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Re: Vacatur of Startup, Shutdown, and Malfunction (SSM) Exemption (40 C.F.R. §§ 63.6(f)(1) and 63.6(h)(1))

Dear Counsel:

In *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), the United States Court of Appeals for the District of Columbia Circuit vacated two provisions in EPA's Section 112 regulations governing the emissions of hazardous air pollutants during periods of startup, shutdown, and malfunction ("SSM"). Specifically, the Court vacated 40 C.F.R. §§ 63.6(f)(1) and 63.6(h)(1), that are part of a regulation, commonly referred to as the "General Provisions Rule," that EPA promulgated under Section 112 of the Clean Air Act. When incorporated into Clean Air Act Section 112(d) regulations for specific source categories, these two provisions exempt sources from the requirement to comply with the otherwise applicable Section 112(d)

emission standard during periods of SSM. Representatives of various industries subject to Section 112(d) rules have raised concerns to EPA about the impact of the *Sierra Club* decision and the potential enforcement exposure a source faces if it fails to comply with a Section 112(d) emission standard during an SSM event. The purpose of this letter is to address those concerns.

Until the Court issues the mandate in *Sierra Club v. EPA*, 40 C.F.R. §§ 63.6(f)(1) and (h)(1) remain in effect. Once the mandate issues, 40 C.F.R. §§ 63.6(f)(1) and (h)(1) will become null and void. The vacatur will immediately and directly affect only the subset of Section 112(d) rules that incorporate 40 C.F.R. §§ 63.6(f)(1) and (h)(1) by reference, and that contain no other regulatory text exempting or excusing compliance during SSM events. Table 1, attached, contains a list of the source category rules that EPA believes will be immediately affected once the mandate issues in *Sierra Club*, as these rules do nothing more than incorporate 40 C.F.R. §§ 63.6(f)(1) and (h)(1) by reference and contain no other regulatory text exempting or excusing compliance during SSM events. EPA's initial analysis of the Section 112(d) source category rules indicates that the majority of the rules include specific regulatory text that exempts or excuses compliance during SSM events, and such regulatory text is in addition to, or in lieu of, a cross-reference to 40 C.F.R. §§ 63.6(f)(1) and (h)(1).¹ See Table 2 (attached) (identifies the source category rules that EPA believes will not be impacted when the mandate issues in *Sierra Club*). The vacatur does not have a direct impact on such source category-specific SSM provisions because those provisions were not challenged and were not before the court in *Sierra*

¹ There is a great deal of variation in the specific regulatory text used in such rules to exempt or otherwise excuse a source from compliance with the applicable Section 112(d) standard during periods of SSM. The following examples are illustrative of the different formulations that EPA has identified in its Section 112(d) source category rules, but are by no means exclusive. See, e.g., 40 C.F.R. § 63.762(a) ("The provisions set forth in this subpart shall apply at all times except during startups or shutdowns, during malfunctions. . . ."); 40 C.F.R. § 63.654(g)(6) ("periods of excess emissions shall be identified in the Periodic Reports and shall be used to determine compliance with the emission standards. . . . (iii) Periods of startup and shutdown that meet the definition of § 63.641, and malfunction that meet the definition in § 63.2 and periods of performance testing and monitoring system calibration shall not be considered periods of excess emissions. . . ."); 40 C.F.R. § 63.1570 (a), (b) and (g) (contains a cross-reference to 63.6(f)(1) and (h)(1) in 63.1570(a) and (b), respectively, but also has regulatory text in 63.1570(g) excusing deviations that occur during SSM. Section 63.1570(g) provides "Consistent with §§ 63.6(e) and 63.7(e)(1), deviations that occur during a period of startup, shutdown, or malfunction are not violations if you demonstrate to the Administrator's satisfaction that you were operating in accordance with § 63.6(e)(1)."); 40 C.F.R. § 63.695(e)(6)(i) ("An excursion is not a violation nor does it count toward the number of excused excursions allowed under paragraph (e)(6)(ii) of this section when the excursion occurs during any one of the following periods: (A) During a period of startup, shutdown, or malfunction when the affected facility is operated during such period in accordance with § 63.6(e)(1)").

Sierra Club. EPA recognizes, however, that the legality of such source category-specific SSM provisions may now be called into question, and EPA intends to evaluate each of them in light of the court's decision. The tables attached to this letter are based on EPA's initial analysis and are, therefore, subject to change.²

Even if a source is subject to a Section 112(d) standard that does no more than incorporate by reference 40 C.F.R. §§ 63.6(f)(1) and (h)(1) and contains no other regulatory text exempting or excusing compliance during SSM events (see Table 1), the impact of the vacatur will vary depending on the source category, and may not be immediate for sources in many categories. EPA's initial evaluation of the subset of Section 112(d) rules that do nothing more than cross-reference 40 C.F.R. §§ 63.6(f)(1) and (h)(1) indicates that most of these rules should not present compliance issues for sources during SSM events. There are various reasons for this. For example, certain Section 112(d) standards can be achieved despite SSM events because the performance of pollution control equipment is not affected by SSM events. Other Section 112(d) standards are expressed as an average over a relatively long period of time (*e.g.*, a yearly rolling average) and expected startup and shutdown events and any malfunctions over that period are not likely to result in an exceedance of the standard. Further, certain Section 112(d) standards impose only work practice requirements with which a source should be able to comply during SSM events.

