

EPA Relaxes Policy on Startup, Shutdown, and Malfunction Emissions Standards

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In 2015, the United States Environmental Protection Agency (EPA) took the policy position that state implementation plans, or SIPs, cannot provide for relaxed air emission standards during Startup, Shutdown, and Malfunction (SSM) periods and remain in compliance with the Clean Air Act (CAA). As of October 9, 2020, that position has reversed.

In issuing its 2015 Startup, Shutdown, and Malfunctions SIP Action, EPA found the SIPs of 36 states inadequate in how they regulated large emitters during SSM periods, and directed those states to modify their plans. The 2015 Action determined that neither exemption nor affirmative defense provisions in SIPs related to SSM periods were consistent with the CAA. The EPA's action was challenged in court by a coalition of states and industry stakeholders, and in 2017 the D.C. Circuit Court granted a request by the Trump administration to pause oral arguments in the litigation while EPA considered whether the policy should be reconsidered or amended. The recent guidance memorandum officially supersedes and replaces the 2015 Action.

The 2020 memorandum cites Supreme Court precedent for the proposition that "the State has virtually absolute power in allocating emission limitations so long as the national standards are met." EPA now posits that this power can include exemption and affirmative defense provisions related to SSM periods, under certain circumstances. The memorandum is careful to note that each determination will be fact and circumstance specific, and that the memorandum itself is guidance only, which does not bind the states or EPA, and thus does not constitute a "final" action subject to judicial review. Any individual state SIP promulgation, on the other hand, is subject to public notice and the potential for administrative challenge. While the EPA's recent action may resolve one legal challenge, we will likely see contests from other quarters as states begin testing the limits of EPA's new-found tolerance for SSM provisions.