Startup/Shutdown/Malfunction/Clean Air Act: Federal Appellate Court Upholds Title V Affirmative Defense



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The United States Court of Appeals District of Columbia Circuit ("Court") addressed in a September 5th Opinion the validity of the Clean Air Act Startup/Shutdown/Malfunction ("SSM") affirmative defense. See SSM Litigation Group v. Environmental Protection Agency, 2025 WL 2552531.

The SSM Litigation Group ("SSM") argued that the United States Environmental Protection Agency ("EPA") recission of the Clean Air Act Title V affirmative defense was arbitrary and capricious because it rests on erroneous legal justifications.

The Court agrees and grants the petition.

SSM provisions might generally be described as follows:

- Startup constitutes setting in operation an effective source or a portion of an effective source.
- Shutdown generally connotates the cessation of operation of an effective source of portion of an effective source.
- Malfunction is generally described as any sudden, infrequent, and not reasonably preventable failure of an air pollution control and monitoring requirement, process equipment, or process to operate in a normal and unusual manner which causes, or has the potential to cause, the emission limitations in the applicable standard to be exceeded (i.e., it does not constitute scheduled maintenance).

The role of SSM exemptions has been a focus of EPA, states, the regulated community, and environmental organizations for many years. Various existing state air rules had historically allowed some excess emissions during SSM events if certain procedural requirements were met.

Certain operators of stationary sources of air pollution are required to apply for and hold a Clean Air Act Title V Permit which must list the enforceable emission limitations and standards applicable to the source under the Clean Air Act. If an operator violates the emission limitations and standards incorporated in its Permit, the operator can be sued for injunctive relief and any appropriate civil penalties. However, the Permit also creates a "shield" from liability that treats compliance with the permit's terms as compliance with applicable Clean Air Act requirements.

EPA is noted to have promulgated after enactment of Title V regulations a provision that created a defense for stationary sources that exceed their emission limitations due to an emergency event. See 57 Fed. Reg. 32250, 32306 (1992).

The Title V affirmative defense is stated to have been retained by EPA for many years until it proposed rescinding it on the ground that it unlawfully encroached on the Judiciary's role to impose "any appropriate civil penalties" for Clean Air Act violations.

EPA had concluded that the defense was unlawful because it operated as an exemption from otherwise applicable emission limitations. Therefore, it was argued by EPA to render those limitations non-continuous in violation of 42 U.S.C. § 7602(k). The SSM defense was rescinded by EPA in 2023.

SSM therefore petitioned for a review of this action.

The Court concludes that EPA's rescission was not reasonably explained and not in accordance with the law. It concluded that because the Title V affirmative defense is a complete defense to liability as opposed to a limitation on judicial remedies, EPA's primary rationale for its rescission was erroneous.

The Court also rejected EPA and environmental intervenors' argument that the Title V affirmative defense is effectively an exemption from applicable emission limitations and therefore renders those

limitations not "continuous" in violation of the Clean Air Act, as interpreted by this court in Sierra Club v. EPA, 551 F.3d at 1027–28. It held that the reasoning of Sierra Club does not support EPA's contention that the Title V affirmative defense is unlawful.

The Court holds that a complete affirmative defense to liability does not render an emission limitation non-continuous under the cited statutory provision.

The Court held that:

…EPA rescinded a thirty-year-old affirmative defense on the ground that it was unlawful under the Clean Air Act. EPA's reasoning, however, cannot be squared with the text of the Clean Air Act or our precedents. Because EPA offered no independent policy rationale, its rescission regulation was unreasonable and not in accordance with law. We therefore grant the petition and reverse the rescission.

A copy of the Opinion can be downloaded here.