

What if EPA (and Sierra Club) Win?

Worst case (complete victory for them):

❖ Gone are:

- ▶ Affirmative defenses (malfunction)
- ▶ Automatic exemption (startup/shutdown)
- ▶ “Unbounded” Director’s discretion

❖ What's left?

- Enforcement discretion
- Permit amendments to address startups/
shutdowns

Enforcement discretion – generally

Tennessee Statutory Factors: T.C.A. §68-201-106:

“In exercising powers . . . the board or department shall give due consideration to *all pertinent facts*, including but not necessarily limited to:

- ❖ (1) The character and degree of injury to, or interference with, the protection of the health, general welfare and physical property of the people;
- ❖ (2) The social and economic value of the air contaminant source;
- ❖ (3) The suitability or unsuitability of the air pollution source to the area in which it is located. . .
- ❖ (4) The technical practicability and *economic reasonableness* of reducing or eliminating the emission of such air contaminants;
- ❖ (5) The economic benefit gained by the air contaminant source through any failure to comply . . . ; and
- ❖ (6) The amount or degree of effort put forth by the air contaminant source to attain compliance.

EPA Statutory factors: C.A.A. §113(e)(1):

“Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as *justice may require*):

- ❖ the size of the business
- ❖ the economic impact of the penalty on the business
- ❖ the violator’s full compliance history and good faith efforts to comply
- ❖ the duration of the violation. . .
- ❖ payment by the violator of penalties previously assessed for the same violation
- ❖ the economic benefit of noncompliance, and
- ❖ the seriousness of the violation.

❖ Options:

Malfunctions:

- ▶ Technical Secretary can issue guidance for mitigating factors for malfunctions
- ▶ Could follow relevant portions of current requirements for an excused malfunction (in Tenn. SSM Rule)

Startups and shutdowns:

- ❖ Modify permit to allow higher emissions during startups/shutdowns
 - ▶ If higher numeric limit may be difficult/expensive to demonstrate compliance
 - ▶ Practice standards would be better, where allowed

❖ Timing – SIP:

- ▶ Tenn. SSM rule (Tenn. SSM Rule) is part of SIP
- ▶ Should be effective until the SIP revision (in response to the SIP call) is approved by EPA

◆ Timing - Title V Permits:

- ▶ Many contain restatement of portions of SSM rule
- ▶ Includes affirmative defense for malfunctions
- ▶ Includes “all reasonable measures” requirements for SSMs
- ▶ If have permit shield, removal of SSM provisions should require reopening a permit, or reissuing a permit without these provisions
- ▶ should be shielded until then

❖ Is Modified Permit a “Modification”?

- ▶ Existing permit allows startups/shutdowns per current rule
- ▶ Revised permit allows startups/shutdowns with new permit condition requirements (permit limit or work practice standards)
- ▶ Argument: No change in operation or increase in emissions means no modification
- ▶ Guidance document on this from Technical Secretary would be helpful