35 ELR 10474 7-2005

ELR
NEWS & ANALYSIS

EPA's Startup, Shutdown, and Malfunction Policy: "The Cart and the Horse Are in the Ditch"

by John C. Evans and Donald R. van der Vaart

Editors' Summary: On December 14, 2004, the U.S. District Court for the Northern District of Georgia ruled that a series of EPA policy memoranda aimed at addressing excess emissions that occur during startup, shutdown, and/or malfunction (SSM) superceded part of Georgia's EPA-approved SIP that allowed, under certain conditions, excess emissions that occur during SSM conditions. The authors argue that this case is notable for two reasons. First, more than one-half of the air regulatory agencies in the country have SIPs that include a provision similar to the Georgia SSM condition. If the court's decision in Sierra Club v. Georgia Power Co. *is upheld on appeal, the result will be to throw the entire CAA §110 SIP structure into jeopardy because it effectively renders the entire SIP submittal and approval process superfluous. Second, the decision highlights several common misconceptions about EPA's SSM policy memoranda. This Article provides a critical analysis of the court's decision in* Sierra Club v. Georgia Power Co. *and in doing so addresses these two important concepts.*

The old adage: "Don't put the cart before the horse"[1] was never truer than in the case of *Sierra Club v. Georgia Power Co*.[2] The court's decision in this case created a situation where not only did the cart overtake the horse, but both now appear to be upside down in the ditch.[3] At the Sierra Club's urging, the U.S. District Court for the Northern District of Georgia misread and misapplied a series of U.S. Environmental Protection Agency (EPA) policy memoranda aimed at addressing excess emissions that occur during startup, shutdown, and/or malfunction (SSM). In doing so, the court read EPA policy to actually supercede a 30-year-old regulation that EPA had approved as part of Georgia's state implementation plan (SIP) allowing, under certain conditions, excess emissions that occur during SSM conditions. This court's decision is important for two reasons. First, more than one-half of the air regulatory agencies in the country have SIPs that include a provision similar to the Georgia Environmental Protection Division (EPD) SSM condition. Most of these regulations, like Georgia's SSM regulation, provide a conditional exemption for excess emissions that result from SSM conditions. As a result, this decision should be carefully examined to determine its impact on similar SSM rules and Clean Air Act (CAA) Title V permit conditions in other states.[4] If this decision is upheld on appeal, the result will be to throw the entire CAA §110 SIP structure into jeopardy because it effectively renders the entire SIP submittal and approval process superfluous. Second, the decision highlights several common misconceptions about EPA's SSM policy memoranda. The most common misconception being the belief that SIPs cannot contain periods of exemption for any reason, including exemptions for SSM conditions. This Article provides a critical analysis of the court's decision in *Georgia Power* and in doing so addresses these two important concepts.

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1. John Heywood, Proverbes, pt. ii, ch. vii (1546) ("Set the cart before the horse.").

2. No. 3:02-CV-151-JTC (N.D. Ga. Dec. 14, 2004) [hereinafter Sierra Club Order]. Georgia Power petitioned the U.S. Court of Appeals for the Eleventh Circuit for interlocutory review. The petition was granted, and a hearing on this issue expected in the summer of 2005.

3. As a preemptive defense to the People for the Ethical Treatment of Animals, please rest assured knowing that no animals were hurt in the construction of this metaphor.

4. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618. The CAA Title V program refers to *id*. §§7661-7661f.

The *Georgia Power* Case

Plaintiffs in this case, a collection of "nonprofit" organizations including the Sierra Club, Physicians for Social Responsibility, and Georgia Forestwatch (collectively known as Sierra Club) filed an action under the CAA's citizen suit provision against "for-profit" Georgia Power Company.[5] Sierra Club alleged, inter alia, that Georgia Power violated the opacity limits set forth in Plant Wansley's Title V operating permit between 1998 and 2002.[6] Georgia Power's Plant Wansley is located near Atlanta, Georgia, and has two coal-fired electric generating units (Units 1 & 2) that were the subject of the alleged opacity violations.

The Wansley coal-fired units are equipped with continuous opacity monitoring systems (COMS). The COMS continuously measure the opacity from each stack and reduce the measurements to six-minute average opacity values. Georgia Power's Title V permit restates the Georgia SIP rule that restricts the opacity from each unit to no greater than 40% on a six-minute average.[7] Georgia Power is required to submit quarterly reports to the Georgia EPD detailing the excess emissions.[8] Based solely on Georgia Power's quarterly reports, the plaintiffs claimed that Wansley Plant Units 1 & 2 exceeded their 40% opacity limitation approximately 4,000 times over a five-year period. Georgia Power acknowledged that the COMS measured opacity in excess of 40% but put evidence forward showing that these excess emissions occurred during periods of SSM. Specifically, Georgia Power relied on Georgia EPD's long-standing and federally approved regulation that conditionally "allows" for excess emissions provided they are the result of SSMs. Georgia EPD's SSM regulation, restated in condition No. 8.13.1(a) of the Wansley Title V permit, provides:

