

ENVIRONMENTAL ALERT

STARTUP, SHUTDOWN, MALFUNCTION EXEMPTIONS VACATED BY D.C. CIRCUIT

In a significant, yet surprising, opinion by the United States Court of Appeal for D.C. Circuit on December 19, 2008, the court vacated the Startup, Shutdown, Malfunction (“SSM”) rules contained in the National Emission Standards for Hazardous Air Pollutants (“NESHAP”), 63 CFR Part 63. *See Sierra Club v. Environmental Protection Agency*, No. 02-1135 (D.C. Circ. Dec. 19, 2008). Pursuant to these rules, sources subject to an air toxic Maximum Achievable Control Technology (“MACT”) standard were exempt from otherwise applicable emissions limits during SSM events. The court’s decision vacated, in total, this important exemption for facilities across the nation.

By way of background, the SSM exemption was incorporated into the general provisions of the NESHAP regulations in 1994. EPA’s reasoning behind this exemption was that during periods of startup, shutdown, and malfunction it is technically impossible for the source to operate at 100% efficiency. However, in order to obtain the protections of the exemption, each source was required to develop a SSM plan to minimize emissions during the startup, shutdown and malfunction periods. The plan was then incorporated into the facility’s Title V permit. Since the promulgation of the 1994 exemption, EPA revised the SSM requirements which included provisions that the SSM plan no longer had to be incorporated into the Title V permit.

Sierra Club brought the instant challenge to the SSM rules arguing that the post-1994 revisions effectively altered the original provisions and therefore must be struck down. Although the Sierra Club’s challenged the post-1994 revisions, the court went even further and struck down not only the revisions but the original SSM rules. Despite the court’s recognition of the technical limitations of control equipment during startup and shutdown, the court marched forward and vacated the SSM exemption. In light of the court’s expansive decision, affected sources must stay abreast of how EPA responds to this situation. At present, EPA has 45 days to file a petition for rehearing, and if rehearing is denied a petition for certiorari may follow. Otherwise, EPA and individual states will have to act swiftly to develop guidance to effectively deal with the inevitable periods of startup, shutdown and malfunction experienced by all sources. Stay tuned.

The D.C. Circuit Court’s vacation of the SSM rules does have an immediate impact on compliance and deviation reporting under Title V facility operating reports. With the SSM exemption vacated to the extent such events produce emissions which exceed applicable permit limitations an affected facility subject to Title V permits must carefully evaluate how to report these events on their deviation and compliance certification reports. Further, both major and minor sources will also need to evaluate how and when to report such events in their excess emission reports and will need to reevaluate how to comply with state malfunction reporting rules.

The Environmental Alert is intended to keep readers current on matters affecting environmental issues and is not intended to be legal advice. For information or assistance regarding any of the information noted above, please contact Scott R. Dismukes at 412.566.1998 or sdismukes@eckertseamans.com, David A. Rockman at 412.566.1999 or drockman@eckertseamans.com, Erin J. McDowell at 412.566.6070 or emcdowell@eckertseamans.com or any other attorney with whom you have been working.