

STARTUP, SHUTDOWN and MALFUNCTION THE HISTORY – UPDATE

ARKANSAS ENVIRONMENTAL FEDERATION

MAY 25, 2022

MARK H. ALLISON



WRIGHT LINDSEY JENNINGS

SSM

WHAT IS AN SSM PROVISION?

A regulatory relaxation of an emission limit or standard or enforcement of a violation during a period of equipment startup, shutdown or malfunction.



WRIGHT
LINDSEY
JENNINGS

SSM

THE LAW

Emission Standard –

a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants **on a continuous basis**

CAA Section 302(k)



WRIGHT
LINDSEY
JENNINGS

SSM

THE LAW

Section 110 - State Implementation Plans for NAAQS

Section 111 - New Source Performance Standards

Section 112 - Hazardous Air Pollutants

Section 501 - Permits



WRIGHT
LINDSEY
JENNINGS

SSM

THE LAW

Emission standards for HAPS require “the maximum degree of reduction in emissions.”

Section 112(d) (1990 CAA Amendments)



WRIGHT
LINDSEY
JENNINGS

SSM

THE LAW

Each permit must include “enforceable emissions limitations and standards . . . and such other conditions as are necessary to assure compliance with the applicable requirements of this chapter.”

Section 504 (Title V, 1990 CAA Amendments)



WRIGHT
LINDSEY
JENNINGS

SSM

THE PROBLEM

Emissions standards and permit limits are based on normal, steady-state operations of process or control equipment

The standards may not reflect emissions during period of equipment startup, shutdown or malfunction



WRIGHT
LINDSEY
JENNINGS

SSM

POSSIBLE SOLUTIONS

COMPLIANCE EXEMPTION FOR SSM EPISODES

ENFORCEMENT DISCRETION

AFFIRMATIVE DEFENSE



WRIGHT
LINDSEY
JENNINGS

SSM

1970s - EPA approves state SIPs with SSM provisions for excess emissions

NSPS General Provisions - 40 CFR §60.11(c)

The opacity standards set forth in this part shall apply at all times **except during periods of startup, shutdown, malfunction**, and as otherwise provided in the applicable standard.



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

NSPS General duty provision - 40 CFR §60.11(d)

At all times, **including periods of startup, shutdown, and malfunction**, owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions.



WRIGHT
LINDSEY
JENNINGS

SSM

1978

EPA policy –

no automatic exemptions

all excess emissions are violations

states have enforcement discretion



WRIGHT
LINDSEY
JENNINGS

SSM

1994 – NESHAP General Provisions – 40 CFR 63.6(e)

Adopted general duty provision – 63.6(e)(1)

Required SSM Plan – 63.6(e)(3)

- incorporated into Title V permit

BUT

How do you make changes to SSM Plan quickly?

What about CBI?



WRIGHT
LINDSEY
JENNINGS

SSM

2002 Revisions to NESHAP General Provisions –
63.6(e)(3)

- SSM Plans no longer incorporated into Title V permits

- SSM Plan must be adopted and implemented



WRIGHT
LINDSEY
JENNINGS

SSM

2006 Revisions to NESHAP General Provisions –
63.6(e)(3)

SSM plans do **not** have to be implemented, **but**

Facility must comply with general duty
provision

Facility must report violations and take
action to minimize emissions

SSM

SIERRA CLUB v. EPA, 551 F.3d 1019 (2008) –

Section 112 and Section 302(k) when read together require “continuous Section 112 compliant standards.”

The general duty provision is not a section 112 compliant standard.

SSM exemption was vacated.



WRIGHT
LINDSEY
JENNINGS

SSM

2010 Portland Cement Rule, 75 F.R. 54970 (Sept. 9, 2010)

Created **affirmative defense** provision for unavoidable malfunctions

- **40 CFR 63.1344**
- In response to an action to enforce the standards set forth in paragraph § 63.1343(b) **you may assert an affirmative defense to a claim for civil penalties** for exceedances of such standards that are caused by malfunction, as defined at 40 CFR 63.2.



WRIGHT
LINDSEY
JENNINGS

SSM

What is an “affirmative defense?”

Fed.R.Civ.Proc. 8(c)

In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense

Ark. R. Civ. Proc. 8

In responding to a complaint, counterclaim, cross-claim or third party claim, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.

What is an affirmative defense that is not one of the listed defenses?

What law governs? Federal or State law?



