

## **Court Strikes Down Key Emissions Exemption**

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Decision tightens hazardous air pollution emissions standards.

The U.S. Court of Appeals for the D.C. Circuit handed down an important and little-noticed decision late last year that impacts virtually all major air sources in the United States that are subject to the Clean Air Act (CAA) Section 112. In the decision, the court vacated an exemption from CAA rules that allowed refineries, chemical plants and other industrial facilities to exceed emissions standards for hazardous air pollutants (HAP) during startup, shutdown, and malfunctions (SSM) of equipment (*Sierra Club v. EPA*, D.C. Cir. No. 02-1135, December 19, 2008). Following is a summary of that decision and what it may mean for regulated entities.

### **Beyond the General Duty Standard**

In the 1970s, the U.S. Environmental Protection Agency (EPA) determined that excess emissions during SSM periods aren't considered violations of the CAA emission standards under CAA Section 111. While exempt from numerical emission limits, EPA required that owners and operators comport their operations in a way that minimized emissions to the extent practicable "consistent with good air pollution control practice." EPA refers to a source's obligation to minimize emissions to the greatest extent practicable as the "general duty" standard.

In 1994, EPA adopted the SSM exemption from CAA Section 112, making each source subject to a national emission standard for HAP exempt from the numerical limits set for emission control pursuant to Section 112, and instead applying the general duty standard. Long concerned with the absence of enforceable emission limitations during SSM events, detractors of the exemption continued to express concern with it in rulemakings involving CAA standards issued in 2002, 2003 and 2006. The legal issue of whether the SSM exemption violates the CAA requirement that some CAA Section 112 standard apply continuously was squarely raised and considered in *Sierra Club v. EPA*. In a 2 to-1 decision, the court ruled that EPA's application of the SSM exemption "belies the text, history, and structure of Section 112" of the CAA. Writing for the majority, Judge Judith W. Rogers determined that in requiring sources regulated under Section 112 to meet the strictest standards for maximum achievable control technology (MACT), "Congress gave no indication that it intended the application of MACT standards to vary based on different time periods."

### **The Impact on Major Air Sources**

The decision raises many interesting and potentially expansive implications for major air sources. Most important is the decision's potential impact on MACT rules. Because all MACT standards are premised on the inclusion of the SSM exemption in the standard, the court's revocation of the SSM exemption raises the interesting question of whether each MACT

standard should now be re-opened to include SSM emissions data in the calculation of the MACT floor.

The court's decision to vacate the SSM exemption, which was originally issued in 1994, invited a heated dissent from Judge A. Raymond Randolph, who argued a challenge to the exemption now is time-barred. The majority accepted the Sierra Club's argument that more recent final rules "changed" the exemption making the new judicial challenge viable and not time-barred.

The practical effect of the majority's reliance on the "reopening doctrine" (meaning that rulemakings that significantly change the context for a regulatory provision can re-open it for comment even if the underlying provision doesn't change) may be that all MACT rules should and will be re-opened to consider the effect of emissions data from SSM events on the development of the MACT floor. Interested parties should stay tuned and monitor EPA's response to this case as more changes may well be in the offing.

The text of the opinion by the U.S. Court of Appeals for the District of Columbia Circuit in *Sierra Club v. EPA* is available at <http://pacer.cadc.uscourts.gov/common/opinions/200812/02-1135-1154946.pdf>.

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