

STARTUP, SHUTDOWN AND MALFUNCTION

AWMA - Kentucky Chapter
Environmental Workshop

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Startup, Shutdown & Malfunction – Legal Background

- ▶ In response to a Sierra Club petition to EPA, a final rule finding a portion of Kentucky’s SIP inadequate was published in the June 12, 2015 Federal Register (80 Fed. Reg. 33840).
- ▶ The Sierra Club initiated the process by filing the petition on June 30, 2011, asking EPA to find 39 SIPs “substantially inadequate” under the CAA due to impermissible treatment of excess emissions from SSM events. Kentucky was one of the 39 states.
- ▶ Deadline for response to the SIP Call is November 22, 2016.

Update on States' Lawsuit

- ▶ Kentucky and 16 other states filed suit on August 11, 2015 in the D.C. Circuit. (*State of Florida, et al. v. USEPA, et al.*, Case No. 15-1267).
- ▶ Opening briefs have been filed.
- ▶ The briefing schedule was adjusted slightly in July so that final briefs are now due October 31, 2016. It seems unlikely that oral argument will occur until 2017.
- ▶ A decision will not be received prior to the deadline for response to the SIP call (November 22).

SIP Call - Kentucky

- ▶ EPA issued the SIP call with respect to 401 KAR 50:055, Section 1(1), which states as follows:

“Emissions which, due to shutdown or malfunctions, temporarily exceed the standard set forth by the cabinet shall be deemed in violation of such standards unless the requirements of this section are satisfied and the determinations specified in subsection (4) of this section are made.”

401 KAR 50:055

- ▶ Section 1(4) states that a source shall be relieved from compliance if the Director of DAQ finds that 5 factors listed have been met.
 - ▶ The malfunction or shutdown and ensuing startup did not result from failure to operate and properly maintain the equipment;
 - ▶ All reasonable steps were taken to correct as expeditiously as practicable the conditions causing the exceedance;
 - ▶ All reasonable steps were taken to minimize emissions;
 - ▶ Not part of a recurring pattern indicative of inadequate design, operation or maintenance; and
 - ▶ The event was not caused in whole or in part by poor maintenance, careless operation or other preventable condition.
- ▶ Section 5: Director to notify of determination within 60 days of submittal of this information.

Other Parts of 401 KAR 50:055

- ▶ **Notice obligations in Section 1**
 - ▶ When emissions during planned shutdown/startup will exceed the standards, notify 3 days in advance. If not foreseeable, notify immediately after decision to shut down.
 - ▶ When emissions due to malfunctions or unplanned shutdown/startup “are or may be” in excess of the standards, notify as promptly as possible.
- ▶ **General compliance obligations in Section 2.**
- ▶ **Shutdown and relocation rules in Section 3.**
- ▶ **Prohibition on circumvention (e.g., dilution) in Section 4.**
- ▶ **General prohibition of air pollution in Section 5.**

How do the pieces work together?

- ▶ Malfunction of process or control equipment occurs.
- ▶ Are emissions limits being exceeded? May be?
- ▶ Notify the Division.
- ▶ Make the demonstration that you met the four factors under Section 1(4).
- ▶ Division's position has been – no news in 60 days is good news.

So What's the Problem?

- ▶ The Kentucky SIP has contained the same regulatory language dealing with SSM outside of Jefferson County since the regulation was adopted in 1979.
- ▶ But, EPA ultimately agreed with the Sierra Club that the regulation could preclude EPA or a citizens group from suing the plant for violating federally enforceable standards. In other words, if the excess emissions were excused by the Division Director, the plant could assert that it did not commit a violation.
- ▶ Kentucky provided a letter on its interpretation to the contrary but EPA ultimately proceeded with the SIP Call.

EPA's Comments on the SIP Call

- ▶ EPA recognized that individual sources may be impacted by the SIP revisions: “[S]ome sources may need to take steps to control emissions better so as to comply with emission limitations continuously, as required by the CAA, or to increase durability of components and monitoring systems to detect and manage malfunctions promptly.”
- ▶ EPA provided guidance to states considering alternative emission limitations for startup and shutdown, such as use of different numeric limits or establishing work practice standards in lieu of numeric limits.

SIP Call Continued

- ▶ EPA specifically noted that “general duty to minimize emissions” provisions are no longer considered sufficiently specific emission limitations to apply during “normal modes of operation such as startup and shutdown.”
- ▶ Emission limitations must apply continuously during all modes of operation without automatic or discretionary exemptions or overly broad enforcement discretion provisions that would bar enforcement by EPA or citizens.

DAQ Stakeholder Discussions

- ▶ Earlier this year, DAQ identified five possible options for response to the SIP Call:
 - ▶ Amend 401 KAR 50:055 to remove deficient provisions.
 - ▶ Remove the regulation from the SIP so it is not federally enforceable but keep it as a state origin requirement.
 - ▶ Amend the regulation to provide enforcement discretion.
 - ▶ Revise the regulations to establish emission limitations/work practice standards.
 - ▶ Do nothing and put the burden on EPA to impose a federal plan.

Other States' Actions

- ▶ Some states have simply amended their regulations to remove the offending provisions.
- ▶ Others have retained the concept of enforcement discretion. Jefferson County's revised Regulation 1.07 is an example of this approach.
- ▶ Other states have attempted to craft regulations that establish in the regulation, or by permit, work practice standards that apply during startup and shutdown in lieu of numeric standards. Examples include North Carolina, Georgia, Texas, and Mississippi.

Other States' Actions

- ▶ EPA's preliminary comments on proposals implementing a work practice standard approach have not been favorable. For example, criticisms of Georgia's proposal included the following:
 - ▶ Sources could use alternative work practice standards without any demonstration that otherwise applicable numeric limits could not be met.
 - ▶ The work practices must be tailored to specific source categories.
 - ▶ Establishing source-specific alternative work practice standards in permits will not suffice unless the permit requirements are also incorporated into the SIP.

Kentucky's Path Forward

- ▶ DAQ's chosen approach is to remove Section 1(1) and (4) of 401 KAR 50:055 from the SIP. A public hearing was held on September 14, 2016. The formal response to the SIP call is moving through the signature process to meet the November 22 deadline.
- ▶ EPA Region 4 was provided an opportunity to review the proposed response and had no comments so EPA is expected to find Kentucky's response satisfactory.
- ▶ Until EPA takes final action approving a revision to the Kentucky SIP, the requirements do not change.

After EPA Approves the SIP Revision...

- ▶ What parts of 401 KAR 50:055 remain in the SIP and are federally enforceable:
 - ▶ Section 1 (2) and (3) – Requirements to notify DAQ of excess emissions due to SSM.
 - ▶ Section 2 – Compliance demonstration provisions.
 - ▶ Section 3 – Shutdown and relocation.
 - ▶ Section 4 – Prohibition on circumvention.
- ▶ If excess emissions occur due to SSM, Condition F.7. of Title V permits requires reporting to the DAQ regional office.

What about 401 KAR 50:055 Section 1(1) and (4)?

- ▶ These parts of the regulation remain in effect as “state origin” requirements, that is they are effective as a matter of state law but not federally enforceable.
- ▶ A source may still assert that the excess emissions from an SSM event should be excused and make a demonstration under Section 1(4). Although a DAQ determination that the emissions should be excused will not bar federal enforcement or a citizen suit, the state’s action should be considered relevant evidence in any future legal proceeding.
- ▶ And, if Kentucky succeeds in its challenge to the SIP Call, these sections could be added back into the SIP.

Questions?

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