

EPA Rejection of Startup/Shutdown/Malfunction Defense Upheld

The United States Court of Appeals for the Sixth Circuit, which has jurisdiction in Michigan, has denied a pair of petitions challenging the United States Environmental Protection Agency's (EPA) rejection of Michigan's startup/shutdown/malfunction (SSM) regulations for Michigan's Clean Air Act (CAA) State Implementation Plan (SIP).

Under the CAA, each state is required to submit a SIP to implement the air quality objectives CAA within that state to EPA for approval. Most of the Michigan Department of Environmental Quality (MDEQ) Air Quality Division (AQD) regulations, along with a number of consent orders and other site-specific instruments that apply to specific emission sources, are included in Michigan's SIP. Once a state regulation or other provision has been approved by EPA for the SIP, that regulation or provision is enforceable by EPA and the public under the CAA.

In 1993, MDEQ adopted revisions to Rule 912 and adopted new Rules 913 and 914. These rules are often referred to as the SSM Rules. Collectively, these regulations provide that, if an emission source has complied with stringent requirements for preventing and minimizing emissions during SSM events, any emissions that occur as a result of an SSM event that exceed emission limits in a permit or a SIP Rule would not constitute a violation. To qualify for this protection, sources must develop and implement detailed written programs to prevent malfunctions and to minimize emissions that might occur during startup or shutdown of a source or a malfunction of equipment.

The SSM Rules were drafted in recognition that, at some sources, higher levels of emissions may inevitably occur during startup, shutdown and/or a malfunction of equipment. The SSM Rules were designed to provide a defense if emissions during an SSM event exceeded an emission limit even though the source had done everything within reason to plan for and prevent malfunctions and to minimize emissions during the SSM event. In these special circumstances, the SSM Rules provide that emissions in excess of an emission limit are not a violation.

MDEQ submitted the SSM Rules to EPA for approval as part of Michigan's SIP in 1996. In 1998, over objections from MDEQ and industry groups, including the Michigan Manufacturers Association (MMA), EPA rejected the SSM Rules for the SIP. EPA determined that any emissions that exceed any emission limit is a violation, regardless of mitigating circumstances, such as an SSM event that occurred despite preventative maintenance. EPA relied on several EPA guidance memoranda from 1982 and 1983 that indicated that SSM emissions should be evaluated on a case-by-case basis and EPA and state agencies should reserve the power to impose fines and penalties on sources that cause excess emissions during SSM events. Pamela Najor, *Court Affirms EPA Rejection of Michigan SIP*, Daily Env't Rep. (BNA), Aug. 31, 2000, at AA-1.

MDEQ and MMA filed separate petitions challenging EPA's decision in the Court of Appeals, arguing that the CAA does not require all excess emissions during SSM events to be

treated as violations and that the CAA provides states with discretion to adopt regulations such as the SSM Rules as part each state's strategy to achieve the air quality goals of the CAA. Pamela Najor, *Federal Court Grants More Time to Utilities*, Daily Env't Rep. (BNA), Sept. 31, 2000, at A-12.

MMA and MDEQ argued that the SSM Rules actually help reduce emissions to the air by providing an incentive for emission sources to develop detailed plans to prevent malfunctions and minimize emissions during SSM events that go beyond any plans that could be required by law. In addition, MDEQ and MMA argued that emissions to the air would not increase because of the SSM Rules because the only emissions that are covered by the rules are those that occur despite compliance with detailed and stringent requirements to take measures to prevent malfunctions and to minimize emissions when SSM events occur. In other words, MDEQ and MMA argued that the SSM Rules provide protection for emissions that are unavoidable through reasonable planning and remedial measures.

The court was not persuaded by these arguments and deferred to EPA's interpretation of the CAA:

EPA has . . . stated that it interprets the CAA as disallowing a broad exclusion from source compliance with emission limitations in SIPs during SSM periods. Under the EPA's statutory interpretation, such an exclusion is inconsistent with the purpose of the CAA's criteria pollutant provisions, which mandate that the [National Ambient Air Quality Standards] be achieved and maintained.

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Given the deference we owe to the EPA's decision, we cannot say that EPA's interpretation . . . of the CAA . . . is unreasonable. Under that interpretation, SIPs cannot provide broad exclusions from compliance with emission limitations during SSM periods. Michigan's proposed rules jeopardize ambient air quality, the EPA found, because the rules excuse compliance from applicable emission limits and provide no means for the state to enforce the NAAQS.

Thus the court found that EPA's interpretation of the CAA as prohibiting regulations, like the SSM Rules, that provide a defense to sources that exceed emission limits during startup, shutdown or malfunction was reasonable and, therefore, the court upheld EPA's rejection of the SSM Rules for Michigan's SIP. The SSM Rules remain valid under Michigan law for the time being, but MDEQ is expected to propose to significantly modify or rescind the SSM Rules in the near future. *Michigan Manufacturers Association v. Browner*, 2000 WL 1234349 (6th Circ) Aug. 24, 2000.

This article was prepared by S. Lee Johnson, a partner in our Environmental Department, and previously appeared in the November, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.