> a. *Excess emissions resulting from startup, shutdown, malfunction* of any source which occur though ordinary diligence is employed *shall be allowed* provided that:
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> i. The best operational practices to minimize emissions are adhered to;
> ii. All associated air pollution control equipment is operated in a manner consistent with good air pollution control practices for minimizing emissions; and
> iii. The duration of excess emissions is minimized.[9]

This condition, when read in the context of the 40% opacity restriction, as it must be, sets out a rational and stepwise approach to excess emissions. Once a COMS device measures a six-minute average over 40%, i.e., an excess emission, the source may pursue a series of demonstrations intended to determine whether the excess emissions were the result of SSM conditions, and, if so, whether certain operational procedures set out above were followed. If the source demonstrates that the excess emissions were the result of SSM conditions and further demonstrates to the satisfaction of the Georgia EPD that the operational criteria were satisfied, the rule very plainly provides that a violation has not occurred. Critical to this regulatory structure, a structure similar to many SIP SSM provisions, is that the agency, the Georgia EPD in this case, has considerable discretion with regard to whether to accept a source's required demonstrations. Once the agency confirms that these criteria have been satisfied, however, the rule does not provide any additional discretion. The rule provides that excess emissions resulting from SSM conditions are not violations of the underlying emission standard.

As noted above, many states have similar SSM regulations that provide qualified or conditional exemptions in their federally approved SIPs.[10] Allowing exemptions, conditional or otherwise, for excess emissions that occur during SSM conditions is a practice not limited to state air rules. EPA also provides for the same, most notably in the federal new source performance standard (NSPS) program.[11] In almost every promulgated NSPS emission standard, EPA states very clearly that the standard is not applicable during periods of SSM. For example, a commonly applicable NSPS for small boilers, Subpart Dc, provides: "[The particulate matter] and opacity standards under this section apply at all times except during periods of startup, shutdown, or malfunction."[12]

Moreover, to the extent that there is any ambiguity in any particular NSPS, the overarching NSPS General Provisions make it clear that it is EPA's intent, unless otherwise clearly provided for in a source-specific rule, to exempt the source from complying with the emission standard during periods of SSM. These General Provisions provide emissions in excess of the level of the applicable emissions limit during SSM periods shall not be considered a violation of the applicable emissions limit unless otherwise specified in the applicable standard.[13]

Returning to the Georgia SIP, rule 391-3-1-.02(b) limits opacity from Wansley Units 1 & 2 to 40%. However, Georgia's SSM rule, SIP rule 391-3-1-.02(2)(a)(7)(i), which is contained in the same federally approved Georgia SIP and, thus, is equally enforceable, provides a conditional exemption to the 40% standard for excess emissions that occur during periods of SSM. In short, the construction of the applicable standard in this case is exactly analogous to the NSPS General Provisions described above. With this in mind, a

5. The court, in what could be described as socioeconomic foreshadowing, noted that Georgia Power is a "for-profit corporation," while three of the plaintiffs, Sierra Club, Physicians for Social Responsibility, and Georgia Forestwatch, are "nonprofit corporations." *See* Sierra Club Order, *supra* note 2, slip op. at 6.

6. The original complaint contained five counts, each asserting a different claim. On June 19, 2003, the court dismissed Count V, and on June 8, 2004, the court granted summary judgment dismissing Count IV. Counts I, II, and III were the subject of the court's December 14, 2004, order. This Article focuses on the December 14, 2004, order.

7. Title V Permit No. 4911-149-0001-V-01-0, condition No. 3.4.2 (this condition restates Ga. Comp. R. & Regs. r. 391-3-1-.02(b) (2000), which limits opacity to less than 40%).

8. Title V Permit No. 4911-149-0001-V-01-0, condition No. 5.3.

9. Ga. Comp. R. & Regs. r. 391-3-1-.02(2)(a) (emphasis added).

10. It is estimated that 27 states have provisions that provide conditional exemptions for excess emissions resulting from malfunction conditions. *See, e.g.*, Ala. Admin. Code r. 335-3-1-.09; Alaska Admin. Code tit. 18, §50.240; Conn. Agencies Regs. §§22a-174-7 & 13; Ind. Admin. Code tit. 326, r. 1-6-4; N.C. Admin. Code tit. 15A, r. 2D.0535 (2005) Ohio Admin. Code §3745-15-06; Wyo. Dep't of Envtl. Quality Rules, ch. 1, §19.