Compliance with Section 112(d) standards during SSM periods should also be less problematic for those sources that are operating in compliance with 40 C.F.R. § 63.6(e)(1)(I), which requires sources to minimize emissions at all times, including periods of SSM, consistent with safety and good air pollution control practices. Sources subject to Section 112(d) standards that only cross-reference the exemption in 40 C.F.R. §§ 63.6(f)(1) and (h)(1) of the General Provisions Rule should, in many instances, be able to minimize their exposure to violations of the applicable Section 112(d) standards by adjusting their operating practices or by adding emission controls or measures to reduce or eliminate excess emissions during SSM periods.

EPA recognizes, however, that some sources subject to Section 112(d) standards that only cross-reference the exemption in 40 C.F.R. §§ 63.6(f)(1) and (h)(1) of the General Provisions Rule may be unable to comply with such standards during SSM events despite their best efforts, including adherence to 40 C.F.R. § 63.6(e)(1)(i). For a source that fails to comply with the applicable Section 112(d) standards during SSM events, EPA will determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during SSM periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions, and whether the source has developed and implemented an SSM plan to minimize such emissions. *See* 40 C.F.R. § 63.6(e)(3)(i). We intend to closely scrutinize any claim that a Section 112(d) standard cannot be

² There are some Section 112(d) source category rules that do not appear in either table because the rules do not contain any SSM exemption. The *Sierra Club* decision has no impact on such rules.

met during a malfunction to determine whether the event was in fact “sudden, infrequent, not reasonably preventable” and was not instead “caused in part by poor maintenance or careless operation.” 40 C.F.R. § 63.2 (definition of malfunction).

We encourage sources that anticipate compliance difficulties to contact EPA or the appropriate state regulatory authority. By engaging with regulators early, sources can identify their compliance concerns and engage in a meaningful dialogue with EPA or the appropriate state regulatory authority about the individual circumstances presented by a particular facility, including any information on the nature and extent of the excess emissions that occurred or are expected to occur during SSM events. In appropriate cases, EPA or the state may be able to take action to resolve a source’s compliance concerns. Such actions may include, for example, issuance of an Administrative Order on Consent that includes a schedule for the source to achieve compliance during SSM events.

EPA is currently evaluating, in light of the *Sierra Club* decision, which Section 112(d) source category standards should be revised, and of these, which should be revised on an expedited basis. As we engage in the process of evaluating and revising rules, we will evaluate any information that we have, and that we may receive from industry or other sources, on emissions during periods of SSM. *See, e.g.*, Clean Air Act Section 112(d)(3)(A) (existing source standards are based on the average emission limitation achieved by the best performing 12 percent of sources “for which the Administrator has emissions information”). EPA will endeavor to promptly address concerns raised with respect to specific Section 112(d) source category standards where the Agency determines that sources within a source category may have a limited ability to comply with those standards during periods of SSM. EPA intends to give highest priority to reviewing and revising those Section 112(d) source category standards that may be difficult for sources to meet during an SSM period given the technological limitations of the processes involved.

Sincerely,

A handwritten signature in blue ink, appearing to read "A. M. Kushner", with a long horizontal flourish extending to the right.

Adam M. Kushner, Director
Office of Civil Enforcement

cc: William Becker, NACAA
Steve Page, OAR
Regional Air Division Directors
Regional Air Enforcement Managers

Table 1 – Section 112(d) Source Category Rules That Will Be Affected Once The Mandate Issues in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), Vacating the Startup, Shutdown, and Malfunction Exemptions in 40 C.F.R. § 63.6(f)(1) and (h)(1)⁴

Relevant Part 63 Subpart	Source Category
R	Gasoline Distribution
S	Pulp and Paper
T	Halogenated Solvent Cleaners
X	Secondary Lead Smelting
Y	Marine Loading Operations
GG	Aerospace Manufacturing
II	Shipbuilding and Ship repair
KK	Printing and Publishing
LL	Primary Aluminum
MM	Combustion Sources at Pulp Mills
CCC	Steel Pickling
III	Flexible Polyurethane Foam Production
LLL	Portland Cement
NNN	Wool Fiberglass
RRR	Secondary Aluminum
TTT	Primary Lead
VVV	Publicly Owned Treatment Works
XXX	Ferroalloy Production

⁴ This Table presents the Clean Air Act Section 112(d) source category rules that EPA currently believes will be directly affected once the mandate issues in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). The rules identified in this Table incorporate 40 C.F.R. Sections 63.6(f)(1) and (h)(1) by reference and contain no other regulatory text exempting or excusing compliance during startup, shutdown or malfunction events. The information in this Table is based on EPA's initial analysis and is, therefore, subject to change.

