The receding role of affirmative defense provisions in Clean Air Act regulations

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The legality of regulatory provisions establishing an affirmative defense for excess air emissions during startup, shutdown, or malfunction (SSM) conditions at industrial facilities has come under judicial scrutiny, and two recent appellate cases have substantially advanced the debate. These cases address the inclusion of affirmative defense provisions in state implementation plans (SIPs) developed under section 110 of the Clean Air Act (CAA or Act) and in New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) promulgated under sections 111 and 112 of the Act:

- *Luminant Generation Co. v. EPA.* 714 F.3d 841 (5th Cir. 2013) (hereinafter, *Luminant*); and
- *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (hereinafter, *NRDC*).

While these cases have by no means resolved this debate, the U.S. Environmental Protection Agency's (EPA's) actions in response to their holdings help discern future trends in the development and use of affirmative defense provisions in CAA regulations.

The evolution of EPA policy on SSM-related affirmative defenses

The 1980s. Section 302(k) of the CAA defines "emission limitation" as a requirement that "limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." To account for the tension between the requirement that emission limitations be "continuous" and the practical reality that control technology can fail unavoidably, states and EPA rely on legal mechanisms such as automatic exemptions, enforcement discretion, and affirmative defenses to provide relief during periods of SSM. States often included automatic exemptions for excess emissions during SSM periods in their original SIPs that EPA approved during the 1970s. Policy guidance from EPA on the treatment of excess emissions during SSM periods started emerging only in the early 1980s. See Memoranda from Kathleen M. Bennett, Assistant Adm'r for Air, Noise, and Radiation, EPA, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (Sept. 28, 1982; Feb. 15, 1983). In these early policies, EPA stated that it could not approve any SIP revision that provided automatic exemptions based on the agency's view that emission limitations must apply on a continuous basis. Recognizing the reality

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that technology can inevitably fail during certain periods of plant operation, these early policies encouraged the use of enforcement discretion for violations occurring during SSM periods. Few states revised their SIPs, however, to remove the "automatic exemption" provisions that EPA found offensive.

1999 Policy. EPA supplemented these early policies in 1999. See Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement and Compliance Assurance, EPA, "[SIPs]: Policy Regarding Excess Emissions During Malfunctions, Startup and Shutdown" (Sept. 20, 1999). The 1999 policy allowed states to go beyond the "enforcement discretion" approach and include in their SIPs an affirmative defense provision that would, in the context of an enforcement proceeding or a civil suit, excuse a source from penalties if the source could demonstrate that it met certain objective criteria. The policy was narrowly circumscribed to apply to actions for penalties, but not to actions for injunctive relief. The approach applied not only to excess emissions during malfunctions, but also during startups and shutdowns that could not be averted through the use of proper planning, design, and operating procedures. Notwithstanding the development of these policies, the "automatic exemption" provisions in approved SIPs remained effective because EPA did not issue SIP calls requiring states to remove those provisions.

Leap forward to 2013. The next major development of EPA's policy on the use of an affirmative defense was a quantum leap that did not occur until 2013, when EPA issued, as described in the next section, its proposed SSM SIP call.

Affirmative defense provisions in state and federal regulations

2013 Proposed SSM SIP Call. EPA approves state SIPs using the "notice and comment" rulemaking process of the Administrative Procedure Act. Once EPA approves a SIP, it remains operative until EPA takes the proper legal action to correct any deficiencies. A change in EPA's policy, without more, is not a sufficient legal action. Thus, the "automatic exemption" and "enforcement discretion" provisions included in a vast majority of approved SIPs remain in full force and effect. *See Sierra Club v. Ga. Power Co*., 443 F.3d 1346, 1354–55 (11th Cir. 2006).

EPA took the first step of a legal action in 2013 with its proposed SSM SIP call, whereby, in response to a petition for rulemaking filed by Sierra Club, the agency proposed to require 36 states to amend their SIPs to eliminate provisions exempting excess emissions during SSM periods. 78 Fed. Reg. 12,460 (Feb. 22, 2013). That proposal also announced the agency's new policy that affirmative defense provisions are not appropriate for periods of startup, shutdown, and other such "planned" events. As originally proposed, the SIP call allowed states to establish an affirmative defense for malfunctions, recommending the use of ten specific criteria for establishing that defense. EPA supplemented the proposal in September of 2014 and is currently scheduled to finalize the SSM SIP Call in May of 2015. EPA has proposed to provide states 18 months to revise their SIPs once the final rule has been issued. If a state fails to timely submit an adequate plan revision, EPA will promulgate a federal implementation plan (FIP) within two years unless the state first rectifies the SIP deficiency. See 42 U.S.C. § 7410.

