# Court to Consider EPA Rule Eliminating Exemption for Excess Emissions During SSM

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A 2015 EPA rulemaking required 36 states to revise their State Implementation Plans (?SIPs?) to eliminate provisions exempting air emission exceedances during periods of startup, shutdown, or malfunction (the ?SSM SIP Call rule?). The SSM SIP Call rule gives states a deadline of November 22, 2016 to submit revised SIPs to EPA. Exemptions in existing Title V permits will remain effective despite the SSM SIP Call rule, but will be removed from those permits when the permits are renewed.

Eight trade associations, 12 companies, and 19 states have filed petitions for review of the SSM SIP Call rule in the U.S. Court of Appeals for the D.C. Circuit. The cases have been consolidated, with the lead case being *Walter Coke, Inc. v. EPA*. All briefs in the case will be filed by August 26, 2016, and the Court will hear oral argument thereafter.

The primary arguments against the SSM SIP Call rule are:

1. States have broad discretion to choose methods to meet air quality goals; for the SSM SIP call to be justified, EPA must find state SSM provisions render each SIP as a whole ?substantially inadequate,? not just inconsistent with EPA?s preferred approach;
2. The ?general duty? provisions of state SIPs create a continuous work practice standard, and sources have a general duty to keep air emissions to a minimum, even during SSM periods; and
3. SIP provisions granting an ?affirmative defense? for exceedances during SSM periods were upheld by the 5th Circuit in 2013. EPA cites a 2014 D.C. Circuit Court decision as authority for removal of ?affirmative defense? provisions from SIPs. However, the 2014 decision was specific to EPA?s National Emission Standard for Hazardous Air Pollutants for Portland Cement Plants and does not apply to SIPs.

Although petitions for review have been filed, the SSM SIP Call rule has not been stayed by the Court, meaning the November 22, 2016 deadline remains in place. As states begin to comply with the rule by

submitting revised SIPs, it remains to be seen whether EPA will allow site-specific alternative emission limitations (including work practices) for startup and shutdown as Title V operating permit revisions and/or for malfunctions (e.g. SSM plan). Another issue for states revising their SIP is whether to include a provision automatically rescinding the changes EPA has required them to make if the SSM SIP Call rule is vacated by the Court or rescinded by the new administration.

As if the uncertainty associated with the SSM SIP Call rule litigation wasn?t enough for states and industry to deal with, EPA proposed a new rulemaking on June 14, 2016 that would remove the affirmative defense states are now authorized to include in Title V permits for excess emissions during an ?emergency.? To prove the defense and avoid liability, the source must demonstrate the emissions are the result of an ?emergency,? as that term is defined in the Title V regulations, and make a number of other required showings. EPA says this provision is inconsistent with its current interpretation of how the Clean Air Act must be enforced and with ?recent court decisions from the U.S. Court of Appeals for the D.C. Circuit.? Once the rule is promulgated as a final rule, states will be required to revise their Part 70 operating permit program to remove the defense. Naturally, litigation will be filed to challenge this final rule, too. Comments on the proposed rule will be accepted by EPA until August 15, 2016.

Proposed Rule to Remove Title V Affirmative Defense, 81 Fed. Reg. 38,645 (June 14, 2016).
Final SSM SIP Call Rule, 80 Fed. Reg. 33,840 (June 12, 2015).

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