11. EPA often defends the SSM provision under the NSPS program by suggesting that the NSPS program is a technology-based program and its goals are not related to the federal national ambient air quality standards (NAAQS). However, as a practical matter many states adopt and implement the NSPS as part of their SIP program designed to achieve compliance with NAAQS. More importantly, it is unclear how the environment distinguishes between excess emissions from NSPS subject sources and excess emissions from non-NSPS sources.

12. 40 C.F.R. §60.43c(d).

13. *Id.* §60.8(c).

critical point—and one that the court appears to have missed in this case—is that inherent to the 40% opacity standard is the exemption for excess emissions resulting from SSM conditions.

In this case, the COMS indicated that the six-minute average opacity values did exceed 40% on numerous occasions.[14] However, what remained unresolved was whether these excess emissions were allowed under Georgia's SSM rule, i.e., were these excess emissions violations of the Title V permit or Georgia SIP. It would seem that in order to decide this case, the court would have been required to first determine if the excess emissions occurred during periods of SSM and second to determine whether, for those events that did occur during these SSM periods, Georgia Power satisfied the conditional exemption criteria set forth in Georgia SIP rule 391-3-1-.02(2)(a)(7)(i).[15] However, the court sidesteps this factually intensive exercise by using EPA policy memoranda to effectively strike down Georgia's SSM rule on the basis that the rule was inconsistent with EPA policy.[16] In doing so, the court was readily able to dispose of Georgia Power's conditional exemption. How the court arrives at this conclusion is important because it highlights a common misreading of EPA's SSM policy. In giving no effect to an existing state regulation and instead preferring EPA policy, the court transcended the authority of the CAA.

Before providing five specific reasons why the Georgia EPD SSM rule was unavailable, despite its adoption by the state and approval by EPA, the court provided a summary of EPA's policy on excess emissions that occur during SSM.

Court's Analysis of EPA's SSM Policy Memoranda

The court begins its analysis with a citation to a 1998 *Federal Register* notice in which EPA rejected a revision to Michigan's existing SSM rule.[17] In this notice, EPA explained:

> Because SIPs are developed to attain and maintain ambient-based standards, any emissions above the SIP approved limits may cause or contribute to violations of the [national ambient air quality standards (NAAQS)]. USEPA believes that SSM regulations that are too broadly drawn can threaten attainment and maintenance of the NAAQS. Therefore, EPA believes that it is reasonable to interpret [CAA] Section 110 to prohibit generally applicable SSM provisions.[18]

It is interesting that the court begins by citing to a notice in which EPA, pursuant to CAA §110, is reviewing a change to an existing SIP SSM regulation. What is particularly ironic is that the court's decision ultimately undercuts EPA's entire CAA §110 SIP approval process, thus making EPA review of state rules superfluous.[19] In drawing the above conclusion, EPA relied on its own internal SSM guidance memoranda. There are two primary concerns with this *Federal Register* as a starting point to the court's analysis. First, EPA policy memoranda that formed the basis for EPA's conclusion have no legal or practical impact on existing state SSM regulations.[20] Second, the court appears to overread this notice and EPA policy to conclude that SSM provisions are strictly prohibited. The policy memoranda do not support such a prohibition, nor does EPA's own action.

First, and most importantly, EPA's SSM policy memoranda should not have had any impact in this case. In 2001, Eric Schaeffer, then-Director of the EPA Office of Regulatory Enforcement, clarified the effect the Agency's SSM policy memoranda have on existing rules.[21] He explained that the policy "was not intended to alter the status of any existing malfunction, startup, or shutdown provision in a SIP that has been approved by the EPA."[22] Through numerous responses to citizen petitions filed under the provision of the CAA's Title V permitting program, EPA has properly and consistently characterized its SSM policy as having no practical or legal effect on existing state SSM rules.[23]

For example, the Sierra Club petitioned EPA to object to a permit issued by the Georgia EPD to Monroe Power Company.[24] The Sierra Club objected to the very same SSM provision that is at issue in the *Georgia Power* case, claiming that the provision was contrary to the CAA and EPA policy and therefore should be removed from the permit.[25] Despite EPA's concern that the existing regulation could, if applied too broadly, be inconsistent with their policy, they stated:

