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COURT OF APPEALS VACATES SSM EXEMPTION UNDER CLEAN AIR ACT

A recent ruling from the Court of Appeals for the D.C. Circuit significantly changes the landscape for major sources under the Clean Air Act (CAA). On December 19, 2008, the Appellate Court vacated the startup, shutdown or malfunction (SSM) exemption which had allowed sources to deviate from the CAA section 112 standards for hazardous air pollutants during startups, shutdowns, and periods of malfunction. Facilities may now face potential enforcement actions for any violation of the maximum achievable control technology (MACT) emission standards, even if such a violation is covered by an SSM plan adopted by the facility.

In 1994, EPA adopted the SSM exemption for section 112. *National Emission Standards for [HAPs] for Source Categories: General Provisions*, 59 Fed. Reg. 12,408 (Mar. 16, 1994). At that time, EPA also required any facility subject to section 112 to develop an SSM plan to minimize emissions during periods of SSM (and required the facility to follow its SSM plan during SSM periods). That SSM plan was subject to revision by the permitting agency, was available for public review, and was incorporated by reference into a facility's Title V operating permit as an applicable requirement.

In a series of actions between 2002 and 2006, EPA changed the requirements of the SSM plan so that the rule reviewed by the Court of Appeals no longer required a facility to follow the SSM plan during SSM periods. The plan was also not required to be made available for public review and input and was no longer considered an applicable requirement under the Title V operating permit. The Court agreed with Sierra Club that the shift "to a regulatory scheme with a non-mandatory plan providing for no [agency] approval or [public] involvement but only after-the-fact reporting changed the calculus . . . and thereby constructively reopened consideration of the exemption from section 112 emissions standards during SSM events." *Sierra Club v. Environmental Protection Agency*, MNo. 02-1135, slip op. at 13 (Dec. 19, 2008).

After finding jurisdiction to hear the case, the Court went on to hold that there must be continuous compliance with section 112 emissions standards and therefore the SSM exemption is unlawful. *Id.* at 16-17.

The full impact of this ruling is difficult to predict. The sweeping language of the Court's opinion may very well eliminate any possibility of operating under an SSM plan that does not require continuous compliance with HAP emissions standards. Those facilities whose Title V operating permit incorporates as an applicable requirement compliance with an SSM plan that was subject to agency review and revision, public input, and is legally enforceable may be able to benefit from the permit shield so long as they comply with their SSM plan. However, for any facility that took advantage of EPA's lessened SSM requirements during the past six years and did not incorporate an SSM plan into its Title V operating permit, no such permit shield exists. Indeed, even those facilities with an SSM plan listed in the Title V permit may be subject to enforcement actions for failure to comply with MACT standards during SSM regardless of their compliance with the specific SSM plan because the Court interpreted the CAA to require continuous compliance with the emission standards.

HRO has extensive Clean Air Act expertise. For further information about this and other CAA issues, please contact Katheryn Coggon, Alan Gilbert, Colin Harris, or Blaine Rawson.

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