to shape their own air programs. This sentiment was widely expressed by the affected States in response to EPA's 2013 proposed rule.<sup>18</sup> Indeed, if the states do not revise their SIPs to remove the affirmative defense provisions, sources in those states may be subject to a Federal Implementation Plan (FIP) under the auspices of EPA. And while states will continue to have enforcement discretion not to bring cases against sources in their states that have unavoidable malfunctions, there will be no affirmative defense provision to protect sources from the pursuit of technical violations that are unavoidable and do not pose a threat to human health or the environment. Despite EPA's change of heart, the same technical realities that gave rise to the SSM policy in the first place still remain an issue for many facilities.

EPA's SNPR appears to provide little, if any, new benefits to human health or the environment. In its revised proposal, EPA does not consider whether the elimination of the malfunction affirmative defense would have any environmental benefit or if the proposed rule is cost-justified.<sup>19</sup> Many of the affirmative defenses previously upheld by EPA already took into account health and environmental impacts and

provided that an affirmative defense was not available if there were impacts.<sup>20</sup> Moreover, in its February 2013 proposed rule, EPA recommended a list of criteria for malfunction affirmative defense provisions to ensure the provisions were consistent with the Clean Air Act, including minimization of the amount and duration of the excess emissions and an “after-the-fact showing that the excess emissions that resulted from the violations did not in fact cause a violation of the NAAQS or PSD increments.”<sup>21</sup> In short, there does not appear to be any significant environmental benefit to the public in eliminating the malfunction defense.

Notwithstanding the D.C. Circuit’s explicit statement that its *NRDC* ruling does not apply to EPA’s SIP rule, EPA concluded that the decision forced EPA to ignore its own reasoning and eliminate a longstanding affirmative defense provision. EPA’s revised rule has no discernible environmental benefit — indeed many existing affirmative defense provisions already limited the defense to situations in which there could be little or no environmental harm. The impact on the energy sector will be particularly acute because electric generating units, whether coal-fired or natural gas-fired, are likely to face increased liability for periodic emissions exceedances that occur during periods of startup, shutdown or malfunction. Significantly, the burden will fall upon the nation’s emerging fleet of natural gas-fired electric generating units and not exclusively upon older, coal-fired units.

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## Endnotes

<sup>1</sup> 79 Fed. Reg. 55920 (Sept. 17, 2014).

<sup>2</sup> 78 Fed. Reg. 12460 (Feb. 22, 2013).

<sup>3</sup> These states include California, Texas, New Mexico, South Carolina, Washington, and West Virginia. 79 Fed. Reg. at 55924.

<sup>4</sup> *Id.* at 55934 ("If the EPA has no authority to create affirmative defenses because it cannot alter the jurisdiction of the courts to assess penalties in enforcement proceedings for violations of CAA requirements, then it follows that states likewise cannot alter the jurisdiction of the federal courts in SIP provisions and the EPA cannot approve any SIP provision that purports to do so.").

<sup>5</sup> 78 Fed. Reg. at 12478.

<sup>6</sup> See Karl Karg, *EPA Acts to Limit Startup, Shutdown and Malfunction Defense*, Latham & Watkins Client Alert (March 14, 2013).

<sup>7</sup> Memorandum: Docket for Rulemaking, "State Implementation Plans: Response to Petition for Rulemaking: Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," p. 7 (Feb. 4, 2013).

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 15.

<sup>10</sup> 749 F.3d 1055, 1063-64 (D.C. Cir. 2014) ("Section 3004(a) [of the Act] creates a private right of action, and as the Supreme Court has explained, 'the Judiciary, not an executive agency, determines the scope – including the available remedies – of judicial power vested by statutes establishing private rights of action.'").

<sup>11</sup> 79 Fed. Reg. at 55934 ("Although the *NRDC v. EPA* decision focused on the jurisdiction of the federal courts to assess civil penalties for violations of EPA regulations promulgated under section 112, because that was what was specifically at issue in the case before it, the EPA sees no reason why the same logic would not apply to any SIP provision that purported to alter or eliminate the jurisdiction of the federal courts to exercise their authority in the event of violations as provided in CAA section 113(b), including the authority to restrain violations, to require compliance, to assess civil penalties, to collect any fees and to award any other appropriate relief.>").

<sup>12</sup> *NRDC*, 749 F.3d at 1064 n. 2 ("We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan.>").

<sup>13</sup> 714 F.3d 841 (5th Cir. 2013) (holding that EPA's approval of the section of the Texas SIP that contained an affirmative defense for unplanned SSM activity and disapproval of the section that contained an affirmative defense for planned SSM activity were not arbitrary and capricious).

<sup>14</sup> See Docket No. 10-1371 (no petition for *cert.* or *en banc* review filed).

<sup>15</sup> *Luminant*, 714 F.3d at 845 ("Under the CAA, the EPA is responsible for identifying air pollutants and establishing National Ambient Air Quality Standards (NAAQS), which specify maximum allowable levels of certain types of pollutants in the air. . . . The States are then permitted, 'within limits established by the NAAQS, to enact and administer their own regulatory programs, structured to meet their own particular needs.'").

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; 42 U.S.C. § 7410 (l). EPA acknowledges the discretion of states to revise their own SIPs, but indicates that states must follow EPA's new interpretation of the Clean Air Act in order to have their SIPs approved. 79 Fed. Reg. at 55926 ("In response to a SIP call, a state retains broad discretion concerning how to revise its SIP, so long as that revision is consistent with the requirements of the CAA. The EPA's interpretation of those requirements will be embodied in the revised SSM Policy, which will be stated in the Federal Register notice for the final action in this rulemaking. If the final SIP call identifies an automatic exemption provision in a SIP as contrary to the CAA, that provision would have to be removed entirely.>").

<sup>18</sup> See Karg, *EPA Acts to Limit Startup, Shutdown and Malfunction Defense*.

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<sup>19</sup> 79 Fed. Reg. at 55927 (“The EPA believes that it is obligated and authorized to issue the proposed SIP calls to remove affirmative defense provisions even though the EPA is unable to estimate the number, nature, costs and resulting emission reductions that will indirectly result from the removal of such provisions from the affected SIPs.”).

<sup>20</sup> 30 Tex. Admin Code § 101.1 (109). Among other elements, in order to prove under the Texas SIP that an upset is “non-excessive,” the owner or operator must prove that “the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality” and that “the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance”. 30 Tex. Admin. Code § 101.222(b). The Washington SIP provides that excess emissions due to upsets are “unavoidable” and “not subject to penalty” if, among other elements, “the operator took immediate and appropriate corrective action in a manner consistent with good air pollution control practice for minimizing emissions during the event, taking into account the total emissions impact of the corrective action, including slowing or shutting down the emission unit as necessary to minimize emissions, when the operator knew or should have known that an emission standard or permit condition was being exceeded.” Wash. Admin. Code § 173-400-107.

<sup>21</sup> 78 Fed. Reg. at 12478-79.