14. Georgia Power argued in its memorandum in support of their motion for summary judgment that COMS are subject to errors and inaccuracies and cannot be considered credible evidence. The issue of whether COMS are reliable and/or credible is an interesting technical argument but will not be addressed in this Article.
15. As noted earlier, Georgia Power provided expert testimony that all excess emissions were a result of SSM conditions.
16. Memorandum from Steven A. Herman, Assistant Administrator, Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator, Air and Radiation, EPA, to Regional Administrators, Regions I-X, EPA, State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999) [hereinafter 1999 Herman & Perciasepe Memorandum]; Memorandum from Kathleen M. Bennett, Assistant Administrator, Air, Noise, and Radiation, EPA, to Regional Administrators, Regions I-X, EPA, Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983) (available from the ELR Guidance & Policy Collection, ELR Order No. AD0687); Memorandum from Kathleen M. Bennett, Assistant Administrator, Air, Noise, and Radiation, EPA, to Regional Administrators, Regions I-X, EPA, Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Sept. 29, 1982).
17. Approval and Promulgation of State Implementation Plans; Michigan, 63 Fed. Reg. 8573 (Feb. 20, 1998).
18. *Id.* at 8574.
19. The court's decision to supplant a state-adopted and federally approved regulation with EPA policy effectively makes the entire SIP review process unnecessary. Under a more traditional approach, once a rule has been adopted by the state and approved by EPA, it is enforceable "as is." Any revision to that regulation, for any reason, is only recognized by EPA and enforceable through a CAA citizen suit and after EPA SIP review and approval.
20. As discussed later in this Article, EPA has the option to make a finding that a SIP is deficient because of an existing SSM regulation by showing that NAAQS is not protected and, thus, issue a SIP call under 42 U.S.C. §7410(k), CAA §110(k).
21. *See* Memorandum from Eric Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA, to Regional Administrators, Regions I-X, EPA, Re-Issuance of Clarification—State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdowns (Dec. 5, 2001) [hereinafter 2001 Schaeffer Clarification Memo].
22. *Id*. at 1.
23. 42 U.S.C. §7661d(b)(2), CAA §502(b)(2) (Title V citizen petition provisions).
24. In re Monroe Power Co., Order of EPA Administrator, No. IV-2001-8 (Oct. 9, 2002), *available at* http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/monroepower_decision2001.pdf
25. *Id.* at 12.

> Nonetheless, *EPA's policy was not intended to alter the status of any existing SIP provision regarding malfunctions, startups, and shutdowns that has already been approved by EPA*. *See* EPA memorandum from Eric Schaeffer, Director, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, and John S. Seitz, Director, Office of Air Quality Planning and Standards, Office of Air and Radiation, to Regional Administrators, Regions I-X, *Re-Issuance of Clarification—State Implementation Plans (SIPS): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdowns* (Dec. 5, 2001).
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> [E]PA cannot properly object to a part 70 permit term that is derived from a federally approved SIP. Condition 6.2.11 of the Monroe Power permit [condition No. 8.13.1 of the Georgia Permit] is such a provision and is inherently part of the "applicable requirement" as that term is defined in 40 C.F.R. §70.2. The Administrator may not . . . ignore or revise duly approved SIP provisions. *See* In re: Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Pet. No. VIII-00-1 (Nov. 16, 2000) at 23-24.[26]

EPA's charge in reviewing a Title V public petition is to ensure the permit, as drafted by the state agency, complies with the CAA and Part 70 requirements. With respect to Georgia's SSM provision, by approving the Title V permit, EPA found it to be in compliance with the CAA and Part 70 requirements.[27] To date, the Georgia EPD has issued hundreds of Title V permits, and because rule 391-3-1-.02(2)(a)(7)(i) is a generally applicable provision, every time EPA approves a Title V permit, they are finding that this regulation is consistent with the CAA.

In rejecting the citizen petition's collateral attack on the SSM rule, EPA advised the petitioners that their concern with Georgia's SSM provision was more properly addressed through the notice-and-comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. §§551(5) and 553. In fact, EPA informed the Sierra Club that they were free to file an administrative petition with EPA requesting that the Agency require Georgia to revise the rule.[28]

EPA rejected a similar collateral attack on Wyoming's SSM rule in a Title V citizen petition.[29] In Wyoming, a citizen group objected to a lumber mill Title V permit issued by the Wyoming Department of Environmental Quality. The permit contained a condition identical to Wyoming's SIP SSM regulation providing that emissions in excess of established limits shall not be deemed a violation if they were the result of a malfunction beyond the control of the operator.[30] The EPA Administrator rejected the challenge to the SSM provision stating that the SSM exemption provision was "inherently part of the applicable requirement" and, therefore, EPA could not ignore or unilaterally revise the provision.[31] While rejecting the challenge, the Administrator did direct EPA Region 8 to review Wyoming's SSM provision—a provision that was first approved by EPA in 1974. If the Agency finds Wyoming's SSM regulation in violation of the CAA requirements, then EPA could issue a SIP deficiency notice and ultimately make a SIP call requiring Wyoming to correct the deficiency.[32]

EPA's consistent position in response to these citizen petitions correctly places the series of SSM memoranda in their proper context. The proper context is that these memoranda merely provide insight to state agencies with respect to how EPA would view future SIP submissions addressing SSM conditions. It should be noted that a SIP revision could be initiated in many ways. The methods to revise a SIP include: a state-initiated rule change, as in the case of Michigan; an EPA review of a SIP and potential SIP call under CAA §110, as recommended in the Wyoming case; or a citizen's administrative request asking EPA to review a SIP, as in the case of Georgia.

