



# **Regulation of Emissions During Startup, Shutdown and Malfunction (SSM) under the Clean Air Act**

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# Alphabet Soup

- **NAAQS** – National Ambient Air Quality Standard
- **SIP** – State Implementation Plan
- **NESHAP** – National Emission Standards for Hazardous Air Pollutants
- **SSM** – Startup, Shutdown and Malfunction

# Genesis of SSM Legal Dispute

## Clean Air Act requires agencies to establish:

- “emission limitations” (Section 110 - SIP)
- “emission standards” (Section 112 – NESHAP)
- “standards of performance” (Section 111- NSPS)

## CAA § 302(k)

“The terms ‘emission limitation’ and ‘emission standard’ mean a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reductions.”

## CAA § 302(l)

“The term ‘standard of performance’ means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous reduction.”

# Legal Mechanisms to Address SSM Emissions

Tension between:

Requirement that emission limitations be continuous

AND

Practical reality that control technology can fail unavoidably or not operate optimally during startups and shutdowns

Legal Mechanisms that evolved to account for this tension:

- Automatic Exemption
- Director Discretion
- Affirmative Defense
- Enforcement Discretion

# Evolution of EPA Policy for SSM Events

## The 1970s

No policy; original SIPs often included automatic exemptions and Director Discretion provisions for SSM events.

## The 1980s (Bennett Memoranda)

EPA stated it would not approve any SIP revision that provided for automatic exemptions for SSM events. However, excess emissions during short periods of startups and shutdowns that cannot be avoided need not be treated as violations.

## The 1990s (Herman Memorandum)

- States may create affirmative defense provisions for SSM events provided the source has burden of proof to establish certain conditions are met.
- Affirmative defense provisions apply to actions for penalties, not to actions for injunctive relief.
- States may create narrowly defined exceptions for startup and shutdown periods.

## Gap Between EPA Policy and Implementation

- A SIP (with SSM provisions) that is approved by EPA goes through formal rulemaking.
- In contrast, EPA's guidance concerning SSM provisions is not a regulation and not accorded the same level of deference as adopted rules.
- EPA's SSM Policy Guidance cannot trump SSM provisions in an EPA-approved SIP.

Sierra Club v. Georgia Power Company, 443 F.3d 1346 (11<sup>th</sup> Cir. 2006).

## EPA's Quantum Leap (2013)

EPA proposed (in response to a Sierra Club petition) a SIP Call to require 36 states (including Tennessee) to eliminate exemptions for SSM event:

*78 Fed. Reg. 12460 (Feb. 22, 2013)*

### Main elements of EPA's proposal:

- Requires states to eliminate Automatic Exemptions and Director Discretion provisions from SIPs.
- Affirmative Defense provisions are not appropriate for startups and shutdowns, and other such planned events.
- Affirmative Defense provisions are appropriate for malfunctions and unplanned events.
- Encourages use of enforcement discretion to address SSM events.

# Case Law Post-EPA (2013) Proposal

## (1) SIP Context

Luminant Generation v. EPA, 714 F.3d 841 (5<sup>th</sup> Cir. 2013)

EPA review of Texas SIP providing an affirmative defense against civil penalties for both planned and unplanned SSM events. EPA approved the affirmative defense provisions for unplanned SSM events, but disapproved the affirmative defense provisions for planned events.

Held:

1. EPA's approval of affirmative defense for unplanned SSM events was consistent with Section 113 of the CAA.
2. EPA's disapproval of affirmative defense for planned SSM events was consistent with the CAA.

[In accord with other decisions upholding EPA's inclusion of affirmative defense for malfunctions in Federal Implementation Plans:

Mont. Sulfur & Chem. Co. v. EPA, 666 F.3d 1174 (9<sup>th</sup> Cir. 2012).

Ariz. Pub. Serv. Co. v. EPA, 562 F.3d 1116 (10<sup>th</sup> Cir. 2009).]

# Case Law Post-EPA (2013) Proposal (Cont'd)

## (2) NESHAP Context

NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. 2014).

EPA promulgated NESHAP regulations for the Portland cement industry. Several environmental organizations petitioned for judicial review.

Held:

1. EPA lacked authority to promulgate an affirmative defense to civil penalties for malfunctions. Courts look to CAA § 113 to determine whether civil penalties are appropriate. CAA § 304 vests authority over private citizen suits in the courts, not EPA.
2. Court recognized the Luminant decision, which came up in a SIP context: “We do not confront here the question whether an affirmative defense may be appropriate in a State Implementation Plan.”

# EPA Final SIP Call Rule

## *80 Fed. Reg. 33,840 (June 12, 2015)*

- Major change from proposal: EPA requiring states to remove affirmative defense provisions from SIPs.
- Final rule, thus, prohibits the use of automatic exemptions, Director Discretion provisions and affirmative defense provisions in SIPs.
- All excess emissions for unplanned SSM events must be addressed through the exercise of the State's enforcement discretion.
- Startup, shutdown and other planned events may be addressed through alternative standards:

Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2008)

*Held*: “Continuous emission reduction” means that “some” standard must apply continuously to meet NESHAP, although “continuous” does not necessarily mean a single unchanging emission standard.

