ALERT
ENVIRONMENTAL

D.C. Circuit Delivers EPA a Loss on Startup, Shutdown, and Malfunction Waivers under the Clean Air Act

March 15, 2024

Pittsburgh, PA and Washington, DC

Environmental Alert

(by **Joseph Schaeffer** and **Gina Buchman**)

On March 1, 2024, the D.C. Circuit issued its long-awaited decision in *Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. EPA*, No. 15-1239 (D.C. Cir. Mar. 1, 2024), in which it vacated the majority of an Environmental Protection Agency (EPA) final agency action commonly referred to as the 2015 SSM SIP Call. The agency action required states to remove provisions in their state implementation plans (SIPs) that insulate sources from liability for excess emissions occurring during periods associated with startups, shutdowns, and malfunctions (SSM). To understand the impact of this decision, it is necessary to understand both what was at issue and what the Court did (and did not) decide.

Environmental Committee **is the product of a long-simmering dispute over SSM provisions.**

Under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, states are required to adopt and submit for EPA's approval SIPs that provide for the implementation, maintenance, and enforcement of national ambient air quality standards within their jurisdictions. 42 U.S.C. § 7410(a)(1). From the time that SIPs were first required as part of the 1970 amendments to the Clean Air Act, many states have included special provisions governing SSM events. These SSM provisions generally fall into one of four categories:

1. *Automatic exemption* provisions excluding SSM periods from otherwise applicable emissions rules;
2. *Director's discretion* provisions allowing state officials to independently and conclusively determine that excess emissions during SSM periods are not violations of applicable emissions rules;
3. *Enforcement discretion* provisions allowing state officials to bar enforcement action for excess emissions during SSM periods; and
4. *Affirmative defense* provisions allowing sources to defend against all or some liability for excess emissions during SSM periods.

After years of sustained criticism of these provisions from environmental organizations, Sierra Club filed a rulemaking petition in 2011 that asked EPA to require states to remove SSM provisions from their SIPs. And in 2015 EPA responded by issuing a SIP call requiring 35 states and the District of Columbia to do just that. 80 *Fed. Reg.* 33840 (June 12, 2015). Industry and many states then filed a petition for review with the D.C. Circuit raising two primary sets of issues: *first*, whether EPA properly exercised its authority to issue a SIP call and, *second*, whether EPA correctly determined that SSM provisions are prohibited under the Clean Air Act.

Environmental Committee **imposes limits on EPA's authority to reject SSM provisions while rejecting limits on EPA's authority to issue SIP calls.**

The Court's decision first addressed whether EPA had properly exercised its authority to issue a "SIP call." Under the Clean Air Act, EPA must issue a SIP call when it finds that a SIP is "substantially inadequate" to (1) attain or maintain the National Ambient Air Quality Standard, inadequate, (2) mitigate interstate pollutant transport, or (3) comply with any requirement of the Clean Air Act. 42 U.S.C. § 7410(k)(5). The petitioners argued that EPA issued the SIP call here without such finding and thus meeting the required preconditions for issuing a SIP call. The Court, however, rejected petitioner's argument and, in doing so, the Court reached four significant conclusions:

1. EPA is not required to make factual findings that a SIP provision prevents (or will prevent) compliance with national ambient air quality standards where, as in this case, EPA has found that a SIP provision has substantial *legal* deficiencies. It need only identify the deficiency and explain why it is substantial;
2. EPA may invoke the need for a SIP "to otherwise comply with any requirement of [the Clean Air Act]," 42 U.S.C. § 7410(k)(5), to issue a SIP call requiring correction of individual provisions even where the SIP as a whole is adequate to meet national ambient air quality standards;[1]
3. EPA may issue SIP calls to clarify ambiguous provisions, even where states have issued *post hoc* interpretative letters, because clarity benefits all stakeholders' ability to police compliance with the Clean Air Act; and
4. EPA may, but is not obligated to, consider costs and benefits before issuing a SIP call.

