

When “My Bad” Means You’re Bad

EPA’s Renewed Focus on “Excess Emissions”

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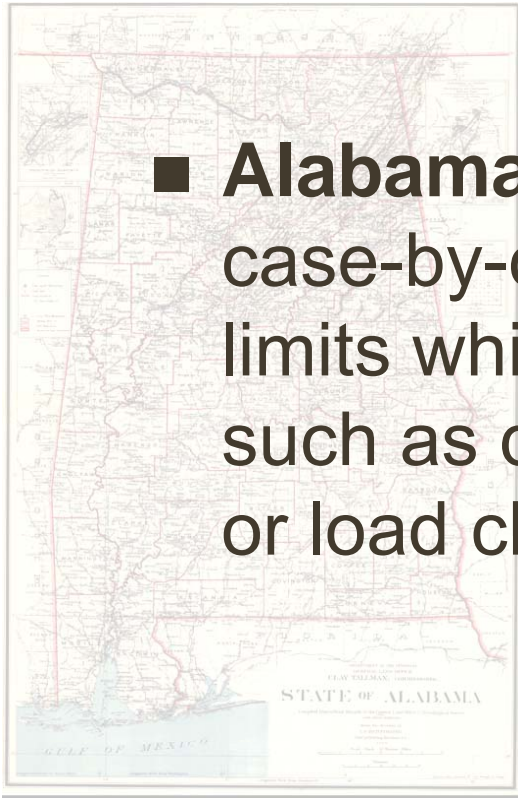


What are “Excess Emissions?”

- Emissions in excess of any applicable emission limit
- Emission limits are set based on “normal” operations and must be attainable
- Most SIPs allow “excess emissions” during startup, shutdown, or malfunction (SSM) and some even maintenance
- Exclusions in SIPs are included in federal NSPS, NESHAPs, and MACT standards

SIP “Excess Emissions” Exclusions

- **Alabama** allows the Director to “exempt on a case-by-case basis exceedances of emission limits which cannot reasonably be avoided, such as during periods of start-up, shut-down or load change.” Ala. Admin. R. 335-3-16-.11(1)



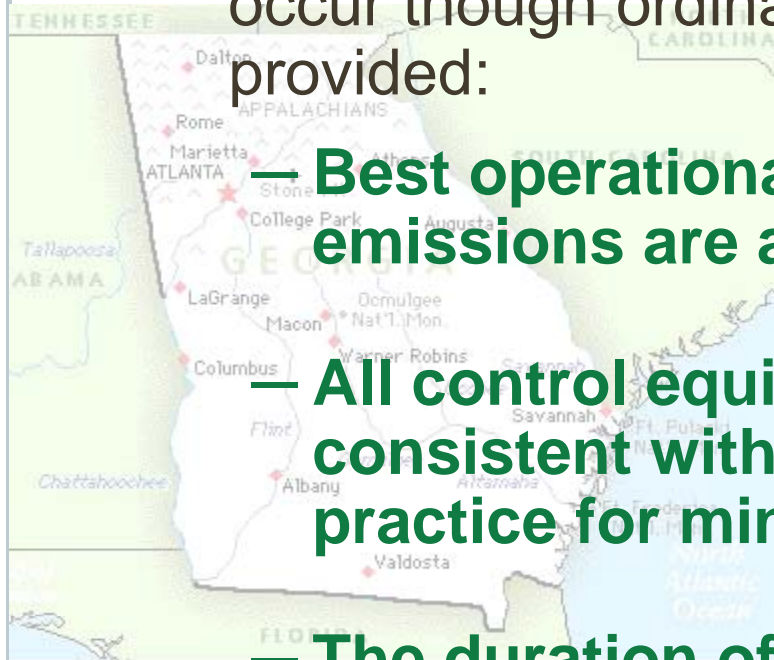
SIP “Excess Emissions” Exclusions

- **Georgia** allows excess emissions during SSM which occur though ordinary diligence is employed provided:

- **Best operational practices to minimize emissions are adhered to;**

- **All control equipment is operated in a manner consistent with good air pollution control practice for minimizing emissions; and**

- **The duration of the excess emissions is minimized**





EPA’s Policy on “Excess Emissions” During Startup, Shutdown, Maintenance and Malfunctions

Bennett Memos (1982 & 1983)