**WRIGHT
LINDSEY
JENNINGS**

SSM

June 30, 2011

Sierra Club Petition to EPA for SIP Call on State SSM policies

Dec. 9, 2011

PORTLAND CEMENT ASSOC. v. EPA, 665 F.3d 177 (D.C. Cir. 2011)

Struck down and remanded the 2010 Portland Cement Rule, but not because of the affirmative defense provision



WRIGHT
LINDSEY
JENNINGS

SSM

Feb. 12, 2013

2013 Portland Cement Rule, 78 FR 10006 (Feb. 12, 2013)

Revised MACT, but retained affirmative defense provision



WRIGHT
LINDSEY
JENNINGS

SSM

Feb. 22, 2013

EPA Proposed Rule, Decision on Sierra Club Petition, Finding of Substantial Inadequacy, and SIP Calls, 78 F.R. 12460 (Feb. 22, 2013)

- Distinguished exemptions, agency enforcement discretion, and affirmative defenses
- Distinguished between malfunctions (unplanned events) and startup and shutdown (planned events)



WRIGHT
LINDSEY
JENNINGS

SSM

March 25, 2013

LUMINANT GENERATION LLC v. EPA, 714 F.3d 841 (5th Cir. 2013)

TX SIP exempted SSM and upset emissions since 1972

2006 SIP revision created affirmative defenses for planned and unplanned SSMs

EPA approved affirmative defense for unplanned SSMs,
EPA disapproved affirmative defense for planned SSMs.
Court upheld affirmative defense for unplanned SSMs.



WRIGHT
LINDSEY
JENNINGS

SSM

April 18, 2014

NRDC v. EPA, 749 F3d 1055, (D.C. Cir. 2014) (J. Kavanaugh)

Upheld revised Portland Cement Rule based on Chevron deference (no violation of anti-backsliding, 749 F.3d at 1060;

EPA had wide discretion to consider “cost effectiveness” of standard, 749 F.3d at 1061),

but **vacated affirmative defense provision**



WRIGHT
LINDSEY
JENNINGS

SSM

NRDC v. EPA, 749 F3d 1055, (D.C. Cir. 2014) (J. Kavanaugh)

42 USC § 7604 allows citizens suits in federal court for violations

1990 CAA amendments allowed court to award penalties for violations;

Penalty assessment criteria, 42 USC §7413

The judiciary determines the scope of judicial power, not an executive agency

Whether penalties are appropriate is up to the court

Did not decide whether affirmative defenses in SIPs are allowed



WRIGHT
LINDSEY
JENNINGS

SSM

UNITED STATES SUGAR CORP. v. EPA, 830 F.3d 579
(D.C. Cir., July 29, 2016)

CAA does not require EPA to account for malfunction events in establishing standards

It was reasonable for EPA to exclude unpredictable events in establishing MACT floors

EPA can account for malfunctions through its enforcement discretion



WRIGHT
LINDSEY
JENNINGS

SSM

June 12, 2015

EPA Final SIP Call - Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, 80 F.R. 33840 (June 12, 2015)

Deadline for corrected SIP submittal was Nov. 22, 2016



WRIGHT
LINDSEY
JENNINGS

SSM

June 12, 2015

Petition for Review, Walter Coke, Inc. v. EPA, Docket 15-1166

Petition for Review Fl. Elec. Power Coordinating Comm. v. EPA, Docket 15-1239

State of Arkansas is a party

June 14, 2016

EPA Proposed Rule, Removal of Title V Affirmative Defense Provisions



**WRIGHT
LINDSEY
JENNINGS**

SSM

Nov. 8, 2016 Election Day

March 15, 2017

TX Petition for Reconsideration of SSM SIP Call

April 24, 2017

Fl. Elec. Power Coordinating Comm. case held in abeyance

October 6, 2018

EPA Grants TX Petition for Reconsideration



**WRIGHT
LINDSEY
JENNINGS**

SSM

April 29, 2019

EPA Proposed Withdrawal of TX SIP Call, 84 F.R. 17986
(comment period ended June 28, 2019)

June 5, 2019

**EPA Proposed Approval of NC NO_x SIP for Large Internal
Combustion Engines and Withdrawal of NC SSM SIP Call, 84 F.R.
26031 (comment period ended August 5, 2019)**



**WRIGHT
LINDSEY
JENNINGS**

SSM

Aug. 7, 2019

EPA Status Report, Fl. Elec. Power Coordinating Group, D.C. Cir. 15-1239, August 7, 2019