The reason EPA responded to these petitions in this manner can be found in §307 of the CAA. Section 307 prohibits collateral attacks on existing rules by requiring that "[a]ny petition for review under this section shall be filed within 60 days from the date notice of such promulgation, approval or action appears in the *Federal Register* . . . ."[33] EPA first approved Georgia's SSM rule in 1972, 1975, and again in 1979. The finality associated with rulemaking is necessary to the stability of the regulatory program under which sources are required to comply not with policy but with final rules. If rules can be collaterally attacked at any time based wholly on the ever shifting sands known as EPA policy, there would be no environmental certainty for states, industry, environmental groups, or the public at large. It is this uncertainty that should concern all parties.

Of course, regardless of the path taken to revise a state's SSM provisions to conform to EPA's ever-shifting policy, the U.S. Supreme Court has made it unambiguously clear that unless and until EPA approves such revision, the existing SSM provision remains enforceable.[34] EPA's policy directive is equally clear that during the pendency of EPA's review of a state's revised regulation (SSM, for example), citizens can only bring action under the federally approved SSM provision—not the state enforceable only, revised

26. *Id.* at 13-14 (emphasis added).
27. *Id.* at 14.
28. *Id.*
29. In re Title V Permit for Buckingham Lumber Co., Order of EPA Administrator, No. VIII-2002-1 (Nov. 1, 2002) (for a listing of citizen petitions and EPA responses, see http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2002.htm).
30. *In re Monroe Power*, No. IV-2001-8, at 13 (citing Wyo. Air Quality Standards & Regs., ch. 1, §5(a)).
31. *Id.* at 16.
32. *Id.* at 17.
33. While CAA §307 goes on to provide that a petition may be accepted if it is based on grounds arising after the close of the 60-day period, it requires such petition to be filed within 60 days after such grounds arise. Citing EPA memoranda between 1983 and 2002, the court found: "Over the past twenty five years, EPA has issued memoranda setting out and clarifying its policy regarding excess emissions during SSM." Sierra Club Order, *supra* note 2, slip op. at 14. Assuming, arguendo, that EPA's position was clearly known and Georgia's SIP was inconsistent with this policy, a challenge made 25 years late is, without question, untimely.
34. *See* General Motors Corp. v. United States, 496 U.S. 530, 20 ELR 20959 (1990). This fact pattern presents an interesting juxtaposition from typical facts where sources would like to take advantage of SIP changes before EPA approves the changes. For example, as states adopt the December 31, 2002, new source review (NSR) reform regulation, sources will undoubtedly like to take advantage of the new provisions, and states and citizen groups will be equally anxious to benefit from the concomitant emission reductions. However, until EPA approves the changes into the SIP, the old NSR provisions remain enforceable by EPA leaving sources with little choice but to wait until EPA approval. If the paradigm applied by the court in this case was applied to the NSR reform example, EPA's latest policy, i.e., its preamble to the new NSR rule, would overrule the existing SIP prevention of significant deterioration regulations, thereby freeing states to begin to enjoy the benefits of the new rule more expeditiously.

SSM regulation.[35] In other words, even if the state were to revise its SSM rule, the only rule the federal government would be authorized to enforce would be the previously approved, pre-revised rule. Despite the fact that the Georgia SSM provision had been state and federally enforceable for over 30 years, the court relied on EPA policy instead of the SIP provision and in doing so rejected the holding of the Court in *General Motors Corp. v. United States*.[36] In *General Motors*, the Court stated that even where EPA does not take timely action to review and approve or reject a SIP revision, it does not change the nature of the existing regulation.[37] Of course, in the *Georgia Power* case no action had been taken by either the state or EPA to revise Georgia EPD's SIP-approved SSM provisions. Therefore, given the holding in *General Motors*, it is unclear how a federally approved SIP rule could be found to be unenforceable simply because a citizen voiced concern over the rule's consistency with EPA policy. At best, the concern over this inconsistency would merely be the first step in moving toward a revision of Georgia's SSM rule—as EPA suggested in response to the Wyoming Title V citizen petition discussed above.

The second problem with applying EPA's SSM policy is not procedural, as above, but is simply a misreading of EPA's SSM policy.[38] The policy provides that in the context of reviewing SIP revisions involving SSM provisions, EPA would not approve a SSM exemption if it "would interfere with any applicable requirement concerning attainment and reasonable further progress."[39] Moreover, despite assertions to the contrary, the SSM policy does not prohibit SSM exemptions altogether. What the policy does do is articulate the CAA requirement that prohibits SIPs from containing conditions that interfere with attainment or progress toward attainment with NAAQS.[40] This is an important distinction because EPA has time and again for over 30 years approved a myriad of exemptions into SIPs for a number of reasons—SSM and otherwise. Most notably, as mentioned earlier, EPA has, through CAA §110's review process, approved numerous SIPs that contain SSM provisions.[41] In fact, EPA approved Georgia EPD's SSM provision on no less than three different occasions.[42] It is axiomatic that EPA could not have approved this SSM exemption without having concluded that the Georgia EPD regulations as a whole were protective of NAAQS.