Having decided that EPA properly issued a SIP call, the Court next addressed whether EPA could lawfully require states to remove SSM provisions from their SIPs. Under the Clean Air Act, SIPs must "include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of [the Clean Air Act]." 42 U.S.C. § 7410(a)(2)(A). Because SSM provisions represent a temporary departure from ordinarily applicable emissions rules, EPA argued in its SIP call that they violate the statutory requirement that an "emission limitation" "limit[] the quantity, rate, or concentration of emissions of air pollutants on a *continuous basis*." 42 U.S.C. § 7602(k) (emphasis added). The Court found that it did not need to decide that issue, however, because EPA had predicated the SIP call on the mistaken conclusion that SIPs must include emission limitations.

The Court held that the Clean Air Act requires a SIP to contain an "emission limitation" only as "necessary or appropriate" to meet applicable requirements under the act. 42 U.S.C. § 7410(a)(2)(A). Provisions that are not "necessary or appropriate" to meet applicable requirements under the Clean Air Act thus can be included in a SIP without needing to meet the definition of an "emission limitation." Those provisions instead can be considered to be "other control measures, means, or techniques." *Id.* The Court accordingly held that EPA cannot call a SIP "solely on the ground that [a measure] fails to meet the statutory definition of an 'emission limitation'—a definition it did not need to satisfy." *Environmental Committee*, at *36. Rather, EPA must determine first that it is "necessary or appropriate" for the emissions rules subject to SSM provisions to operate on a continuous basis. Because EPA did not do so, it failed to establish that SIPs were subject to call for including SSM provisions authorizing automatic exemptions, director's discretion, or complete affirmative defenses to noncompliance.

Though siding with the petitioners' position on SSM provisions in most respects, the Court notably upheld the SIP call in two cases. First, the Court determined that EPA could call a SIP to clarify an ambiguous provision that would be unlawful under certain interpretations. In this case, the Court denied the petitions for review as to Tennessee's overbroad enforcement discretion provision that could be read to allow the state to foreclose EPA enforcement actions and citizens suits. And second, the Court held that states cannot include affirmative defense provisions in their SIPs that limit the available relief for violations of emissions rules, such as provisions that block EPA and citizens from seeking monetary penalties. Doing so would unlawfully remove the authority to determine remedies that Congress vested exclusively in the judiciary.

Environmental Committee's long-term impact is uncertain.

The Court's decision preserves SSM provisions for the foreseeable future, and also supports the Clean Air Act's core principle of cooperative federalism. The Court reminds the litigants that EPA is obligated to set permissible concentrations of air pollutants and it is the states that determine how they will meet those air quality standards consistent with their particular circumstances and priorities. *Environmental Committee*, at *22. The petitioner's victory here is a reminder to EPA of its constitutional mandate.

But the petitioners' victory might be short-lived. As Judge Nina Pillard noted in partial dissent, the Court's partial vacatur of the SIP calls rests on EPA's failure to establish that operation of emissions rules on a continuous basis (i.e., free from SSM provisions) is "necessary or appropriate" to meet applicable requirements under the Clean Air Act. *Environmental Committee*, at *27 (Pillard, J., dissenting). Calling this a "low bar," she speculated that EPA might not even be required to make a factual showing and offered several arguments that EPA might make to support its rejection of SSM provisions. *Id.* The Court's rejection of proposed limits on EPA's authority to issue SIP calls will also help clear the path if EPA were to accept Judge Pillard's invitation. Whether EPA does so, however, is another matter—particularly with a looming presidential election. And, of course, there is no guarantee that any reissuance of the SIP call would not be met with another legal challenge.

For more information on this decision in the D.C. Circuit or other related Clean Air Act matters, please contact Joseph V. Schaeffer at (412) 394-5499 or **jschaeffer@babstcalland.com** or Gina Falaschi Buchman at (202) 853-3483 or **gbuchman@babstcalland.com**.

[1] This conclusion is arguably dicta as the Court determined that EPA met its factual burden even if it were to apply an "as-a-whole" standard.