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EPA Proposes Major Overhaul of SSM Policy and Removal of Key Exemptions in 36 SIPs

Provisions states have been using for startups, shutdowns and malfunctions for more than 40 years will be found inconsistent with the Clean Air Act if a rule recently proposed by US EPA is finalized. States impose strict numeric emission limits on major sources during periods of normal operation. The majority of state implementation plans (SIPs) contain additional provisions that allow sources to exceed those strict limits during periods of startup, shutdown and malfunction, when control equipment cannot be operated effectively and emissions are too unpredictable to meet a fixed limit. The proposed rule purports to clarify and correct EPA's long-standing policy regarding the control of emissions during periods of startup, shutdown and malfunction (SSM Policy), but would effectively eliminate key exemptions and affirmative defenses relied upon by many sources to ensure compliance with their permits and a major overhaul of many SIPs.

The cornerstone of EPA's proposed rule is a finding that states must now treat all exceedances of an emission limit as violations of the Clean Air Act. EPA further proposes that any SIP provision contrary to this finding renders the SIP substantially inadequate under the Clean Air Act and subject to a mandatory SIP revision (SIP Call). If finalized as drafted, states will no longer be able to allow sources to exceed their normal operating permit limits during periods of startup, shutdown or malfunction. The proposed rule offers some opportunity for states to work around this ban, through special enforcement limits or affirmative defenses, but the opportunities for use of these options are limited and the proposed rule would make them difficult to implement.

The practical effect of EPA's proposed rule, therefore, will be stricter emission limits for those sources that currently rely on a startup, shutdown or malfunction exemptions. As just one example, Ohio law imposes a general 20% six-minute opacity limit on stack emissions, but malfunction periods are exempt from this limit. *See* OAC 3745-17-07(A)(3)(c). EPA's proposed rule would leave Ohio's 20% opacity limit unchanged but remove the exemption for malfunctions. As a result, sources that had been able to comply with the limit during periods of normal operation must now ensure that they leave a sufficient margin of error to correct for malfunctions as well. This requirement (and dozens of others through the country) will become significantly stricter in light of EPA's revisions.

The SSM Policy broadly applies to all state implementation plans and, therefore, impacts virtually all major emission sources. However, the proposed rule focuses on select provisions in 36 states, proposing to find that most of them violate the Clean Air Act. Sources should carefully review the proposed rule to determine whether they currently rely on any of the provisions EPA has proposed for disapproval. The current comment period will be one of the only opportunities sources have to challenge EPA's retroactive application of its revised SSM Policy.

Even those who do not rely on a provision directly addressed in the proposed rule should consider commenting. In addition to undoing 40 years of state regulatory practice, EPA's SSM Policy revisions touch on two key elements that have been garnering significant attention among the regulatory community. The first is US EPA's proper role in developing state implementation plans. While EPA often sets overarching goals, states have the primary authority under the Clean Air Act to determine both how to achieve those goals and how to allocate the related burdens. State allocation is critical since every state is different, both in terms of its environmental needs and its economy. Recent EPA rules have attempted to dictate how states achieve the goals of the Clean Air Act rather than just what must be achieved. The current rule is a prime example of that practice, since it focuses not on

whether states achieve EPA's national ambient air quality standards, but on how states go about achieving them.

EPA's proposed rule also implicates “sue-and-settle” rulemaking. In rules running the gamut from hazardous air pollutants to regional haze, EPA has entered consent decrees and settlement agreements with special interest groups that place strict time limits on EPA’s regulatory action, forcing hurried decision-making and limiting EPA's ability to allow necessary public involvement. The deadlines in this rule stem from EPA's settlement of a lawsuit by Sierra Club, in which EPA agreed to act no later than August 27, 2013. That extremely short deadline not only compelled EPA to rush its own analysis of the SIP’s identified by Sierra Club, but also to cut short public comment on the proposed rule, limiting the ability to have appropriate public hearings (only one has been scheduled). While the proposed rule is 80-pages long and relies on a lengthy legal memorandum, it contains only a sketch of the policy EPA proposes to implement and leaves many key questions unanswered. That hurried process virtually assures there will be unintended consequences.

The comment period on the proposed rule ends May 13, 2013 and, with EPA’s August 2013 deadline looming, an additional extension is not likely. If you are interested in assistance with the preparation of comments or would like more information on how the proposed rule may affect you, please contact one of the lawyers below or the Squire Sanders lawyer with whom you regularly work.

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