- Malfunction Exclusions
 - ☒ Automatic Exemptions
 - ☑ Enforcement Discretion

- Startup, Shutdown and Maintenance Exclusions
 - ☒ Scheduled maintenance is predictable
 - ☒ Any activity that could be foreseen, avoided, or planned
 - ☒ Startup and shutdown are part of normal operations; however:
 - ☑ Infrequent short periods of excess emissions during startup and shutdown that cannot be prevented through careful planning and design

Herman Memo (1999)

- ☑ States May Provide Affirmative Defense

(but should only apply to actions for penalties, not actions for injunctive relief)

- ☒ States can't limit EPA's or citizens' ability to enforce

- ☑ States may take into account technology based limitations during periods of startup and shutdown

Schaeffer Memo (2001)

- Previous guidance doesn't apply to existing SIPs
- “Existing SIP rules . . . may only be changed through established rulemaking procedures and existing permit terms may only be changed through established permitting processes”
- EPA will watch for future rulemaking actions

Areas of Recent Activity

- SIP Revision and Approval
- Enforcement
- Citizen Suits and Petitions
- Arm Twisting

Region 9 – Nevada SIP

- Nevada’s “excess emissions” provision reads:
 - “Breakdown or upset, determined by the control officer to be unavoidable and not the result of careless or marginal operations, shall not be considered a violation of these regulations.”



Nevada SIP

- In 2006, Nevada rescinds its “new” reporting provision
- EPA proposed to **approve** the rescission because of its connection with the original excess emissions rule, AND
- EPA, **on its own**, proposed to **disapprove** Nevada’s original excess emissions rule, claiming that approval in 1972 and again in 1978 was “**in error**”

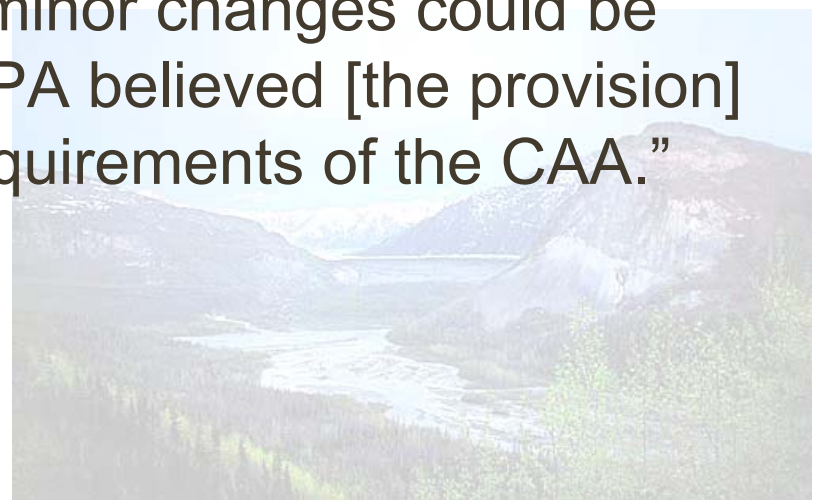
SIP Corrections

- CAA § 110(k)(6): “Whenever the . . . action approving, disapproving, or promulgating any plan or plan revision . . . was in error, the Administrator may, in the same manner . . . revise such action as appropriate without requiring any further submission from the state.”



Alaska SIP

- 1998 - EPA approved Alaska's excess emissions rule
- 2005 - Alaska changed "stationary source" to "facility"
- 2007 - EPA proposes to disapprove the change because "approval of the minor changes could be interpreted to imply that EPA believed [the provision] was consistent with the requirements of the CAA."



