



Emily Schilling

Partner
801.799.5753
Salt Lake City
ecschilling@hollandhart.com

EPA Proposes Changes to Policies Governing Excess Emissions During Startup, Shutdown, and Malfunctions That Would Require Revisions to 36 State Implementation Plans

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On February 22, 2013, EPA proposed to find that provisions in 36 State Implementation Plans ("SIPs") providing affirmative defenses to monetary penalties in the cases of excess emissions resulting from startup or shutdown are contrary to the Clean Air Act and require a SIP revision. 78 Fed. Reg. 12460 (Feb. 22, 2013). The policy proposed by EPA as part of this rulemaking will have broad implications, including in states where a formal SIP revision is not proposed.

In the West, EPA's proposed rule would affect SIPs in Colorado, Montana, North Dakota, South Dakota, and Wyoming, as well as in Idaho and New Mexico. Each of these states were the subject of a 2011 Sierra Club petition requesting that EPA (1) rescind its policy allowing for affirmative defenses in certain cases during periods of SSM; and (2) require SIP revisions in 39 identified states. EPA agreed to revisions to its policy for affirmative defenses in the cases of startups and shutdowns, and is proposing related revisions to 36 of the 39 SIPs identified in the Sierra Club petition. Sierra Club also asserted that EPA should cease relying on interpretive letters when assessing the consistency of SIP provisions with the Clean Air Act, a request denied by EPA.

As part of the rulemaking, EPA is proposing to clarify and revise its SSM policy in a manner that would prohibit both automatic and discretionary affirmative defenses to monetary penalties in the case of excess emissions that result from startup or shutdown of a stationary source. EPA considers startup and shutdown activities to be part of "normal source operation." Therefore, any excess emissions resulting from these activities must be accounted for in the emission limits applicable to the source—and any emissions above these permitted levels during these periods of operation would be treated in all cases as violations. In such cases, EPA states that assessment of civil penalties is appropriate.

For example, the proposal includes "criteria and procedures for the use of enforcement discretion by air agency personnel and appropriately defined affirmative defenses." 78 Fed. Reg. at 12464. Specifically, EPA is proposing to allow for special emission limitations or other narrowly-tailored control techniques applicable to startup and shutdown.

EPA denied Sierra Club's request to eliminate all affirmative actions for malfunctions, although the Agency is proposing to "reiterate" its policy for such events. Under the proposed guidance, a valid affirmative defense for malfunctions is applicable only to monetary penalties and must be limited to "malfunctions that are sudden, unavoidable, and unpredictable." EPA recommends comprehensive language for an affirmative defense for malfunctions, including a requirement that the activity could not have been foreseen or avoided by better operation and maintenance practices. The proposed language also includes new recommended provisions for a "written root cause analysis" designed to correct and eliminate the cause of the malfunction, as well as a requirement that the malfunction and the root cause report be provided in the first compliance report after the initial occurrence of the violation. The defendant has the burden of demonstrating the existence of all of the elements of the affirmative defense in a judicial or administrative proceeding. 78 Fed. Reg. at 12478.

EPA's proposal provides an analysis of each of the 39 states' SSM policies and makes a determination as to whether a SIP revision is appropriate. In Colorado, for example, EPA asserts that the SIP inappropriately provides an affirmative defense for violations due to excess emissions during startup and shutdown—despite EPA's 2006 approval of the state's SSM provisions. 78 Fed. Reg. 12529-30. In North Dakota, EPA is proposing to disapprove specific language applicable to excess emissions at sources, including oil field service and drilling operations, where such limits are technically infeasible, as well as exemptions where the excess emissions result from temporary operational breakdowns or cleaning of air pollution equipment. 78 Fed. Reg. at 12531-32.

Those states subject to the SIP call would have 18 months after final publication of the rule to submit a revised SIP. If a state fails to submit a SIP revision, or a SIP revision is disapproved, EPA will impose a Federal Implementation Plan within 24 months.

Comments on the proposal are due by March 25, 2013, however, the deadline for written comments is extended to April 11, 2013 if a request for a hearing is made. The hearing would be scheduled for March 12, 2013.

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