

EPA to Rescind Longstanding Policy for Excess Emissions during Startup, Shutdown and Malfunction

In response to a petition for rulemaking by the Sierra Club in June 2011, the U.S. Environmental Protection Agency ("EPA") plans to rescind its policy on the treatment of excess emissions during periods of startup, shutdown, and malfunction ("SSM") of industrial process or emission control equipment. *See State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule*, 78 Fed. Reg. 12460 (Feb. 22, 2013). The EPA policy, which has been incorporated into various Clean Air Act State Implementation Plans ("SIPs"), allowed for more lenient treatment of excess emissions during SSM events. In conjunction with the change in policy, EPA is proposing SIP calls, or calls for states to revise their SIPs to correct substantial inadequacies, for 36 states, including Alabama, to assure that each state's SIP complies with the Clean Air Act's "continuous compliance" requirements.

CAA Background

The Clean Air Act ("CAA") requires each state to develop a SIP for the implementation, maintenance, and enforcement of National Ambient Air Quality Standards within the state. Section 110(a) requires each state's SIP to "include enforceable emission limitations and other control measures, means or techniques . . . as may be necessary or appropriate to meet the applicable requirements of this Act . . ." 42 U.S.C. § 7410(a). The term "emission limitation" is defined in Section 302(k) as a requirement limiting "the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis* . . ." 42 U.S.C. § 7602(k) (emphasis added). EPA and federal courts agree that, based on the plain language of Section 302(k), emissions limitations must apply on a continuous basis. *See, e.g., Sierra Club v. Johnson*, 551 F.3d 1019 (D.C. Cir. 2008) (EPA not authorized to issue emission limitations that do not apply on a continuous basis).

Previous EPA Guidance

Initially in 1982, and again in 1983, 1999, and 2001, EPA has issued guidance documents in which the agency has interpreted the CAA to allow leniency for excess emissions during periods of SSM. In these guidance documents, EPA has indicated that automatic categorical exemptions for excess emissions during SSM were impermissible, but condoned the use of an "enforcement discretion approach" for excess emissions during malfunctions under which states could determine that enforcement action was not appropriate as a result of excess emissions. *See Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions* (Feb. 15, 1983). EPA has also recommended that states utilize in SIPs narrowly drawn affirmative defenses, which provide a defense to monetary penalties, but not a defense to injunctive relief, for violations of emissions limits during periods of SSM. *See State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown* (Sept. 20, 1999). The series of guidance documents contains detailed recommendations for the drafting of SIP provisions regarding treatment of excess emissions during SSM. However, these guidance documents are not binding on EPA or the states, and, therefore, many SIPs contained exemptions and other provisions that provided for more leniency than that recommended by EPA.

Proposed Rule

The proposed rule clarifies EPA's position on the use of various approaches to treatment of excess emissions during SSM. With regard to affirmative defenses, EPA is proposing that affirmative defenses to monetary penalties are appropriate for malfunctions, because these emissions are often beyond the control of the owner or operator, but are not appropriate for startup, shutdown, and maintenance events, which are generally planned events within the control of the source. However, the affirmative defenses will not prevent actions for injunctive relief and must be narrowly drawn to encompass only events entirely beyond the control of the owner or operator and for which the source must have taken all practicable steps to prevent and minimize the emissions that resulted from the event.

EPA reiterated that exemptions from emissions limitations during periods of startup and shutdown, whether categorical or discretionary, which would result in exceedances not being treated as violations, are not consistent with the CAA and, therefore, are impermissible. Under the proposed rule, states may, however, establish narrowly tailored alternative emission limitations that apply during planned periods of startup and shutdown for specific categories of emission sources.

Potential Effects on Industry

In conjunction with the proposed rule, EPA is proposing SIP calls for 36 states, including Alabama. If the rule is finalized, affected states will have eighteen months to revise their respective SIPs to comply with the rule or face possible sanctions or the promulgation of a federal implementation plan for the state.

The proposed rule will require the Alabama Department of Environmental Management to revise Ala. Admin. Code Rule 335-3-14-.03(1)(h)(1) and Rule 335-3-14-.03(1)(h)(2). According to the proposed rule, these regulations contain impermissible director's discretion exemptions that are inconsistent with the fundamental requirements of the CAA. Other affected EPA Region IV states include Florida, Georgia, Kentucky, Mississippi, North Carolina, and Tennessee.

