TIMELINE

September 12, 2008 – *Sierra Club v. the EPA* was argued before the DC Circuit[8].

December 19, 2008 – DC Circuit vacated the SSM exemption.

D.C. Circuit Court of Appeals vacated the Startup, Shutdown, Malfunction ("SSM") rules contained within the NESHAP General Provisions, 40 C.F.R. Part 63, Subpart A. Sierra Club v. Environmental Protection Agency (Docket Nos. 02-1135, 03-1219, 06-1215, 07-1201)

Until this decision, sources were exempted from MACT technology-based emission limits if all elements of the SSM exemption were satisfied. Sources were nevertheless required by the general duty clause to minimize emissions to the greatest extent possible.

The Sierra Club argued that these 2002-2006 changes so effectively modified the original SSM rules that the SSM rules adopted in 1994 should be struck down, although the Sierra Club had not challenged such 1994 rules. Two of the three judges on the panel agreed, relying upon an obscure "constructive reopener" to find that EPA in effect reopened the SSM exemption for comment when it made such substantial changes to the rules. The court's rationale was based on its conclusion that the original rule had four cornerstone requirements that were undone by the 2002, 2003, and 2006 amendments. These four cornerstones of the original rule were described (perhaps incorrectly) by the majority as follows:

1. **Sources must comply with their SSM plans during periods of SSM;**

2. **SSM plans must be reviewed and approved by permitting authorities like any other applicable requirement;**

3. **SSM plans must be unconditionally available to the public, which could participate in evaluating their adequacy in the permit approval process; and (4) SSM plan provisions must be directly enforceable requirements.**

The dissenting opinion noted that the 1994 SSM rules did not require SSM plans to be submitted as part of a Title V permit application or approved by permitting authorities. Further, although not noted by the dissent, it was never clear that SSM plans were to be "unconditionally" available to the public for review – as in many cases agency confidentiality rules would allow the agency, but not the public, to review such plans. Regardless, the majority found that because the 2002-2006 amendments no longer required that the SSM plan be a part of the permit, no longer required public review, and no longer even required a facility to comply with the plan in order to claim the benefit of the SSM exemption, the EPA had "constructively reopened" the SSM exemption and the

Sierra Club could now challenge the underlying 1994 rules.

On the merits, the Sierra Club asserted that both the original and subsequent rulemakings unlawfully and arbitrarily failed to assure compliance with CAA requirements. In vacating the SSM exemption, the D.C. Circuit agreed, stating that "[b]ecause the general duty is the only standard that applies during SSM events - and accordingly no section 112 standard governs these events - the SSM exemption violates the CAA's requirement that some section 112 standards apply continuously." The court read CAA Sections 112 and 302(k) together to find that Congress required some "continuous section 112-compliant standards." (Section 112 provides "emissions standards" must require MACT standards. Section 302(k) defines "emission standard" as "a requirement…which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis.")

The court noted that EPA had not attempted to justify the SSM rules under Section 112(h) of the CAA. This statutory provision allows EPA to relax a MACT standard "if it is not feasible in the judgment of the Administrator to prescribe or enforce [a numerical] emission standard for control…" Presumably the majority was suggesting that EPA could use Section 112(h) to establish SSM requirements (work practice standards or different numerical emission limits) in lieu of MACT standards during SSM events, but that it had not done so. The dissent argued that the majority should not rest its opinion on this point because the parties had not been given the opportunity to brief this issue. This is a critical point, because the MACT standards are based on actual data demonstrating the capabilities of the best performing facilities (for new sources – the top 5% performers were used for the MACT floor; for existing sources the top 12% of sources); however, for all but a handful of MACT standards, SSM data was excluded from the data base for determining the floor.

The court's decision to vacate the exemption rather than rescind the 2002-2006 rules was criticized in the dissent as a dangerous precedent. Per 42 U.S.C. § 7607(b)(1), a petition for judicial review must be filed within 60 days from the date notice of an action appears in the Federal Register. Because public notice for the original rulemaking was published on March 16, 1994, any challenge brought after May 16, 1994 is automatically barred. The majority opinion sidestepped the barrier by adopting the Sierra Club's argument that the subsequent rulemakings significantly changed the context for the SSM exemption and allowed it to be "re-opened" for comment.

But, what is sauce for the goose is sauce for the gander. Because all of the MACT rules were premised upon the existence of the SSM exemption, the revocation of the SSM exemption should now allow constructive reopener by regulated entities to challenge the underlying MACT rules as being too stringent without the consideration of data from SSM periods for development of the MACT floor. This raises the possibility that all MACT standards will require reopener to evaluate SSM data on a source category by source category basis.

January 28, 2009 – DC Circuit granted EPA a 60-day extension to file for rehearing of *Sierra Club v. EPA* and the SSM exemption vacatur was stayed during this 60-day period.

April 3, 2009 – the American Chemistry Council requested a rehearing of *Sierra Club v. EPA* and the SSM exemption vacatur was stayed until the DC Circuit decides if the case will be reheard.

May 29, 2009 – EPA issued a brief that opposed industry requests for the DC Circuit to reconsider its decision in the *Sierra Club v. the EPA* case.

July 22, 2009 – Mr. Adam M. Kushner, Director of Civil Enforcement for EPA, issued a guidance letter titled "Re: Vacatur of SSM Exemption (40 CFR 63.6(f)(1) and 63.6(h)(1)".

July 30, 2009 – DC Circuit denied the American Chemistry Council request for a rehearing.

August 5, 2009 – EPA filed a motion seeking a 60-day stay on the mandate to vacate the SSM exemption.

August 6, 2009 – Industry interveners filed a motion to stay the mandate pending appeal of the decision to the United States Supreme Court.

September 23, 2009 – DC Circuit granted EPAs request and denied the industry intervenors motion.

October 16, 2009 – DC Circuit issued the mandate vacating the SSM exemption

March 8, 2010 - Supreme Court Refuses to hear appeal

The U.S. Supreme Court announced that it had denied certiorari to the American Chemistry Council in ACC's effort to obtain Supreme Court review of the U.S. Court of Appeals for the D.C. Circuit's decision in *Sierra Club v. American Chemistry Council et al. See, "*Court Overturns 15-Year Old Pollution Exemption for Industries," posted December 24, 2008.

In 1994, during the Clinton Administration, the EPA promulgated a rule that permits industrial operations that are starting up, shutting down or malfunctioning ("SSM events") to emit more toxins into the air than is normally allowed. In a 2 to 1 decision, the U.S. Court of Appeals for the District of Columbia Circuit struck down that exemption holding that it conflicts with the clear language of section 112(h) of the Clean Air Act.

The Supreme Court's denial of certiorari effectively puts an end to the litigation. If industry wants to have the rule reinstated, a legislative change in the Clean Air Act will be required.