Michael Best

April 29, 2019

EPA Shifts Policy for Shielding Malfunction Events from Fines Under Clean Air Act

In a shift from Obama-era guidance, the EPA published in today's *Federal Register* a proposal to approve affirmative defense provisions in Texas's state implementation plan (SIP) that would shield large stationary sources from civil penalties for excess air emissions resulting from upset events and unplanned maintenance, startup, or shutdown activities. This presents a significant shift in EPA policy and could forecast similar changes in the implementation of the Clean Air Act in other states—including Wisconsin.

Major sources of air emissions must adhere to emission limitations that are established by states to attain and maintain compliance with National Ambient Air Quality Standards (NAAQS). These limitations are incorporated into SIPs that are drafted by states and, once approved by EPA as meeting the applicable requirements of the Clean Air Act, become federally enforceable. If a SIP is found by the Administrator of the EPA to no longer meet a relevant NAAQS, Section 110(k)(5) of the Clean Air Act allows the Administrator to issue what is known as a "SIP Call" to require a state to submit a proposed revision of its SIP to correct the deficiency.

EPA's action today involves a SIP Call issued to 36 states in 2015, and is the latest action in a long running saga that debates the legality of what are known as "affirmative defenses" in the Clean Air Act and SIPs. An "affirmative defense" in this context means a defense advanced by a defendant in an enforcement proceeding that specifies particular criteria that, if met, prevent imposing penalties on that defendant for violations of Clean Air Act SIP requirements. At issue here is a Texas affirmative defense that applies to air emissions experienced during unplanned events (e.g., startup, shutdown, or malfunctions). Whether facilities may face civil penalties for violating emissions standards during these events has been a long-running point

Related Industries

Advanced Manufacturing

Related Practices

Environmental & Natural Resources Regulatory

of contention between industry interests and environmental advocates.

EPA historically allowed states to have narrowly tailored affirmative defenses in their SIPs for startup, shutdown, and malfunction events. In 2010, EPA approved a Texas SIP that contained affirmative defenses, and that approval was upheld by the Fifth Circuit Court of Appeals in 2013. *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013, cert denied). However, in 2014, the D.C. Circuit Court of Appeals held that affirmative defenses in EPA's hazardous air pollutant rules violated a court's inherent authority to levy penalties under the Clean Air Act. *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). Notably, the *NRDC* decision expressly reserved judgment on whether affirmative defenses in SIPs were similarly barred. Nevertheless, under the Obama Administration the EPA extended the *NRDC* decision to additionally prohibit affirmative defenses in SIPs. In doing so, the Obama EPA issued a 2015 SIP Call to 36 states, including Texas, which required those states to revise their SIPs to eliminate affirmative defenses for startup and shutdown activities. This 36-state SIP Call remains subject to a legal challenge that is being held in abeyance in the D.C. Circuit. *Environmental Committee of the Florida Electric Power Coordination Group, et al. v. EPA* (D.C Cir).

Today, EPA proposes reversing the Obama-era policy that determined the *NRDC* decision applies to state SIPs and instead interprets the decision to more narrowly apply to only prohibit affirmative defenses within EPA's hazardous air pollutant rules. EPA tentatively finds that it may now approve, or otherwise uphold previous approvals, of affirmative defenses in SIPs. EPA's action today uses its discretion to grant a proposal from EPA Region 6 that finds the affirmative defense provisions in the Texas SIP that were approved by EPA in 2010 and upheld by the court in *Luminant* in 2013, are adequate under the Clean Air Act. If finalized, EPA would remove Texas from its 2015 SIP Call, allowing the Texas SIP to contain affirmative defenses that conditionally shield industrial sources from civil penalties for unplanned events.

While EPA's action is limited to Texas, its interpretation of the reach of *NRDC* has implications for the other 35 states in the 2015 SIP Call. EPA will accept comments on this proposal until June 28, 2019.

Although Wisconsin was not subject to the 2015 SIP Call, EPA previously approved types of affirmative defenses in the Wisconsin Air Code, including NR 436.03 which "authorizes emissions in excess of the limits [which] are temporary and due to scheduled maintenance, startup or shutdown of operations carried out in accord with a plan and schedule approved by the department." EPA Region 5 had once threatened WDNR with a SIP Call that would direct Wisconsin to withdraw NR 436.03 from its SIP. Although that SIP Call was never issued to Wisconsin, WDNR has been evaluating what, if any, changes to NR 436.03 and the Wisconsin SIP may be necessary. Today's proposal from EPA signals that NR 436.03 should remain a viable component of the Wisconsin SIP and a defense to Clean Air Act enforcement actions.

Related People

Cameron Field
Senior Associate
cffield@michaelbest.com
T 608.283.2259

Taylor Fritsch
Associate
ttfritsch@michaelbest.com
T 608.257.7471

Todd Palmer
Partner
tepalmer@michaelbest.com
T 608.283.4432