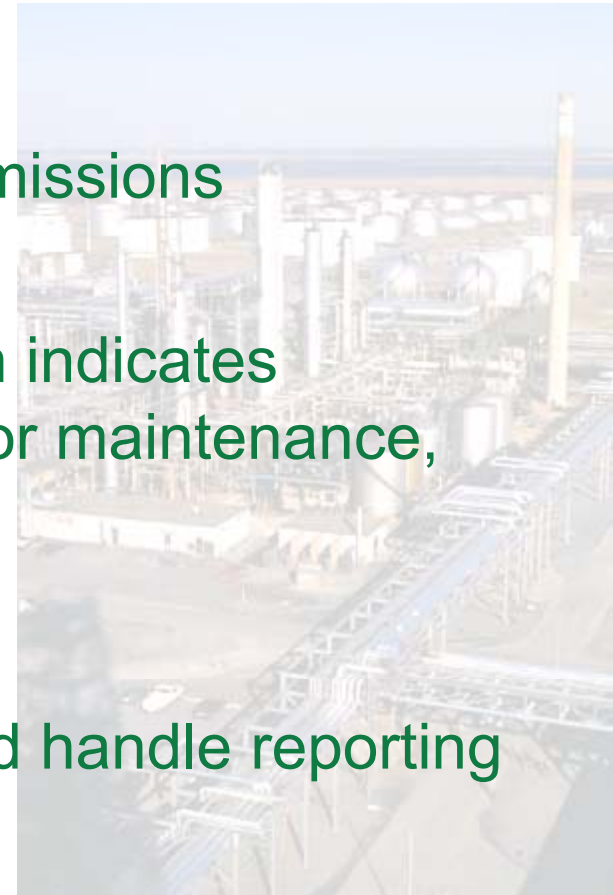
Enforcement

- Region 6 Refineries

- MACT standard has excess emissions exclusion
- Excessive use of the exclusion indicates inadequate design, operation or maintenance, which is not excluded

- Lesson

- How you use the exclusion and handle reporting is important



Sierra Club v. Georgia Power Company

- District Court found that the Georgia SSM rule was no defense
- 11th Cir. reversed; but invited Sierra Club to petition EPA for a SIP Call
- On remand, District Court applied SSM exclusion to all alleged violations

Sierra Club – Georgia SSM Rule Petition

- May 2005 - Sierra Club petitioned EPA for SIP Call to delete the Georgia SSM exclusion
- July 2007 - EPA denied the petition
 - not ambiguous (11th Circuit)
 - not an automatic exemption (11th Circuit)

Arm Twisting

- Happens in SIP Revisions, Enforcement Actions and Citizen Suits/Petitions

- Why?



SIP Calls

- CAA § 110(k)(5): Whenever the EPA finds that the plan for any area is **substantially inadequate** to attain or maintain the relevant national ambient air quality standard . . . EPA shall require the State to revise the plan as necessary . . .

SIP Revisions

- CAA § 110(L): EPA must approve unless the revision would interfere with any applicable requirement concerning attainment and reasonable further progress

SIP Revisions

- “[S]o long as the ultimate effect of a State’s choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.” *Train v. Nat’l Res. Def. Ctr.*, 421 U.S. 60, 79 (1975)

SIP Call v. SIP Revision

- Legal Standards
- Burden of Proof
- State/Federal Politics
- Internal EPA Politics
- State decisions to be more strict are golden

SIP Revisions

- August 2002 - EPA approved Missouri SIP SSM revisions
 - Additional factors for director to consider
 - Additional information requirements
 - One hour trigger for written report
 - “In summary, the revised rule is consistent with EPA’s aforementioned policy”

SIP Revisions

- April 2007 - Oklahoma DEQ seeks comments on its excess emissions reporting requirements
- “EPA cannot approve into the SIP any rule which provides for Director’s Discretion to exempt a source from compliance with the emission limitation or which could limit EPA or citizens’ ability to seek enforcement action for violation of emission limitations during excess emissions.” EPA Region 6.

What Does this Mean to You?

■ State Regulators

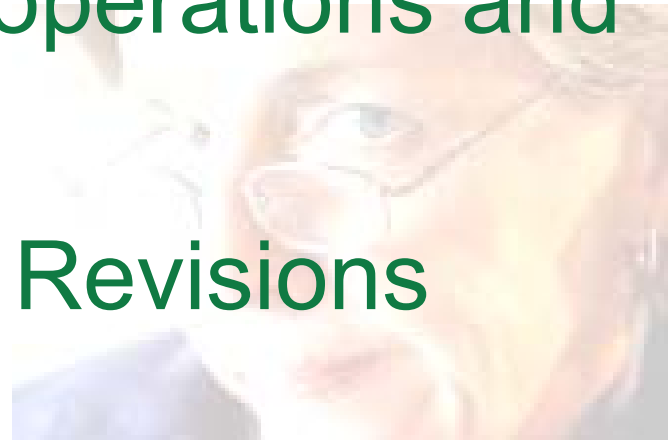
- Remember Nevada
- Expect Visitors



What Does this Mean to You?

■ Regulated Parties

- Be careful with operations and reporting
- Be Alert to SIP Revisions



What Does this Mean to You?

- Lawyers

- Buy a new car



Questions?

