Petition for Certiorari Filed in SSM Lawsuit

Luminant Generation has filed a petition for certiorari asking the U.S. Supreme Court to review an appellate court ruling affirming EPA’s decision to limit affirmative defenses for excess emissions during periods of startup, shutdown, and malfunction (SSM). Petition for Writ of Certiorari, Luminant Generation Co. LLC, et al. v. U.S. E.P.A., 82 USLW 3004 (Jun. 24, 2013) (No. 10-60934). A March 25, 2013 ruling by the U.S. Court of Appeals for the Fifth Circuit backed EPA’s partial approval and partial disapproval of Texas State Implementation Plan (SIP) provisions, authorizing affirmative defenses only for excess emissions related to unplanned or malfunction events and prohibiting affirmative defenses related to planned maintenance.

This case has the potential for far-reaching impact given EPA’s February 22, 2013 proposed rule to modify the Agency’s SSM policy and require revisions to SIPs in 36 states. In its proposed rule, EPA seeks to eliminate automatic exemptions of SSM emissions for compliance purposes and place limits on state environmental agencies granting exemptions under SIP executive discretion provisions. Further, EPA proposes to limit affirmative defense provisions as it has in the context of the Luminant Generation case, allowing affirmative defenses only for excess emissions related to unplanned malfunction events.

The proposed Texas SIP made available affirmative defenses for excess emissions related to both unplanned SSM events (i.e., malfunctions) as well as planned SSM events (i.e., maintenance). In both the unplanned and planned contexts, a party asserting an affirmative defense for these emissions would be required to satisfy nine criteria including that the excess emissions could not have been prevented through planning and design, that unauthorized emissions were not part of a recurring pattern, and that the unauthorized emissions did not cause or contribute to an exceedance of NAAQS, PSD increments, or a condition of air pollution. EPA approved the SIP provision allowing for affirmative defenses related to unplanned SSM emissions, but denied the SIP provision allowing for affirmative defenses related to planned SSM emissions. The Agency stated that because maintenance events are planned, “sources should be able to comply with applicable emission limits during these periods of time,” (75 Fed. Reg. 26,896 (May 13, 2010)) and therefore affirmative defenses should not be available. On review, the Fifth Circuit Court of Appeals approved EPA’s determination.

Luminant Generation’s petition for certiorari asks the U.S. Supreme Court to address two key issues with the Fifth Circuit’s opinion. First, Luminant challenges EPA’s authority to “substitute its judgment for a state’s about the proper means of controlling air pollution in that state, without identifying applicable authority in which EPA’s action is grounded.” Petition for Writ of Certiorari, Luminant Generation, 82 USLW 3004 at 2 (Jun. 24, 2013). Luminant asserts that EPA never provided statutory authority for its position that allowing emission spikes during planned SSM periods would violate the Clean Air Act, and that the Agency impermissibly rejected the Texas SIP provision allowing affirmative defenses for planned SSM emissions based on a bare policy preference.
Second, Luminant asserts that the Fifth Circuit’s opinion violates basic administrative law doctrine by upholding EPA’s partial disapproval of the Texas SIP based on a justification that EPA did not assert during the rulemaking process. The Fifth Circuit upheld EPA’s decision based on the conclusion that the affirmative defense provision did not comport with Clean Air Act Section 7413, however EPA never relied on Section 7413 for its partial denial of the Texas SIP.

We will provide additional updates on the U.S. Supreme Court’s decision on the petition for certiorari and the potential impacts of this case on EPA’s proposed SSM policy revision and SIP call as additional information becomes available.

If you have any questions regarding any matters discussed in this briefing, please contact any of the Winston & Strawn attorneys listed below or your usual Winston & Strawn contact.

**Chicago**
Charles A. DeVore

**Washington, D.C.**
Jay Holloway
Liz Williamson