In a recent example unrelated to SSM, EPA approved a general exemption from Colorado's opacity requirement for military training exercises.[43] Colorado asked EPA to approve a rule exempting the U.S. military from the state's general opacity requirement, which provided that "no owner or operator of a source shall allow or cause the emission into the atmosphere of any air pollutant which is in excess of 20% opacity."[44] In establishing the military training exemption, Colorado placed conditions on the exemption including requiring a buffer zone and requiring an observer to be present to ensure the smoke does not drift outside the military complex. While the exemption is admittedly nominal in scope, what is stunning is EPA's analysis of Colorado's submittal. Colorado, cognizant of their own prior unsuccessful attempts to gain EPA approval of previous SIP revisions, attempted to preempt EPA comment by including NAAQS modeling and monitoring to support their contention that during these exempt periods NAAQS would still be protected.[45] EPA found NAAQS modeling results to be "inconclusive." Notwithstanding this deficiency, EPA proposed and approved of this exemption stating "approval of the opacity exemption is not based on these [NAAQS Modeling] results."[46] EPA approved the exemption because of the rule's restrictions, e.g., buffer zones and observers, on military activity, which, by design, creates emissions greater than 20%.[47] Thus, despite EPA's own admission that Colorado had failed to demonstrate protection of NAAQS during the exemption period, it nevertheless approved the exemption. What this example demonstrates is that neither the CAA nor a series of EPA policy memoranda prohibit states from enacting, or EPA from approving, regulations with exemption periods. What the Act does prohibit, and what is the actual thrust of EPA policy, is EPA approving a SIP that is not protective of NAAQS.[48]

If EPA SSM policy memoranda do not affect existing SSM exemptions and do not prohibit states from adopting, or EPA from approving, rules with exemptions, what is the proper interpretation of these memoranda? The effect is twofold. First, as discussed earlier, the memoranda provide agencies insight with regard to SSM rule revisions. Second, the memoranda express the Agency's opinion that if a source has an excess emission—an emission not excused by the inherent exemptions contained in the SIP (like Georgia's conditional exemption)—then that excess emission cannot be considered compliance. For example, if Georgia Power emitted greater than 40% but was unable to satisfy the conditional elements of Georgia EPD's SSM rule, e.g., they did not minimize the duration of the excess emission, EPA policy would be in play. However, if Georgia Power were able to make all the required demonstrations, the conditional exemption under the Georgia EPD SSM rule would apply. Un-

35. Memorandum from Michael S. Alushin, Associate Enforcement Counsel for Air, Office of Enforcement, EPA, Revised Guidance on Enforcement During Pending SIP Revisions (Mar. 1, 1991).

36. 496 U.S. 530, 20 ELR 20959 (1990).

37. *See* Save Our Health Org. v. Recomp of Minn., Inc., 37 F.3d 1334, 25 ELR 20589 (8th Cir. 1994). In a citizen suit, the court upheld the enforcement of a state odor regulation even though the court recognized that odor is not a federally regulated pollutant. Nevertheless, the court enforced the odor provision because regardless of the reason it was approved, it remains a valid regulation until EPA takes affirmation action to change the federally approved SIP.

38. A misreading of these memoranda is common among both the regulated and regulatory communities.

39. *See* 1999 Herman & Perciasepe Memorandum, *supra* note 16, at 2. *See also* 42 U.S.C. §7410(l), CAA §110(l).

40. 42 U.S.C. §7410, CAA §110.

41. See various state regulatory codes *supra* note 10.

42. 37 Fed. Reg. 10842 (May 31, 1972); 41 Fed. Reg. 35184 (Aug. 20, 1976); and 44 Fed. Reg. 54047 (Sept. 18, 1979).

43. Approval and Promulgation of Air Quality Implementation Plans, 68 Fed. Reg. 4933 (Jan. 31, 2003).

44. Colorado Air Quality Control Commission, Reg. No. 1, §II.

45. *See* Approval and Promulgation of State Implementation Plans, 64 Fed. Reg. 48127 (Sept. 2, 1999) (EPA's proposed disapproval of Colorado's revision to Colorado Regulation No. 1 providing coal-fired electric utility boilers with certain exemptions from the state's existing limitations on opacity and sulfur dioxide during SSM periods).