If the proposed rule is finalized, appropriate SIP revisions in the form of narrowly drawn affirmative defenses or alternative emissions limitations will be essential to protect source operators from penalties where appropriate. Even with appropriate revisions, emissions sources, particularly sources that operate on an as-needed or intermittent basis, may face increased liability for excess emissions during periods of SSM as a result of the rule.

ADDITIONAL ITEMS OF INTEREST:

Civil Enforcement

Kentucky Utilities to Resolve Clean Air Act Violations

In January, Kentucky Utilities Company ("KUC") agreed to pay a civil penalty of \$300,000 and install a new system to reduce sulfuric acid mist emissions in order to resolve alleged Clean Air Act violations at a facility in Ghent, Kentucky. The sulfuric acid mist pollution control system will cost KUC approximately \$57 million and should reduce sulfuric acid mist emissions by more than 3.7 million pounds a year. In addition, KUC will spend \$500,000 for an environmental mitigation project that includes installing a geothermal heating and cooling system at an elementary school in KUC's service area.

EPA Reaches Settlement for Violations at Legacy AT&T Wireless Sites

An EPA settlement reached in early January will require New Cingular Wireless ("NCW") to pay a \$750,000 civil penalty and spend \$625,000 on environmental projects to resolve violations at 332 legacy AT&T Wireless sites that NCW now owns. These include violations of EPCRA, Clean Water Act, and Clean Air Act requirements. NCW will also conduct comprehensive compliance audits at more than 1,300 sites.

Kemira Group Subsidiaries Settle TSCA and FIFRA Violations

In January, Kemira Chemicals agreed to pay a civil penalty of \$301,600 in response to allegations that they violated the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The EPA accused the chemical company of selling and distributing unregistered and misbranded pesticides as well as improperly reporting pesticide production. In addition, Kemira Water Solutions will pay a civil penalty of \$503,110 after an EPA inspection identified 27 violations of the Toxic Substance Control Act's ("TSCA") Inventory Update Reporting rule for the 2006 reporting period. The company has since submitted the required information.

Automotive Electronics Manufacturer to Pay Penalty for Clean Air Act Violations

Also in January, Edge Products LLC settled with the EPA and agreed to pay a \$500,000 civil penalty for manufacturing and selling devices which allowed diesel truck owners to remove emission controls from their vehicles in violation of the Clean Air Act. Diesel trucks have particulate filters which remove particulate matter (PM) emissions from a truck's exhaust, and a truck will not operate properly if a filter is removed because of a monitoring device. Edge's devices allowed the truck to operate after the filter had been removed. In addition to the civil penalty, Edge must also buy back the devices it sold and implement an emission mitigation project to offset the excess PM emissions that it caused.

Nevada Gold Mining Companies to Correct EPCRA Violations

Three gold mining companies, all subsidiaries of Barrick Gold Corporation, agreed in February to pay \$278,000 in penalties and spend \$340,000 on a supplemental environmental project after they failed to correctly report toxic chemical inventories and releases from 2005 to 2008. The Emergency Planning and Community Right-to-Know Act ("EPCRA") requires that companies using toxic chemicals file annual reports estimating the inventories and releases of certain chemicals. The companies have agreed to audit and correct their reports from 2005 through 2011 to comply with EPCRA.

Criminal Enforcement

Transocean to Pay Criminal and Civil Penalties for Deepwater Horizon Incident

The Department of Justice announced in January that Transocean Deepwater Inc. has agreed to plead guilty to violating the Clean Water Act and pay over \$1 billion in civil and criminal fines and penalties for its part in the Deepwater Horizon incident. Transocean will pay \$1 billion in civil penalties and \$400 million in criminal fines. The company must also improve the "operational safety and emergency response capabilities" at their U.S. drilling rigs.