# Tennessee SIP Provisions Called by EPA

## I. State Regulations

### A. Tenn. Comp. R. & Regs. 1200-3-20-.07(1) & (3)

- 1) Provisions authorizing the Technical Secretary to “excuse or proceed upon” violations of SIP emission limitations during “malfunctions, startups and shutdowns.”
- 2) EPA found these provisions go “too far because a court could reasonably conclude that the provisions in question preclude the EPA and the public from enforcing against violations that occur during SSM events if the official chooses to ‘excuse’ such violations.” 78 Fed. Reg. at 12,513.

### B. Tenn. Comp. R. & Regs. 1200-3-5-.02(1)

- 1) Provision allowing the Technical Secretary to make due allowances in permits for startups and shutdowns.
- 2) EPA found this provision operates as an impermissible discretionary exemption. 78 Fed. Reg. at 12,513.

# Tennessee SIP Provisions Called by EPA (Con'd)

## II. Knox County Regulations

### A. Knox County Regulation 32.1(C)

- 1) This provision specifies that a “determination that there has been a violation of these regulations or orders pursuant thereto shall not be used in any lawsuit brought by any private citizen.”
- 2) EPA found that “by seeking to restrain the ability of private citizens to pursue enforcement actions, the provision is inconsistent with the fundamental structure created by Congress in CAA section 304.” 78 Fed. Reg. at 12,513.

## III. Shelby County Regulations

### A. Shelby County Code § 16-87

- 1) This provision incorporates by reference the SSM provisions in the Tennessee SIP.
- 2) EPA found these provisions to be substantially inadequate for the same reasons that EPA found the Tennessee SIP to be defective.

# SIP Call Litigation: Arguments of Industry Petitioners

- I. **EPA applied an unreasonable interpretation of its statutory SIP Call authority under CAA § 110(k)(5)**
  - A. Fails to give meaning to the higher threshold of “substantial inadequacy,” which allows issuance of a SIP Call only if plan “is substantially inadequate to attain or maintain the relevant [NAAQS]” or “to otherwise comply with any requirement of the [CAA].”
  - B. Fails to consider the SIP as a whole. EPA cannot object to a particular provision in the SIP so long as the ultimate effect of a state’s choice of emission limitations is compliance with the NAAQS. Train v. NRDC, 421 U.S. 60 (1975).
  - C. Ignores the “cooperative federalism” context of Section 110, which gives states “the power to determine which sources should be burdened by regulation and to what extent.” Union Elec. Co. v. EPA, 427 U.S. 246 (1976).

# SIP Call Litigation: Arguments of Industry Petitioners (Cont'd)

- II. **EPA's prohibition on "exemptions" from emission limitations is not supported**
  - A. General duty provisions and work practice conditions provide control "at all times."
  - B. EPA's mandate of "continuous" application of SIP limits is based on incorrect reading of relevant statutory provisions:
    - 1. EPA misreads the definition of "emission limitation" in CAA § 302(k):
      - a. Plain language of definition imposes a requirement of uninterrupted emission reductions without that requirement applying to every period of source operation.
      - b. Legislative history (CAA 1977 amendments) makes clear that "continuous" does not mean "over all periods of operations." Congress added § 302(k) to address its concerns with use of "intermittent" controls (i.e., dispersion techniques) and not to prohibit states from taking into account the inherent technological limits of control technology that otherwise provides "continuous" emission reductions.
    - 2. The 2008 *Sierra Club* decision is not controlling because the context there was the development of NESHAP standards under Section 112, not States' development of SIPs under Section 110.
    - 3. EPA misreads elements in Section 110(a)(2)(A) by ignoring the "as may be necessary or appropriate" language.

# SIP Call Litigation: Arguments of Industry Petitioners (Cont'd)

## III. EPA's blanket prohibition of "affirmative defenses" not supported by the CAA or case law

- A. EPA previously recognized that CAA allows states to allow affirmative defense in SIPs (1990 Policy Memorandum).
- B. EPA vigorously defended affirmative defense provisions in SIPs (Luminant, 714 F.3d 842 (2013)).
- C. Every court that has considered the lawfulness of affirmative defense provisions in a SIP/FIP has found them to be permissible (Fifth, Ninth and Tenth Circuits).
- D. EPA's extension of the 2014 *NRDC* decision is contrary to the CAA as the case deals with EPA's promulgation of categorical national standards for hazardous pollutants under CAA § 112.

# Future of SSM Law

- Contingent on the outcome of judicial review of the EPA SIP Call rule before the D.C. Circuit
- If States/Industry Petitioners prevail:
  - States may continue to incorporate automatic exemption, Director Discretion and affirmative defense provisions in SIPs for SSM events.
- If EPA prevails:
  - For startups, shutdowns and other planned events, states may opt to include alternative emission limits in SIPs.
  - For malfunctions and other unplanned events, states would use enforcement discretion to address SSM events.