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D.C. Circuit Restores EPA's Emergency Emissions Defense

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On September 5, 2025, the D.C. Circuit Court of Appeals in *SSM Litigation Group v. Environmental Protection Agency, et al.*, Case No. 23-1267 (D.C. Cir. 2025), reversed the Environmental Protection Agency's (EPA) rescission of the narrow affirmative defense under Title V of the Clean Air Act. This defense protects stationary sources – such as manufacturing facilities and refineries – from liability for violations of Clean Air Act emission limitations under Title V when the violation is a result of emergency events.

The ruling restores a legal safeguard that had been in place for decades, giving operators a structured way to demonstrate that excess emissions were unavoidable despite proper operation and reasonable mitigation efforts. For businesses – particularly those in regions prone to hurricanes, tornadoes, wildfires, or other natural disasters – the decision provides both operational flexibility and a measure of legal certainty. It also underscores the limits of EPA's authority to unilaterally remove long-standing regulatory protections without sufficient justification.

With EPA now facing the possibility of an appeal or further rulemaking, companies should carefully evaluate their compliance programs, emergency response plans, and documentation procedures to ensure they are prepared to rely on this defense if future enforcement actions arise.

Background: The Emergency Affirmative Defense

As the Court discussed in *SSM Litigation Group*, EPA is the agency tasked with imposing emission standards and limitations for air pollution sources from stationary sources such as power plants, factories, and refineries. These requirements and limitations were consolidated into Title V in 1990 and resulted in the Title V permit program for operators of stationary sources. In 1992, EPA promulgated regulations that created a narrow affirmative defense for exceeding emission limitations due to emergency events.

Under the regulations, the defense covered events that arose "from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God" that caused the failure to meet the emission limitations. Under the affirmative defense, the onus was on the operator to establish that (1) an emergency as defined in the regulations occurred, (2) the facility was being properly operated, and (3) the permit holder had taken all reasonable steps to minimize excess emissions during the emergency. 40 C.F.R. § 70.6(g)(3). If this was established, then the permit holder would not be found in violation of the Clean Air Act. *Id.* § 70.6(g)(2).

The EPA's 2023 Rescission and Court's Recent Reversal

This regulation and defense remained in place for decades until 2016, when the EPA first proposed rescinding it. The EPA argued that the defense improperly encroached on the judiciary's role in imposing civil penalties. That proposal ultimately culminated in a final rule adopted in 2023, formally rescinding the defense. *See* 88 Fed. Reg. 47029, 407030-31.

On September 5, 2025, the D.C. Circuit in *SSM Litigation Group* reversed the EPA's 2023 rescission of this affirmative defense, reinstating the emergency event affirmative defense originally promulgated by the EPA. The D.C. Circuit concluded:

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 the law. We therefore grant the petition and reverse the decision.

SSM Litigation Group, Case No. 23-1267, at 13.

The D.C. Circuit soundly rejected the EPA's rescission in *SSM Litigation Group*, concluding that the emergency affirmative defense was a "complete affirmative defense" that does not encroach on the judiciary's role in imposing civil penalties for violations of emissions limitations and therefore is permitted under its ruling in *Committee of Florida Electric Power Coordinating Group, Inc. v. EPA*, 94 F.4th 77 (D.C. Cir. 2024). Similarly, the D.C. Circuit concluded that an affirmative defense is not an exemption precluded under *Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2024), because – by definition – an affirmative defense does not exempt liability. On the contrary, the Court emphasized that "[t]he very concept of an affirmative defense assumes that a legal standard remains in force, because otherwise there would be no claim – and no need for an affirmative defense."

Implications of the Court's Ruling on Manufacturers and Energy Companies

The D.C. Circuit's opinion makes clear that the EPA's 2023 rescission of the emergency affirmative defense did not meet the required standards for adopting a new regulation. As a result, the Court reversed the rescission, putting the regulation back in place.

This decision will have a significant impact on manufacturers and energy companies, particularly in the Gulf Coast and other regions prone to natural disasters such as hurricanes, wildfires, and tornadoes. During these unavoidable emergencies, facilities may temporarily exceed emissions limits to safely continue operating. The Court's decision provides these sectors with a legal safeguard against potential enforcement actions during such unavoidable incidents.

Whether EPA seeks to change this regulation again in light of this ruling remains to be seen. The agency has the option to appeal the decision to the U.S. Supreme Court, which could potentially alter or limit the scope of the emergency affirmative defense. Even if no appeal is filed, EPA could pursue further regulatory action, such as issuing a revised rule that narrows or clarifies the circumstances under which the defense may be invoked or releasing guidance to influence enforcement practices.

What Should Businesses Do Now?

The D.C. Circuit's decision restores a valuable tool for operators, but businesses should exercise caution in relying on this defense. The emergency event affirmative defense remains narrow and highly fact-specific, and companies must be prepared to meet the burden of proof if they intend to invoke it. To mitigate risk and prepare for potential enforcement, companies should consider the following steps:

1. Review Title V Permits and Compliance Programs

Businesses will want to ensure that internal compliance policies and Title V permit conditions are updated to reflect the reinstated affirmative defense. Some permits may still contain language from EPA's rescission rule. Businesses should carefully review these provisions and, where necessary, seek revisions to align with current regulatory standards.

2. Document Emergency Procedures

Regulators and courts will expect comprehensive documentation demonstrating that an event was sudden, unforeseeable, and beyond the company's control. To meet this expectation, businesses should implement or update their emergency response and environmental compliance protocols to emphasize robust recordkeeping, detailed operational logs, and timely incident reporting.

3. Invest in Prevention

The affirmative defense is only available where the facility was being properly operated at the time of the event. Businesses should continue investing in preventive maintenance, operator training, and monitoring systems to demonstrate diligence.

Particularly for facilities located in the Gulf Coast and other regions vulnerable to extreme weather events, businesses should rigorously stress-test their emergency response plans in light of the reinstated affirmative defense. These plans should clearly outline procedures to minimize excess emissions while maintaining safe and continuous operations.

4. Monitor Regulatory and Legal Developments

EPA may appeal the ruling to the Supreme Court or initiate further rulemaking to narrow or clarify the scope of the affirmative defense. Businesses should closely monitor these developments and be prepared to adjust their compliance strategies accordingly. Given the complexity of this issue and the possibility of further litigation or regulatory action, businesses should consult with legal counsel to assess the implications of the ruling for their operations, compliance obligations, and enforcement risk.

How Baker Donelson Can Assist

Baker Donelson's Environmental Group is closely monitoring the D.C. Circuit's reinstatement of the emergency event affirmative defense under Title V of the Clean Air Act. As EPA considers whether to appeal the decision or pursue further rulemaking, now is the time for companies to review their Title V permits, update emergency response and emissions documentation protocols, and ensure operational practices align with regulatory expectations. If you have questions about how the ruling affects your facility, how to document and preserve the defense, or how to proactively prepare for potential future EPA actions, please reach out to Kat Statman or a member of our Environmental Group.