EPA continuing review of the 2015 SSM SIP Call Rule



**WRIGHT
LINDSEY
JENNINGS**

SSM

Arkansas SIP Provisions

Reg. 19.601 Upset Conditions (since at least 1997)

For purposes of this paragraph, “upset condition” shall be defined as **exceedences of applicable emission limitations lasting 30 or more minutes**, in the aggregate, during a 24-hour period, **unless otherwise specified in an applicable permit or regulation (such as New Source Performance Standards [NSPS] regulations)**. All upset conditions, resulting in violation of an applicable permit or regulation, shall be reported to the Department. Any source exceeding an emission limit established by the Plan or applicable permit shall be deemed in violation of said Plan or permit and shall be subject to enforcement action. **The Department may forego enforcement action** for federally regulated air pollutant emissions given that the person responsible for the source of the excess emissions does the following:



WRIGHT
LINDSEY
JENNINGS

SSM

Arkansas SIP Provisions

Reg. 19.602 Emergency Conditions (since at least 1997)

An “emergency” means **any situation arising from the sudden and reasonably unforeseeable events beyond the control of the source**, including natural disasters, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the upset condition. An emergency shall not include non-compliance to the extent caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error.

An emergency **constitutes a complete affirmative defense** to an action brought for noncompliance with such technology-based limitations if the following conditions are met.



**WRIGHT
LINDSEY
JENNINGS**

SSM

ARKANSAS PC&E COMMISSION DOCKET 16-001-R (April 15, 2016)

removal of language providing for an affirmative defense during periods of startup, shutdown and malfunction as stated in Reg. 19.602 and Reg. 19.1004(H) and replacement with language providing factors for the Director's consideration in determining whether enforcement action is warranted.

Motion to Withdraw Rulemaking (Sept. 14, 2018)

The Arkansas Attorney General joined in a lawsuit challenging EPA's action. Oral arguments in the legal challenge to EPA's SSM SIP Call were originally scheduled for May 8, 2017; however, the current EPA administration requested that the oral arguments be extended to provide adequate time for the appropriate time to fully review the SSM SIP Call. EPA indicated that the prior positions taken by the Agency with respect to the SSM SIP Call "may not necessarily reflect its ultimate conclusions after [their review of that action] is complete."



**WRIGHT
LINDSEY
JENNINGS**

SSM UPDATE

October 9, 2020

EPA Memo - Inclusion of SSM provisions in SIPs

Can states have SSM provisions in SIPs?

Section 110 (SIPs) and Section 112 (HAPs) are very different

States have no role in setting 112 standards and limited flexibility

States have “virtually absolute power” in SIPs as long as NAAQS are met

- Exemptions and discretion OK if SIP protects NAAQS by design
- Requires multi-factor, in-depth analysis of SIP
- Affirmative defenses OK if narrowly tailored and facility has made “every reasonable effort” to comply



**WRIGHT
LINDSEY
JENNINGS**

SSM UPDATE

COOPERATIVE FEDERALISM?

109	NAAQS	EPA STANDARD
110	STATE SIPS	STATES IMPLEMENT
111	NSPS	EPA STANDARD
112	NESHAP/MACT	EPA STANDARD
113	FED. ENFORCEMENT	CITIZENS SUITS
501	TITLE V PERMITS	EPA PROCEDURE



SSM UPDATE

November 3, 2020 Election Day

Jan. 20, 2021 – President Biden sworn in

March 11, 2021 – EPA Administrator Regan sworn in



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

March 11, 2021

Court Vacatur of Exemption From Emission Standards During Periods of Startup, Shutdown, and Malfunction, 86 F.R. 13819

This final rule amends the NESHAP General Provisions at 40 CFR part 63, subpart A, to remove universally the SSM exemptions contained in 40 CFR 63.6(f)(1) and (h)(1) from non-opacity and opacity emission standards, respectively, by deleting the phrase “except during periods of startup, shutdown, and malfunction.”

