

Emergency Exit: D.C. Circuit Restores Clean Air Act Title V Emergency Defense in *SSM Litigation Group v. EPA*

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In its recent decision in *SSM Litigation Group v. EPA* (published September 5, 2025), the D.C. Circuit struck down EPA's 2023 rescission of the long-standing Clean Air Act ("CAA") Title V "emergency affirmative defense," holding that the agency's action was arbitrary, capricious, and contrary to law. For three decades, Title V permits contained a narrow defense shielding operators from liability for excess emissions caused by sudden and unforeseeable emergencies, provided the facility was otherwise properly operated and took reasonable steps to minimize emissions.

The U.S. Environmental Protection Agency ("EPA") rescinded this defense in 2023, reasoning that it unlawfully infringed on judicial authority to impose civil penalties and rendered emission limits non-continuous under the CAA. The D.C. Circuit disagreed, drawing a sharp distinction between impermissible limits on judicial remedies and permissible defenses to liability, and holding that an affirmative defense does not undermine the Act's requirement for continuous emission standards. The decision restores an important safeguard to regulated entities, clarifies the limits of EPA's authority when it comes to affirmative defenses and judicial remedies, and underscores the need for agencies to provide legal reasoning *and* policy rationales when rescinding entrenched regulatory provisions.

Key Takeaways

Emergency Defense Restored

- The D.C. Circuit unanimously [restored the Title V Emergency Affirmative Defense](#), which [EPA eliminated in 2023](#), providing facilities a crucial legal tool to defend against Clean Air Act ("CAA") violations caused by unforeseeable emergency events.

EPA Authority Limited

- The court reinforced that EPA may not eliminate defenses to liability by recasting them as unlawful intrusions on judicial penalty authority or as "non-continuous" exemptions. The distinction between liability defenses and remedy limitations is central to the decision.

Continuity Requirement Clarified

- The decision makes clear that the Clean Air Act's requirement for "continuous" emissions standards does not bar the use of affirmative defenses; standards always remain enforceable, even if liability may be avoided in narrow circumstances.

Regulatory Durability Requires Policy Support

- Because EPA offered no independent policy justification for its rescission, the court had little difficulty finding the rule legally defective. Agencies must pair legal reasoning with policy rationale when undoing decades-old programs.

Compliance Strategy Implications

- Facilities should review and update, if needed, compliance plans and reporting protocols (including pre-submission review of Title V deviation reports), Title V permit terms, and enforcement defenses in light of the revived emergency defense, while also recognizing that courts remain the ultimate arbiters of whether the defense applies in a given case.

Background: EPA's Controversial 2023 Rule Change

For over three decades, EPA regulations provided facilities with an affirmative defense for CAA Title V Permit violations caused by emergency circumstances. This defense allowed facilities to avoid liability for excess emissions during "sudden and reasonably unforeseeable events beyond the control of the source, including acts of God."

To qualify for the defense, facilities had to demonstrate that: (1) an emergency actually occurred; (2) the facility was being properly operated; and (3) all reasonable steps were taken to minimize excess emissions during the emergency.

The regulations defined an emergency as "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God," that "causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency." 40 C.F.R. § 70.6(g)(1) (2022). If the emergency defense applied, a permittee would not be found in violation of the Clean Air Act for exceeding emissions limitations.

In 2023, EPA rescinded this long-standing defense in a final rule, arguing it was unlawful on two grounds. First, it encroached on the judiciary's authority to impose civil penalties; and second, it functioned as an impermissible exemption that rendered emission standards non-continuous in violation of the CAA. The rescission was particularly significant for oil & gas operations, power plants, chemical factories, and other heavy industry sources facing inherent risks of equipment failures, natural disasters, and other emergency events causing temporary emission exceedances despite proper operation and maintenance.

The D.C. Circuit's Decision: *SSM Litigation Group v. EPA*

Writing for a unanimous three-judge panel, Judge Neomi Rao comprehensively rejected both of EPA's legal justifications for eliminating the emergency defense. The court's analysis provides important clarity on the scope of EPA's regulatory authority and the nature of affirmative defenses under environmental law.

Affirmative Defense v. Remedial Limitation

The court distinguished between two types of regulatory “defenses”:

- **Complete Affirmative Defenses** that provide a total defense to liability (i.e., the Title V Emergency Defense).
- **Partial Defenses**, which only limit available remedies after a violation is established.

Citing its 2024 decision in *Environmental Committee of Florida Electric Power Coordinating Group v. EPA*, the court emphasized that complete affirmative defenses are permissible because they address the “antecedent question of liability” rather than constraining judicial remedial authority. 94 F.4th 77 (D.C. Cir. 2024).

Defense v. Exemption

The court also rejected EPA's argument that the emergency defense impermissibly functioned as an exemption from emission standards. The court explained the distinction:

An affirmative defense allows a defendant to avoid liability, but it does not alter the underlying legal requirements. The 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.

(Internal citations omitted). This confirms that emission standards remain “continuous” even when an affirmative defense is available, because the standards themselves are never suspended or lifted.

What This Means for Title V Permittees

The decision restores a critical defense for Title V facilities facing CAA enforcement actions or citizen suits arising from emergency-related emission exceedances. This is particularly important for oil & gas operations, power generation, chemical manufacturing, refineries, and metals production.

While the emergency defense provides important protection, facilities should remember that it requires strict compliance with specific criteria: the event must be sudden and reasonably unforeseeable; the event must be beyond the facility's control; the facility must be properly operated during the event; and all reasonable steps must be taken to minimize excess emissions.

To support ongoing compliance, confirm whether your Title V permit incorporates or references the emergency affirmative defense language; ensure operational protocols include a method of clear documentation of emergency events and steps to minimize emissions; and ensure plant operators are up to date with respect to emergency protocols. * EPA is reviewing the decision for potential appeal, though it is not yet clear whether EPA will appeal.

For questions on how this decision may affect your specific operations or compliance obligations, please contact [Tim Sowecke](#), [Tyler Self](#), or other members of [GableGotwals' Environmental and Natural Resources Law Team](#).



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** EPA's potential appeal would go to the Supreme Court, given the D.C. Circuit's exclusive jurisdiction over nationally applicable EPA rules.*

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