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THE CUBICAL

October 25, 2024

Startups, Shutdowns & Malfunctions

One of the strongest points of contention between the regulated community and regulators revolves around the issue of whether and how to sanction noncompliance with air pollution control requirements resulting from startups, shutdowns, and malfunctions (SSM). The divergence of opinion is particularly stark when it comes to malfunctions. The regulated community views such events as unforeseeable and beyond the control of the operator. In their view, defenses and exemptions to air pollution control regulations should apply during such periods.

As one might expect, regulators see this issue entirely differently. In their view, the same air pollution control requirements must apply at all times. As they see it, anything less would subject surrounding communities to unacceptable human health and environmental risks.

The fight over how to regulate air pollution during SSM conditions has continued unabated for at least the last fifteen years, and there have been plenty of twists and turns during this time. Policy statements have been withdrawn, replaced, and then re-instated again. Calls for states' air quality control regulations (known as State Implementation Plans, or SIPs) to be amended so as to eliminate any exemptions and defenses for SSM conditions have been issued, reconsidered, and then re-issued

again. This fight has broadly trended in the direction of eliminating or minimizing such exemptions and defenses. However, two recent developments - one a proposed rule and the other a judicial opinion - may show the way towards a two-track approach to the regulation of SSM conditions.

In the first recent development, EPA issued a proposed rule that establishes and amends new source and hazardous air control standards for the chemical manufacturing industry. This proposed rule would mostly eliminate exemptions and defenses for such standards during periods where SSM conditions are being experienced. According to the preamble of the proposed rule, federal law requires that emissions limitations and standards established by this rule must apply continuously, including during SSM conditions. On the other hand, in the second recent development, the U.S. Circuit Court of Appeals for the D.C. Circuit took a more permissive approach. In *Envtl. Comm. of the Fla. Elec. Power Coordinating Grp., Inc. v. EPA* (decided March 1, 2024), the D.C. Circuit held that SIPs may include regulations allowing for exemptions to state air pollution control regulations during SSM conditions so long as certain conditions are met. According to the D.C. Circuit, unlike the sections of the Clean Air Act (CAA) authorizing the promulgation of standards for new sources and for hazardous air pollutants, the section of the CAA authorizing the development, review, and implementation of SIPs allows for states to use a broader array of compliance and enforcement tools than continuously applicable emissions limitations and standards.

This can all change over the next several years. A change in the political party controlling the White House, more judicial opinions and appeals, additional litigation by state attorneys' general and environmental organizations, legislative action by Congress, or further regulatory actions by EPA and the states may reshuffle the deck once again For now though, the development of the regulation of SSM conditions appears to be proceeding along two separate tracks - a "restrictive track" for federal standards for new sources and hazardous air pollutants, and a "permissive track" for standards established by states as part of their respective SIPs.

Malfunctions, Upsets & Emergencies: Compliance Management and Enforcement Response

While the battle over how to regulate air emissions during SSM conditions continues at the federal level, it is at the state level where the rubber usually hits the road. A typical enforcement scenario is a manufacturing facility that has experienced several power loss events over a period of several weeks or months, with each such event resulting uncontrolled emissions of air pollutants due to the loss of power. If these events are frequent and/or severe enough, the manufacturing facility is likely to find itself on the wrong end of an enforcement action by the state environmental agency. Negotiations over a possible consent agreement will likely involve whether the availability of any SSM-related defenses or exemptions to any air pollution control requirements that may have been violated during the power loss events. The ultimate result will likely depend on, among other things, the manufacturing facility's documentation with respect to such events.

In terms of how state regulators approach this issue, the following must be kept in mind. The rationale for exemptions and defenses for malfunctions and upset conditions is the notion that the event was unforeseeable and beyond the control of the operator. However, state regulators are generally skeptical about whether a particular

malfunction or upset was really beyond the operator's control. This skepticism is amplified in cases where the facility has experienced a series of related malfunction events in succession. Because of this skepticism, enforcement and settlement discussions tend to gravitate more towards penalty mitigation rather than penalty avoidance.

An informed and successful response to an enforcement action arising out of one or more malfunction or upset events will depend on applying fundamental principles of environmental compliance management. A cornerstone of effective environmental compliance management is the maintenance and implementation of robust documentation practices. A facility's environmental compliance plan should have procedures and practices in place for identifying, recording, and investigating the root cause of environmental incidents and near misses. If a particular unit or piece of equipment appears to be prone to malfunction or upset events, the facility should investigate potential solutions to either eliminate the problem, or to at least mitigate the frequency and severity of such events until a long-term solution can be identified and implemented. If malfunction or upset events are frequent or severe enough, the facility should consider proactively engaging with the regulatory agency to discuss causes, potential impacts, and possible solutions.

It is unlikely that such practices will allow a facility to avoid penalties associated with an enforcement action. However, it may provide the key to significantly mitigating the magnitude of any penalties assessed.

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