EPA has been codifying the court decision by **modifying SSM exemptions in individual NESHAP as they are opened for review and modification**



**WRIGHT
LINDSEY
JENNINGS**

SSM UPDATE

September 8, 2021

Sierra Club v. Regan, USDC, N.D. Cal., 21-cv-6956

Lawsuit to compel EPA to take action on SSM SIP call submissions (31 agencies) or issue notice of failure to submit revised plans (12 agencies including Arkansas)



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

September 20, 2021

EPA withdraws October 2020 memorandum regarding use of SSM provisions in SIPs

SSM provisions generally viewed as inconsistent with CAA requirements

Exemptions, exclusions and affirmative defenses not consistent with CAA will not be approvable

Reverts to 2015 SIP Call analysis



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

January 12, 2022

EPA publishes notice of failure to submit, 87 F.R. 1680

Alabama, **Arkansas**, California—San Joaquin Valley Air Pollution Control District (APCD), District of Columbia, Illinois, Ohio, North Carolina—Forsyth County, Rhode Island, South Dakota, Tennessee—Shelby County, Washington—Energy Facility Site Evaluation Council (EFSEC), and Washington—Southwest Clean Air Agency (SWCAA).

Effective Feb. 11, 2022

Starts two year clock for FIP



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

FEBRUARY 17, 2022 – 87 F.R. 8952

EPA approves SIP revisions to Alaska “Excess Emissions” provision

Provides penalty relief in enforcement action for unavoidable excess emissions

Revision clarifies that all excess emissions are violations

Removes provision from EPA approved SIP; only applies to state enforcement

Does not preclude EPA or citizens from injunctive relief or penalties in federal court action



**WRIGHT
LINDSEY
JENNINGS**

SSM UPDATE

APRIL 1, 2022 – 87 F.R. 19042

EPA renews 2016 proposal to remove Title V emergency affirmative defense provisions at 40 CFR 70.6(g) and 71.6(g).

Comment deadline was May 16, 2022

APC&EC Rule 26.707



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

April 11, 2022 – 87 FR 21118

Sierra Club v. Regan - Notice of proposed consent decree

Establishes schedule over next year for EPA to make final findings on SSM SIP call revisions for remaining agencies



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

Fl. Elec. Power Coordinating Comm. v. EPA, D.C. Cir. 15-1239

Case reactivated – Dec. 17, 2021

Supplemental briefs filed – Jan. and Feb. 2022

Oral argument – March 25, 2022



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

Fl. Elec. Power Coordinating Comm. v. EPA

Involves EPA's approval of SSM provisions in SIPs

affirmative defenses

exclusions/exemptions

enforcement discretion

Does not involve EPA's power to set NSPS/HAPs standards

EPA approval makes SIP federally enforceable

Available as defense in citizens suit



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

Fl. Elec. Power Coordinating Comm. v. EPA

Substantive arguments

Prior rulings on SSM affirmative defenses only apply to EPA standard setting under section 111 and section 112

Those rulings do not apply to affirmative defense provisions in SIP implementation under section 110

Luminant case (EPA approved SIP SSM AD for malfunctions)

NRDC v. EPA, fn 2 (recognizing Luminant case and not reaching SIP issue)

Cooperative federalism



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

Fl. Elec. Power Coordinating Comm. v. EPA

Procedural arguments

EPA did not justify its SIP call

Under section 110(k)(5), EPA must show that a SIP is “substantially inadequate” to achieve/maintain NAAQS

Requires a state-specific factual analysis; not a broad change in policy



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

May 5, 2022, 87 FR 26707

EPA Proposes to approve changes to SSM provisions in Indiana, Michigan and Minnesota SIPs

Indiana and Minnesota eliminated offending language from federally approved SIP

Michigan retained SSM provision as state-only enforceable, limited it to air toxics and nuisance, and removed SSM provision from federally approved SIP.



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

May 16, 2022 – 87 F.R. 29710

Proposed Rule – Revised NSPS (Aab) for EAF Steel Plants

will override SSM exemptions in general NSPS provisions 40 CFR 60.11(c) and 60.8(c)



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

May 22, 2022

Arkansas DEQ public notice of Draft SIP Revision to 19.602

Affirmative defense to enforcement action for emergencies

Remove section 19.602 from EPA approved SIP

Will not be removed from Rule 19 by PC&E

EPA and citizens are not governed by 19.602



WRIGHT
LINDSEY
JENNINGS

SSM UPDATE

WHERE DO THINGS STAND?

WILL CAA BE A STRICT LIABILITY STATUTE?

SSM provisions continue to be removed from federal standards

SSM provisions removed from state approved SIPs? Maybe

State-only affirmative defense provisions allowed to stand?

State enforcement discretion allowed to stand?

EPA enforcement discretion?

CAA section 113 factors apply in federal court actions

2024 election?



**WRIGHT
LINDSEY
JENNINGS**

SSM UPDATE

THE END

MARK H. ALLISON

mallison@wlj.com

(501) 978-9903



WRIGHT LINDSEY JENNINGS