Table 1 (Continued) – Section 112(d) Source Category Rules That Will Be Affected Once The Mandate Issues in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), Vacating the Startup, Shutdown, and Malfunction Exemptions in 40 C.F.R. § 63.6(f)(1) and (h)(1)

Relevant Part 63 Subpart	Source Category
AAAA	Municipal Solid Waste Landfills
JJJJ	Paper and Other Web Coating
RRRR	Metal Furniture
VVVV	Boat Manufacturing
YYYYY	Electric Arc Furnaces – area sources
ZZZZZ	Iron and Steel Foundries – area sources
EEEEEE	Primary Copper – area sources
FFFFFF	Secondary Copper – area sources
GGGGGG	Primary Nonferrous metals – area sources
HHHHHH	Paint Stripping and Miscellaneous Coating – area sources
LLLLLL	Acrylic/Modacrylic fibers – area sources
NNNNNN	Chromium Compounds – area sources
OOOOOO	Flexible Polyurethane Foam Production and Fab – area sources
PPPPPP	Lead Acid Batteries – area sources
RRRRRR	Clay ceramics – area sources
TTTTTT	Secondary Nonferrous metals – area sources
YYYYYY	Ferroalloys Production – area sources

Table 2 – Section 112(d) Source Category Rules That Will Not Be Affected When the Mandate Issues in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008)⁵

Relevant Part 63 Subpart	Source Category
F, G, H, I	Hazardous Organic NESHAP for Synthetic Organic Chemical Manufacturing
L	Coke Oven Batteries
N	Chromium Electroplating
O	Ethylene Oxide Sterilizers
S	Pulp and Paper (some emissions standards only)
U	Polymers and Resins I
W	Polymers and Resins II
AA	Phosphoric Acid Manufacturing
BB	Phosphate Fertilizer Production
CC	Petroleum Refineries
DD	Off-site Waste and Recovery
HH	Oil and Natural Gas Production
OO-YY	Generic MACT (8 categories)
DDD	Mineral Wool
EEE	Hazardous Waste Combustors
GGG	Pharmaceutical Manufacturing

⁵ This Table presents the Clean Air Act Section 112(d) source category rules that will not be immediately affected by the vacatur in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). These rules contain specific regulatory text that exempts or excuses compliance during SSM events, and such regulatory text is in addition to, or in lieu of, a cross-reference to 40 C.F.R. Sections 63.6(f)(1) and (h)(1). Although these provisions will remain in effect following the issuance of the mandate in *Sierra Club*, EPA recognizes that the legality of such source category-specific SSM provisions may now be called into question, and EPA intends to evaluate them in light of the court's decision.

Table 2 (Continued) – Section 112(d) Source Category Rules That Will Not Be Affected When the Mandate Issues in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008)

Relevant Part 63 Subpart	Source Category
HHH	Natural Gas Transmission and Storage
JJJ	Polymers and Resins IV
MMM	Pesticide Manufacturing
OOO	Polymers and Resins III
PPP	Polyether Polyols
QQQ	Primary Copper Smelting
UUU	Petroleum Refineries II
CCCC	Nutritional Yeast
DDDD	Plywood and Composite Wood Products
EEEE	Organic Liquids Distribution
FFFF	Miscellaneous Organic NESHAP
GGGG	Vegetable Oil Extraction
HHHH	Wet-formed Fiberglass Mat
III	Auto and Light Duty Truck Coating
KKKK	Metal Can Coating
MMMM	Miscellaneous Metal Parts Coating
NNNN	Large Appliances Coating
OOOO	Fabric Printing, Coating, and Dyeing
PPPP	Plastic Parts Coating
QQQQ	Wood Building Products
RRRR	Metal Furniture Coating
SSSS	Metal Coil Coating
UUUU	Cellulose Production

Table 2 (Continued) – Section 112(d) Source Category Rules That Will Not Be Affected When the Mandate Issues in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008)

Relevant Part 63 Subpart	Source Category
WWWW	Reinforced Plastics Composites Manufacturing
XXXX	Rubber Tire Manufacturing
YYYY	Gas Turbines
ZZZZ	Reciprocating Internal Combustion Engines
AAAAA	Lime Manufacturing
BBBBB	Semiconductor Manufacturing
CCCCC	Coke Ovens
DDDDD	Industrial Boilers
EEEEE	Iron and Steel Foundries
FFFFF	Integrated Iron and Steel Production
GGGGG	Site Remediation
HHHHH	Miscellaneous Coating
IIIII	Mercury Cell Chlor-alkali Plants
JJJJJ	Brick and Clay Manufacturing
KKKKK	Clay Ceramics
LLLLL	Asphalt Roofing and Processing
MMMMM	Flexible Polyurethane Foam Fabrication
NNNNN	HCl Production
PPPPP	Engine Test Cells/Standards
QQQQQ	Friction Materials Manufacturing
RRRRR	Taconite Ore Production
SSSSS	Refractory Products

Table 2 (Continued) – Section 112(d) Source Category Rules That Will Not Be Affected When the Mandate Issues in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008)

Relevant Part 63 Subpart	Source Category
TTTTT	Primary Magnesium Production
BBBBBB	Gasoline Distribution – area sources
MMMMMM	Carbon Black Production – area sources
SSSSSS	Glass Manufacturing – area sources