



112 Start-up, Shutdown & Malfunction (SSM) Provisions: The Long & Winding Road

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SSM Presentation Overview

- History of SSM Rulemakings, including Industry & Environmental Community Court Challenges
- DC Circuit Court Decision
- Industry Responses & Latest Court Decision
- Current State of Play: How the Environmental Community, Industry, and EPA Are Responding



SSM History

- EPA first issued SSM requirements in 1994
 - Sources exempted from limits during SSM
 - Must have SSM plan & use it during SSM events
 - SSM plan part of Title V permit, publicly available
- Industry challenge: Title V incorporation burdensome, plan components confidential business information
- EPA revised rules in 2002: SSM plan no longer part of Title V, plans available to public only on request
- Sierra Club petitioned for reconsideration, EPA agreed to modest changes: sources must submit SSM plans with Title V permits



SSM History, Part 2

- EPA issued a new revised rule in 2003
- Sierra Club & NRDC issued challenges based on limited public availability of plans; EPA agreed to take comment
- EPA issued yet another revised rule in 2006
 - Sources don't have to follow SSM plans during SSM events
 - Must meet "general duty" to minimize emissions at all times
 - Limited public access to SSM plans
- Sierra Club and others sued again: this time argued that exemption from compliance with limits is unlawful and arbitrary
- Big issue is whether litigants can now raise issues that weren't addressed in their original petitions



DC Circuit Court Decision

12/19/2008

- 2-1 decision vacating the SSM rules; rules were “constructively re-opened” due to EPA actions in 2006 rule
- SSM exemption violates the CAA requirement that 112 standards apply continuously
- Dissenting justice: Sierra Club took no legal action in 1994, Court has no jurisdiction



Reaction to DC Circuit Court Decision

- Industry's initial analysis was that Court decision was limited to MACT rules that relied entirely on references to specific, vacated General Provisions SSM provisions; doesn't impact MACT-specific SSM provisions
- Nevertheless, industry as a whole felt it was left hanging with some enforcement exposure; lots of discussions with EPA, decision to appeal based on jurisdictional issues and "draconian" consequences for industry
- Petition for Rehearing was denied on a close vote
- EPA and Industry subsequently asked for and were granted a 60-day stay to address uncertainties around the vacatur; the 60-day period is now over



Environmental Community Response to Court Decision

- Less than a month after the DC Circuit Court decision, NRDC and Sierra Club filed a petition for rulemaking asking EPA to:
 - Reopen 34 “legally deficient” MACT standards to set proper floors, cover all pollutants, eliminate “unlawful” use of surrogates
 - Delete **any** provision in specific MACT standards that provides an SSM exemption from continuous compliance with MACT limits



Industry Response to Court Decision

- Considering petitioning Supreme Court for review; focus on jurisdictional issues rather than compliance
- Analyzing impact rule-by-rule
- Where vacatur would leave a sector unable to continuously comply with MACT standards or result in major compliance uncertainty, industry has begun approaching EPA to work on short-term and longer-term fixes

EPA Response to Court Decision

Adam Kushner memo:

- Court decision limited to 2 specific provisions of 112 General Provisions
- Vacatur will only “immediately and directly” affect MACT rules incorporating these 2 provisions by reference
- Rules that have specific regulatory text exempting/excusing compliance during SSM events not directly impacted
- Provides tables listing MACT rules affected/not affected
- Urges affected industry to contact EPA; enforcement discretion will be applied if reasonable efforts to limit emissions during SSM events



How EPA is Addressing SSM (& Other Issues) for the Pulp & Paper Industry

- EPA is working on an “integrated rulemaking” for pulp and paper. Key components:
 - Short-term SSM fix for specific provisions written into two industry MACT rules
 - Possible “re-do” of MACT floors & limits for two MACT rules
 - Possible re-do of NSPS for kraft pulp mills
 - Longer-term fix to SSM issues—work practice standards?
 - Major ICR to provide the data to support these efforts
 - Proposed rule(s) “early” 2011, final “early” 2012