

D.C. Circuit Vacates EPA's Exemption for Excess Emissions During Startup, Shutdown and Malfunction Episodes for Major Sources of Air Toxics

On December 19, 2008, the U.S. Court of Appeals for the District of Columbia Circuit vacated a major Environmental Protection Agency (EPA) rule exempting large industrial sources from the Clean Air Act's (CAA) standards for hazardous air pollutants (HAPs) during periods of startup, shutdown and malfunction (SSM). *Sierra Club v. EPA*, No. 02-1135 (D.C. Cir. Dec. 19, 2008). In a 2-1 decision, the court determined that EPA's recent amendments to the SSM exemption rule, which was originally promulgated in 1994, subjected the rule to judicial review. The court further held that the revised SSM exemption rule must be vacated because it violates the requirement of the CAA that emission standards for HAPs must apply continuously.

Unless the decision is vacated by the Court of Appeals on rehearing or by the Supreme Court on certiorari, the decision will dramatically change the regulatory framework for HAPs emitted by large industrial sources. For fourteen years, many large industrial facilities, in reliance on the SSM rule, have not controlled HAP emissions to numerical limits during SSM events. As a result of the court's ruling, these facilities may now have to comply with section 112 Maximum Available Control Technology (MACT) requirements during all stages of operation, including SSM events.

BACKGROUND

Section 112 of the CAA requires EPA to set emission control standards that impose MACT requirements on emitters of HAPs. Since the 1970's, EPA has recognized that major sources often have difficulty controlling emissions reliably during SSM periods. In 1994, EPA exempted these sources from section 112 MACT standards during SSM events, instead imposing on them a "general duty" to "operate and maintain any affected source . . . in a manner consistent with safety and good air pollution control practice for minimizing emissions." 40 C.F.R. § 63.6(e)(1)(i). The 1994 SSM exemption rule also required HAP sources to submit publicly available compliance plans to state permitting authorities. In most states, such plans were incorporated into the sources' CAA Title V operating permits, thus making the plans directly enforceable against the permittees.

In 2002, 2003, and 2006, EPA adopted a series of amendments to the 1994 SSM exemption rule, triggering the legal challenges resolved in the D.C. Circuit's December 19 decision. Those amendments preserved the "general duty," but eliminated the specific provisions requiring industrial sources to comply with SSM plans, to make those plans publicly available, and to incorporate them into Title V operating permits. Environmental advocacy groups filed a series of review petitions that resulted in the court's consolidated decision vacating the 1994 SSM exemption rule as amended.

SUMMARY OF THE DECISION

Timeliness of the Review Petitions

Before addressing the merits, the court rejected EPA's argument that the court lacked jurisdiction because the environmental petitioners were impermissibly seeking to overturn a rule promulgated in 1994, well after the 60-day window for judicial review provided in the CAA. The court held that even though the 1994 SSM exemption rule would have been closed to direct challenge, EPA's more recent amendments changed the 1994 rule so substantially that it "constructively reopened consideration of the exemption from section 112 emission standards during SSM events."

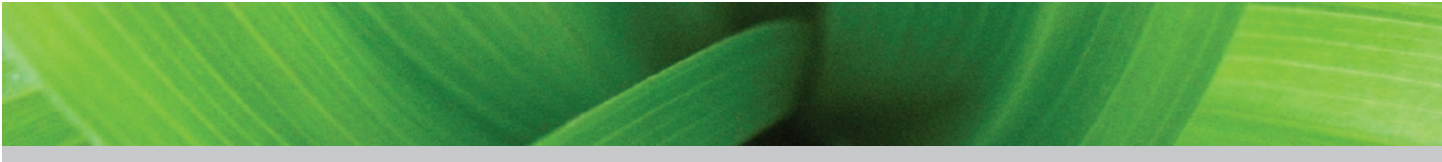
The Merits

The court held that the SSM exemption rule, as modified by amendments in 2002, 2003, and 2006, ran contrary to the unambiguous text of the CAA. The court focused on the definition of "emissions standard" in section 302(k) of the Act, which requires that emissions standards "limit[] the quantity, rate or concentration of emissions of air pollutants on a continuous basis." The court reasoned that this definition requires EPA to apply section 112-compliant standards *at all times* of operation — including during SSM events. The court determined that because the "general duty is not a section 112-compliant standard," and because "the general duty is the only standard that applies during SSM events," the SSM exemption rule "violates the CAA's requirement that *some* section 112 standard apply continuously" (emphasis added).

The court rejected EPA's argument that section 112 allows the agency discretion "concerning those particular activities to which the emission limitations in a MACT standard apply." Citing its decision earlier this year vacating EPA's Clean Air Mercury Rule (CAMR) for coal and oil-fired electric utilities, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), the court determined that the 1990 amendments to the CAA removed EPA's discretion "to relax emission standards on a temporal basis," including during SSM events. The court therefore held that the SSM exemption rule, as amended, must be vacated.

IMPLICATIONS

The D.C. Circuit's invalidation of the SSM exemption rule will take effect in 45 days unless the court's mandate is automatically stayed by timely petitions for rehearing, or an order staying the mandate pending Supreme Court review. Once the rule is vacated, owners and operators of major sources under section 112 may find that their SSM plans under the "general duty" no longer provide a legal exemption from MACT emission standards during SSM periods. This development could have major impacts on a broad array of industrial facilities, many of which do not have the technical capability to meet MACT standards during SSM events. This is a particular concern during a time when facilities are closing down temporarily to cut costs and avoid permanent layoffs.



This decision is the third by the D.C. Circuit this year striking down a major EPA rule on the basis of a strict reading of the CAA. The D.C. Circuit similarly refused to defer to EPA's interpretations of the CAA in decisions vacating the Clean Air Mercury Rule (CAMR) and remanding, without vacatur, the Clean Air Interstate Rule (CAIR)¹. The D.C. Circuit's CAMR decision, *New Jersey v. EPA*, is now on petition for certiorari before the U.S. Supreme Court. Since the D.C. Circuit's SSM rule decision rested in part on its interpretation of section 112 in *New Jersey*, a grant of review of *New Jersey* by the Supreme Court could have implications for the SSM exemption rule. It is unclear whether the incoming Obama Administration will change EPA's litigation posture in these cases.

¹ On December 23, 2008, the D.C. Circuit remanded the CAIR case to EPA to revise CAIR consistent with its July 11, 2008 decision in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). The D.C. Circuit's decision leaves CAIR in place pending further rulemaking by EPA. See Van Ness Feldman's Issue Alerts of July 14, 2008 ("D.C. Circuit Vacates Clean Air Interstate Rule, Creating Uncertainty for Air Regulatory Programs") and February 11, 2008 ("D.C. Circuit Strikes Down EPA's Clean Air Mercury Rule"), available at <http://www.vnf.com/news-alerts.html>.

FOR ADDITIONAL INFORMATION

For more information on the SSM decision, and how it might affect your company, please contact Dick Penna, Stephen Fotis, Britt Fleming or any member of the Van Ness Feldman Air Regulation Practice at (202) 298-1800.

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