46. Approval and Promulgation of Air Quality Implementation Plans, 67 Fed. Reg. 65080, 65081 (Oct. 23, 2002).

47. *Id.* Note that the first reason given by EPA applies equally to many sources including coal-fired boilers whose uncontrolled emissions are greater than 20% by design. Ignoring this first justification, what remains is the requirement that the exemption be narrowly tailored.

48. *See generally* 42 U.S.C. §7410, CAA §110.

der the rule, the facility would not be in violation of any regulation—state or federal—and there would be no need to consider or apply EPA's SSM policy memoranda.

Court's Application of EPA SSM Policy

The court, having discussed EPA's policy memoranda, erroneously concluded: (1) EPA SSM policy could be applied to Georgia's existing federally approved rule; and (2) the policy prohibits exemptions altogether. In reaching its conclusion, the court set out five reasons why the Georgia EPD SSM regulation was unavailable to Georgia Power.

First, the court looked at plain language of permit condition No. 8.13.1, which restates Georgia's SSM rule. Before restating the SSM rule, the Georgia EPD included the following introductory language: "The Division [EPD] may allow excess emissions in certain cases as described below." The remainder of the condition read just as the regulation 391-3-1-.02(2)(a)(7)(i):

> b. Excess emissions resulting from startup, shutdown, malfunction of any source which occur though ordinary diligence is employed shall be allowed provided that:
>
> i. The best operational practices to minimize emissions are adhered to;
> ii. All associated air pollution control equipment is operated in a manner consistent with good air pollution control practices for minimizing emissions; and
> iii. The duration of excess emissions is minimized.[49]

The court looked at the introductory language in the permit and concluded that because it used the word "may," the regulation was no longer a conditional exemption but simply a statement of Georgia EPD's enforcement discretion. This conclusion is in error. To understand why, it is important to acknowledge a fundamental tenant of the Title V program. That is, the Title V permit cannot add to, change, subtract, or modify any existing regulatory requirement.[50] With this understanding, the proper construction of permit condition No. 8.13.1 can be made. Without argument, the regulatory language "shall be allowed" sets out a nondiscretionary exemption for excess emissions resulting from SSM conditions. The discretionary portion of the permit language, i.e., the "may," relates only to whether the source can demonstrate to the satisfaction of the Georgia EPD (or to the court) that it has met the three subjective requirements that condition or qualify the allowance for the exemption. Thus, the nonregulatory introductory term "may" simply emphasizes the subjective nature of the conditional exemption. A source cannot unilaterally declare itself to have satisfied the requirements of the SSM rule. The Georgia EPD must make its determination as to whether each of the criteria is satisfied.[51]

Second, to support its conclusion that the Title V permit rendered the entire Georgia EPD SSM regulation discretionary, the court compared the language of the Title V permit's "emergency defense" provisions (condition Nos. 8.13.2 through 8.13.5) to Georgia EPD's SSM language (condition No. 8.13.1). Condition Nos. 8.13.2 through 8.13.5 are verbatim emergency provisions taken directly from EPA's minimum permit requirements at 40 C.F.R. §70.6(g)(5). Each state is required to adopt certain minimum provisions to gain EPA approval to implement the Title V program.[52] The emergency provision is one of those minimum program requirements.[53] The court seems to suggest that failure to use the phrase "affirmative defense," as in the emergency exemption provision, results in the conclusion that the SSM is not an affirmative defense. However, simply because a rule written by a state agency 30 years earlier does not include the phrase "affirmative defense" does not defeat its operation. The key to determining if a regulation creates an affirmative defense is its conditional nature. A closer look at the language shows that Georgia's SSM rule states that excess emissions "shall be allowed *provided that*" certain demonstrations are made. The language creating the acceptable affirmative defense in EPA's emergency provision is not the use of the term "affirmative defense," but rather the conditional nature of the phrase "if the Permittee demonstrates." While the conditional language in the SSM and emergency provisions is different, the effect is exactly the same in that both are conditional exemptions. The semantic difference is without meaningful distinction and does not support the court's finding of disparate effect.

Third, the court compares the Georgia EPD SSM rule to EPA's SSM policy memoranda to conclude that the rule doesn't satisfy EPA's policy-based criteria. According to the court's analysis, EPA established 10 criteria that must be met for an affirmative defense to excess emissions during startup and shutdown.[54] The court found that permit condition No. 8.13.1, and therefore rule 391-3-1-.02(2)(a)(7)(i), contained no more than three or four of these criteria. The fact that a 30-year-old regulation doesn't conform to EPA's latest policy is not surprising and perhaps provides some of the reasoning behind EPA's 2001 Schaeffer Clarification Memorandum stating that their SSM policies are not intended to apply to existing SSM conditions. Moreover, the documents at issue are policy memorandums and not rules. Insofar as they are policies, they create no obligations on state regulators or those they regulate.[55] At best, the failure to conform to EPA's latest thinking would suggest that EPA should investigate Georgia's SIP to ensure its provisions are

49. Title V Permit No. 4911-149-0001-V-01-0, condition No. 8.13.1.

50. Operating Permit Program, Final Rule, 57 Fed. Reg. 32250, 32251 (July 21, 1992) ("title V . . . does not impose substantive new requirements . . .").