2012 Luminant Decision-SIP. EPA's decision not to prohibit affirmative defenses for malfunctions in the originally proposed SIP call is consistent with the Fifth Circuit's 2012 holding in *Luminant*. The *Luminant* court held that EPA's interpretation of the CAA section 113 penalty provision authorizing affirmative defenses that are narrowly tailored to address periods of unavoidable excess emissions dur-

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ing SSM periods in SIPs was entitled to *Chevron* deference. The Ninth Circuit has also upheld EPA's inclusion of affirmative defenses for malfunctions in Federal Implementation Plans (FIPs). *Mont. Sulfur & Chem. Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012); *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116 (9th Cir. 2009).

2014 NRDC Decision-NESHAP. EPA has included affirmative defense provisions in several recently promulgated NSPS and NESHAP regulations. However, in April 2014, the D.C. Circuit ruled in *NRDC* that EPA *lacked authority* to promulgate an affirmative defense to civil penalties for malfunctions in its NESHAP regulations for the Portland cement industry. This case was the result of several petitions for review filed by environmental organizations objecting to EPA's inclusion of an affirmative defense for unavoidable malfunctions in those standards. Despite EPA's argument that it was trying to resolve "the tension between requirements that emissions limitations be 'continuous' and the practical reality that control technology can fail unavoidably," the court held that EPA's creation of an affirmative defense to civil penalties exceeds the agency's statutory authority. In so holding, the D.C. Circuit specifically acknowledged the Fifth Circuit's decision in *Luminant* and stated that it was not opining on the validity of an affirmative defense in the context of a SIP.

Whither after *Luminant* and *NRDC*?

Although EPA and others expected that several states would establish affirmative defenses for malfunctions in their SIPs in response to the SSM SIP call, EPA proposed to eliminate this option on September 17, 2014. EPA issued a supplemental notice of proposed rulemaking that rescinds the agency's prior policy allowing affirmative defenses in SIPs. 79 Fed. Reg. 55,920 (Sept. 17, 2014) (hereinafter, Supplemental Proposal). Relying on the logic of the D.C. Circuit's holding in *NRDC*, EPA's Supplemental Proposal would require 17 states to eliminate affirmative defense provisions for malfunctions from their SIPs. EPA acknowledges that it is applying the reasoning of the *NRDC* decision "broadly," since that decision applied narrowly to the affirmative defense provision in the NESHAP promulgated by EPA under CAA section 112.

EPA's decision to expand the holding of the *NRDC* case to SIPs, as explained in the Supplemental Proposal, is a harbinger of the future of affirmative defense provisions in CAA regulations. The agency's decision is entirely at odds with its prior policies and statements. Just seven months earlier, EPA asserted that the use of affirmative defense provisions for malfunctions was consistent with the CAA. EPA took this position in the *Luminant* case, and the Fifth Circuit upheld it. EPA even defended the affirmative defense provision in *NRDC*. Although the D.C. Circuit struck down the affirmative defense provision, the court acknowledged that its holding was limited to EPA's section 112 rules and said it was not ruling on the issue with respect to SIPs. In a startling reversal, EPA now proposes to rescind its SSM policy interpreting the CAA to allow the use of the affirmative defense for malfunctions.

NRDC and *Luminant* represent the views of two different U.S. circuit courts of appeal on the legality of affirmative defense provisions in two different contexts. In the Supplemental Proposal, EPA acknowledges its prior position in *Luminant* but does not explain why it is following one circuit court's decision that did not directly address SIPs over another circuit court's decision that did. The legality of EPA's

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choice to disregard the Fifth Circuit's decision in *Luminant* is a matter that the courts must decide. This is especially true with respect to the state of Texas, which EPA is now asking to remove the very affirmative defense provision the Fifth Circuit determined was in compliance with the CAA.

The time to file an appeal in the *NRDC* decision has run. In June 2014, Sierra Club filed a petition for judicial review of the affirmative defense provisions in two NSPS and seven NESHAP regulations promulgated by EPA in the 2011–2012 timeframe. The case is currently being held in abeyance so that EPA may respond to an administrative petition filed by Sierra Club on the same issues.

The future of the affirmative defense provision

It is fairly clear that EPA is disinclined to provide affirmative defenses for planned events such as startups and shutdowns. Moreover, EPA's recent actions suggest that the agency will not allow affirmative defenses for malfunctions and other unplanned events in state or federal regulations either.

However, EPA seems amenable to the establishment of alternative requirements, such as work practice standards, that apply in lieu of the otherwise-applicable emission limitations during planned events. For excess emissions during unplanned events, EPA touts the availability of enforcement discretion to provide appropriate relief. Sources can take a small measure of comfort in the fact that the section 113 penalty provision allows the agency and the courts some discretion in setting penalty amounts. Ultimately, courts may still have a further role to play in settling the issue of the legality of the use of the affirmative defense in CAA regulations.

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