

News: Legal Updates

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DC Circuit Strikes Down NESHAP Startup, Shutdown and Malfunction Regulations

MORE INFORMATION

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Continuing its run of decisions unfavorable to the EPA, the DC Circuit announced its decision Friday in *Sierra Club v. EPA*, ___ F.3d ___, 2008 WL 5264663 (DC Cir. 2008) to strike down EPA's long standing NESHAP regulations regarding start up, shut down and malfunction events ("SSM"). EPA regulations required facilities to have plans to minimize emissions during SSM and to report their compliance with those plans, in recognition that existing controls would not be effective during SSM. Yet the court treated this requirement as an "exemption" from emissions limitations requirements rather than an emissions control program in and of itself. The court's decision has the extraordinary impact of exposing sources subject to NESHAP regulations to liability for failing to comply with NESHAP limitations during unavoidable SSM events, when such compliance may well be impossible. Despite the breadth of this impact, the court strained to reach its conclusion, subjecting it to a stinging dissent and perhaps rehearing.

EPA adopted regulations for SSM for NESHAP sources in 1994 following the strengthening of the Hazardous Air Pollution ("HAP") requirements in the 1990 Clean Air Act Amendments. EPA modeled these rules on existing SSM regulations for stationary sources, which imposed a "general duty" to minimize emissions during SSM. The EPA strengthened the NESHAP rules by requiring the development of a written plan for minimizing emissions during SSM and incorporation of the SSM plan into a Title V permit.

In 2002, EPA issued rules intended to modify the SSM Plan requirement, both by no longer requiring it to be incorporated into the permit and by modifying the source's obligation to present the plan to the permit issuing authority or have it available for public inspection. Court challenges by environmental organizations forced EPA to modify these regulations several times, culminating in rules adopted in 2006 which continued to take the SSM plans out of the Title V permit itself, but required that SSM Plans be maintained at the facility for inspection. The environmental groups appealed, challenging not only the 2006 final regulation but the 1994 regulations establishing the SSM exemption.

In voiding the NESHAP SSM regulations, the court made several extraordinary leaps. First, the court's decision to assert jurisdiction over the 1994 SSM regulation disregarded the statutory requirement that challenges to EPA rules be filed within 60 days of the rule's adoption and long standing jurisprudence that discourages review of long standing rules. The court held that by modifying requirements for SSM Plans, the EPA

constructively reopened the underlying SSM requirements. Yet, the EPA is always modifying various rules based on experience or new data. As the Dissent pointed out, subjecting existing regulations to challenges just because of subsequent modifications would create "intolerable" instability. Plainly the court could have voided the 2006 rules, leaving the original SSM requirements in place, but chose not to do so.

Second, the Court's basis for voiding the SSM regulations required a strained reading of the CAA and one which had neither been argued nor briefed by any of the parties. The Court held that the statutory direction to adopt emissions limitations for NESHAP sources and the general definition of "emissions limitation" required EPA to adopt limits which applied continuously and thus forbade the adoption of what the court termed an "exemption" for SSM. The Court further held that EPA could only seek to apply "exemptions" under authority of a separate statutory section which explicitly allowed easing standards when strict compliance is not possible but which EPA had not specifically included in any of its prior discussions. Yet, by characterizing the SSM regulations as an "exemption" from control requirements rather than a specific method to minimize emissions during periods when emissions control systems may be ineffective, the court's evaluation focused on whether the CAA specifically allows "exemptions" to NESHAP emissions limitations rather than whether the EPA has the authority to evaluate appropriate control requirements during different operating scenarios. The court's reading effectively dismissed statutory language which appeared to allow for work standards or other practices which would not necessarily result in continuous compliance and dismissed EPA's claim of discretion to consider these for failing to cite the exact statutory section.

The far reaching and immediate impact of the court's decision assures that EPA will seek a stay and rehearing *en banc*. While environmental groups have challenged these SSM regulations, the operational reality is that no source has the ability to assure continuous compliance during SSM. The extent and nature of NESHAP SSM Plans to minimize emissions during such events and to document compliance with the general duty requirement is obviously subject to extensive debate, but the concept of not insisting on strict compliance with emissions limits during SSM dates to the early days of the CAA. The court's decision flies in the face of this logic and history and exposes numerous sources throughout the country to needless and unavoidable liability.

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