51. In a very interesting twist, Sierra Club argued that permit condition No. 8.13.1 was not even applicable to citizen suits or EPA because the permit's introductory language, "[the] *Division* may allow excess emissions . . . ," was a statement of EPD's discretion only. This argument is ultimately an argument against Sierra Club's interest. Assuming Sierra Club is correct and condition No. 8.13.1 is not applicable because of the introductory language, the permit would be defective because it would not contain all applicable requirements, most obviously the SSM exemption provision at GA. COMP. R. & REGS. r. 391-3-1-.02(2)(a)(7)(i). The court would likely be required to either strike down the entire permit defeating Sierra Club's claims or apply the federally enforceable version of rule 391-3-1-.02—a version that does not contain the introductory phrase. Without the introductory phrase, there can be no doubt that Geogia's SIP "allows" excess emissions resulting from SSM conditions and Georgia Power would have survived summary judgment.

52. 57 Fed. Reg. at 32250; 40 C.F.R. §70.1 (Title V citizen petition provisions).

53. *Id.*

54. Sierra Club Order, *supra* note 2, slip op. at 18 (citing 1999 Herman & Perciasepe Memorandum, *supra* note 16, at 3-6).

55. *See* Appalachian Power v. EPA, 208 F.3d 1015, 30 ELR 20560 (D.C. Cir. 2000) (the court struck down EPA's 1998 *Periodic Monitoring Guidance for Title V Operating Permits Program*, finding that certain guidance provisions should have undergone rulemaking).

protective of NAAQS. However, given the fact that EPA's 10 criteria have not been through rulemaking, it is doubtful that EPA would find Georgia's SSM provision to be deficient based solely on its failure to match EPA policy. It is interesting to note that EPA's conditional exemption for emergencies contained in permit condition Nos. 8.13.2 through 8.13.5—the conditional exemption the court appears to find acceptable—runs afoul of EPA's own memoranda. It clearly provides an exemption from any applicable SIP standard. Further, the emergency provision itself fails to measure up to the criteria outlined in EPA's own SSM policy. For example, EPA's policy for malfunctions requires repairs be made in an expeditious fashion and that off-shift labor and overtime must have been utilized.[56] The permit's emergency provisions contain no such requirement. As a result, when held to EPA's SSM policy standard, EPA's own emergency provision would fail.

Fourth, the court found that Georgia's SSM provision makes no distinction between malfunctions on one hand and startup and shutdowns on the other.[57] The court notes that EPA's SSM policy treats malfunctions differently than startups and shutdowns. For the same reasons discussed above, it is unclear what legal effect is produced when an established regulation does not comport with an EPA policy statement.

Finally, the court points again to EPA's SSM policy to find that an affirmative defense (conditional exemption) for excess emissions during startup and shutdowns is available only if such periods were "short and infrequent and could not have been prevented through careful planning and design."[58] At this point, the court shifts its focus and appears not only to use EPA policy to strike down Georgia's SSM provision, but is now applying EPA's affirmative defense (conditional exemption) criteria. Neither the permit condition nor Georgia's SSM regulation require that such excess emissions be "short or infrequent." To the extent that a factual determination was in order, it would have seemed more appropriate to examine whether the excess emissions during startup and shutdown were the result of poor maintenance, poor operation, or the result of a failure that could have been reasonably prevented, i.e., the conditional standards contained in the Georgia EPD SSM rule and Title V permit.[59]

Conclusion

The court's decision in this matter raises serious questions as to the extent that the public, regulated community, and regulators can rely on the enforceability of existing SIP-approved regulations. The court's willingness to strike down enforceable SIP provisions in preference for EPA policy should merit the attention of all parties. In addition, the decision highlights some common misconceptions regarding both the application and interpretation of EPA's SSM policy memoranda. These misconceptions include a belief that exemptions are not allowed in a federally approved SIP. Because of the shortcomings discussed above, the cart—EPA's SSM policy—clearly outpaced the horse—EPA's SIP revision process and the Georgia EPD SSM regulation—resulting in both ending up in the metaphorical ditch.

56. 1999 Herman & Perciasepe Memorandum, *supra* note 16, at II.3.

57. Sierra Club Order, *supra* note 2, slip op. at 19.

58. 1999 Herman & Perciasepe Memorandum, *supra* note 16, at 6.

59. Title V Permit No. 4911-149-0001-V-01-0, condition No. 8.13.1.b (citing GA. COMP. R. & REGS. r. 391-3-1-.02(2)(a)(7)(ii)).