

End Of Clean Air Act Affirmative Defense Could Hurt Cos.

By **Madeleine Boyer, Laura LaValle and Zachary Pilchen** (May 9, 2022)

The U.S. Environmental Protection Agency is moving aggressively to reinstitute sweeping revisions to its affirmative defense and startup, shutdown and malfunction, or SSM, exemptions under the Clean Air Act that would have far-reaching implications for industry operations.

Industry has two opportunities to provide input. The first is by commenting on the EPA's proposed rule to remove affirmative defenses from its Title V operating permit regulations. The deadline for comments is May 16.

The second opportunity is by responding to a proposed state implementation plan, or SIP, call that would impose deadlines for the EPA to remove the SSM provisions of 10 states in the next two years. The deadline for comments on this matter is May 11.

On April 1, the EPA revived an Obama-era rulemaking to remove provisions from its Title V operating permit regulations that allow industry to assert affirmative defenses for CAA permit violations from upset and emergency emissions releases. The agency originally proposed to repeal the long-standing affirmative defense provisions in 2016, during the Obama administration, but the Trump administration withdrew the proposal.

Now the EPA seeks to move forward with its earlier proposal again. The agency is accepting new comments on the proposal, and will consider comments submitted in connection with the 2016 proposal.

Accordingly, the EPA indicated that comments previously provided regarding the 2016 proposal do not need to be resubmitted. The agency envisions that any current permitting provisions that include or recognize affirmative defense provisions would remain intact until their renewal, and would be dropped during removal.

For 30 years, federal CAA Title V operating permit regulations, and the vast majority of SIP-approved state and tribe rules, have included affirmative defense provisions that take into account emergency situations. Emergency events involve sudden and reasonably unforeseeable events beyond the control of the source that unavoidably cause emissions to exceed technology-based limits in the permit. With successful demonstration of the affirmative defense, a source can avert or mitigate civil enforcement.

In the proposal, the EPA reasserts its position that affirmative defense provisions are "inconsistent with the enforcement structure of the CAA," and with opinions of the U.S. Court of Appeals for the District of Columbia Circuit. The applicability and scope of malfunction-related provisions was first challenged in 2008 by the D.C. Circuit in *Sierra Club v. EPA*.

That decision held that air toxics regulations issued under CAA Section 112 must apply on a continuous basis, and, this being the case, SSM exemptions in existing maximum achievable



Madeleine Boyer



Laura LaValle



Zachary Pilchen

control technology, or MACT, standards were invalid. Since then, the EPA has made multiple attempts to ratchet down the scope of when industry can use malfunctions as a defense to liability.

The agency has looked to support rollbacks of long-standing affirmative defense provisions for malfunctions through a broad reading of the D.C. Circuit's 2014 decision in *Natural Resources Defense Council v. EPA*, in which then-Judge Brett Kavanaugh held that the affirmative defense provisions in 112 standards usurped the role of federal courts to determine whether penalties are appropriate for exceedance of emission limitations.

Even so, both D.C. Circuit opinions were limited to rules issued under CAA Section 112 — i.e., MACT standards or National Emission Standards for Hazardous Air Pollutants — and, on their face, do not extend to any other programs in the CAA. The EPA's reliance on those rulings to repeal affirmative defenses more broadly will certainly be challenged.

This very issue is at the heart of the controversy about the legality of the agency's 2015 SSM SIP call, the legality of which was only recently addressed in oral argument before the D.C. Circuit in the key case, *Environmental Committee of the Florida Electric Power Coordinating Group Inc. v. EPA*.

On April 11, the U.S. Department of Justice issued for public comment a proposed consent decree with environmental groups to proceed with the 2015 SIP call. The proposed consent decree would set an aggressive suite of deadlines for the EPA to remove SSM provisions from multiple states' SIPs.[1] Separately, the agency is reconsidering SSM SIP call waivers granted during the Trump administration to Iowa, North Carolina and Texas.

If the EPA's proposal to remove the affirmative defense provisions from Title V operating permits is finalized as written, and the agency moves forward with its 2015 SIP call under the proposed consent decree timetable, industry could see far-reaching implications. Prosecutorial discretion from civil enforcement for emergency and force majeure events for Title V permits would be effectively curtailed, presumably now left to the purview of federal courts under the Kavanaugh opinion.

The result would, for practical purposes, effectively render the CAA a strict liability statute. Although companies can still argue to a court that the CAA does not allow for strict liability, and that unavoidable exceedances should not be construed as per se violations, the vast majority of CAA enforcement is conducted by state enforcement agencies, and rarely moves to state litigation, much less federal court.

Removing these defenses could also make industry more vulnerable to citizen suits for unavoidable exceedances of emission limits. Industry will need to weigh these implications in its permitting approaches within an environmental regulatory landscape that increasingly leaves no room for error.

Madeleine Boyer is a principal, Laura LaValle is office managing principal and Zachary Pilchen is an associate at Beveridge & Diamond PC.

Beveridge & Diamond chairman Stephen Richmond and associate Jennifer Leech contributed to this article.

Disclosure: While serving as an attorney-advisor in the EPA Office of General

Counsel, Zachary Pilchen advised the agency on its 2015 call for state implementation plans concerning excess emissions during startup, shutdown and malfunction, and on Environmental Committee of the Florida Electric Power Coordinating Group Inc. v. EPA.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See *Sierra Club v. Regan*, 87 Fed. Reg. 69 (April 11, 2022).