Virginia Charter Fishing Boat Captain Pleads Guilty to Felony Lacey Act Violation

On January 9, Jeffery Adams and Adams Fishing Adventures Inc. pleaded guilty to trafficking in illegally-harvested striped bass, in violation of the Lacey Act. Adams admitted to taking charter clients to an exclusive economic zone to harvest striped bass, even though he knew it was illegal. He faces a maximum of five years in prison and a \$250,000 fine, as well as forfeiture of any fishing vessel used to commit the crime. The company faces a maximum fine of \$500,000 and forfeiture the vessels used.

Virginia Charter Fishing Boat Captain to Surrender Captain's License

In February, William W. Lowery, a charter fishing boat captain in Virginia, pleaded guilty to trafficking in illegally-harvested striped bass in violation of the Lacey Act. As part of the plea agreement, he has agreed to pay a fine of \$5,000 plus \$1,300 in restitution to the National Oceanic and Atmospheric Administration, serve 30 days in jail, surrender his captain's license, and not engage in the charter fishing industry in any way during his supervised release.

Agency News

EPA Releases Draft Risk Assessments for Chemicals Found in Household Products

As part of the Toxic Substances Control Act Work Plan, on January 4 the EPA released for public comment its assessments on five chemicals commonly found in household products. This includes chemicals found in paint stripper products, degreasers, and spray-on protective coating. Three of the draft risk assessments express concern for human health while two others indicate concern for ecological health. The EPA will take action to address possible risks if the final risk assessment shows a cause for concern.

2011 TRI Shows Increased Total Toxic Chemicals, Decline in Air Pollutants

The Toxics Release Inventory for 2011, published this January, revealed an 8 percent decrease in total toxic air releases from 2010 to 2011, according to the EPA. However, the TRI also showed that total toxic chemical releases increased for the second year in a row. The EPA cites a decrease in hazardous air pollutant emissions as the reason for the decrease in toxic air releases. The agency attributed the increase in total toxic chemical releases to metals mining.

EPA Report on Children's Health and the Environment in America Released

In January, the EPA released the third edition of its "America's Children and the Environment" report, which shows trends for contaminants that may affect children. The most notable findings were that the levels of cotinine and lead in the blood of children have decreased since the 1980s. In addition, the percentage of children living in "counties where pollutant concentrations were above the levels of one or more national air quality standards" dropped from 1999-2009.

EPA Releases State Enforcement and Compliance Information

On February 7, the Environmental Protection Agency announced that it will now have state dashboards and comparative maps which will provide information on environmental performance. The dashboards and maps have data from the last five years and include inspections, violations, enforcement actions, and penalties. This new program is a part of EPA's Enforcement and Compliance History Online ("ECHO") website which provides information on over 800,000 regulated facilities.

Recent Lawsuits

Virginia Court Allows CWA Claims for Discharges from Pre-SMCRA Waste Piles

In early January, a U.S. district court judge in Virginia denied defendant Penn Virginia Operating Company's motion to dismiss plaintiff's Clean Water Act ("CWA") claims based on alleged discharges of pollutants from "gob piles" associated with mining activities that occurred prior to the enactment of the Surface Mining Control and Reclamation Act in 1977. The "gob piles" are piles of waste comprised of coal mixed with mining byproducts, in this case located on land owned by Penn Virginia. According to the court, plaintiffs Southern Appalachian Mountain Stewards, the Sierra Club, and Appalachian Voices, alleged that Penn Virginia is a person under the CWA and that the company is adding pollutants to waters of the United States from a point source without a permit sufficient to state a cause of action under the CWA. According to the court, drainage from gob piles creates gullies that may be considered point sources or, in some instances, the gob piles may be considered point sources themselves. *See Southern Appalachian Mountain Stewards, et al. v. Penn Virginia Operating Co., LLC*, Case No. 2:12CV000020.

Sierra Club Suit Dismissed in Montana

The U.S. District Court for the district of Montana dismissed a suit in January by the Sierra Club against the director of the Montana Department of Environmental Quality. The Sierra Club claimed that the Montana DEQ failed to ensure permits issued since 1995 have not harmed water quality or prevented damage to surface and groundwater in the state in accordance with the Surface Mining Control and Reclamation Act of 1977. The court ruled in favor of the Montana DEQ, which argued that the case was barred by the Eleventh Amendment; that the decisions at issue were discretionary and beyond the reach of the citizens' suit provision; and that the action was not ripe for review. *See Montana Environmental Information Center v. Opper*, No. 6:12-cv-00034-CLC (D. Mont. Jan. 22, 2013).

Supreme Court Confirms Definition of "Discharge" Under CWA

In *Los Angeles County Flood Control District v. Natural Resources Defense Counsel*, No. 11-460 (Jan. 8, 2013), the U.S. Supreme Court held that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA." The holding, which is consistent with the Court's 2004 decision in *South Florida Water Management Dist. V. Miccosukee Tribe*, 541 U.S. 95, was based on the CWA definition of "discharge of a pollutant" as the *addition* of a pollutant to navigable waters from a point source. In this case, the alleged discharge was merely the flow of water from one portion of the river through a concrete channel to a lower portion of the river, which did not involve any "addition" of pollutants.

Beekeepers Sue EPA Over Honeybee Deaths

Environmental and consumer protection groups and beekeepers filed a lawsuit in March alleging that the EPA is not doing enough to protect honeybees. The suit, which was filed in the U.S. District Court in San Francisco, alleges that EPA is not doing enough to restrict insecticides which may have a toxic effect on honeybees. The pesticides at issue are a part of a class known as neonicotinoids, which are transported through a plant's vascular tissue and can be toxic to insects.

Other

Secretary of the Interior Ken Salazar to leave the Department

In January, Secretary of the Interior Ken Salazar announced that he would be leaving his position this spring. During his time, Salazar oversaw the establishment of ten national wildlife refuges and seven national parks. The Department of the Interior also authorized 34 solar, wind and geothermal energy projects on public lands under his watch.

Birmingham Meets Air Quality Standards

The EPA reported in January that Birmingham, Alabama meets federal air quality standards, a first for the city in 30 years. While Birmingham had complied with many of the air quality standards recently, it still had an issue with particulate matter. The Alabama Department of Environmental Management and the Jefferson County Health Department helped draft a plan to improve air quality after testing revealed unhealthy levels of pollution around some Birmingham schools and neighborhoods. This plan helped lower emissions which in turn helped Birmingham meet the air quality standards. While the city is now classed as "in attainment," it will have to meet more stringent standards in a few years as a result of EPA's passage of tougher standards in December.

ATTORNEY PROFILES

Richard E. Davis is a senior partner with Starnes Davis Florie LLP. He represents clients in federal and state courts in Alabama as well as in matters involving federal and state regulatory agencies. Richard's environmental practice includes Clean Water Act, Clean Air Act, and CERCLA litigation; natural resource and property damage claims; land use and water use issues; and the defense of corporations and individuals accused of environmental crimes as well as regulatory enforcement and compliance matters. Richard also defends personal injury actions based on alleged chemical exposure (so-called "toxic torts"). Richard is a Fellow in the Litigation Counsel of America Trial Lawyer Honorary; was listed in the 2008 - 2012 editions of *Alabama Super Lawyers*[®] magazine for Environmental Litigation, was selected for inclusion in the 2011, 2012, and 2013 editions of *Best Lawyers in America*[®]—in 2011 for both Environmental Law and Natural Resources Law and in 2012 and 2013 for both Litigation-Environmental and Natural Resources Law; was included by ALM (publisher of *The American Lawyer*, *Corporate Counsel*, and law.com) as a Top Rated-AV Preeminent Lawyer in Mass Tort Litigation; was selected by peer review as one of Birmingham Magazine's Top Attorneys in Environmental Law in 2012; and served as Chair of the Alabama State Bar Environmental Law Section for 2010-2011.

J. Scott Dickens is a partner with Starnes Davis Florie LLP. Scott's practice is primarily devoted to environmental and construction litigation. He has represented clients in all State and Federal Courts in Alabama, in arbitration proceedings before the American Arbitration Association and Alabama Building Commission, and in the United States Court of Federal Claims. Scott's practice includes CERCLA and RCRA litigation; architect and engineer liability claims, particularly relating to environmental issues; and construction related matters. He also frequently speaks at environmental and construction seminars. Scott is a 1996 graduate of Cumberland School of Law where he was a member of the *Cumberland Law Review*.

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