



## Startup, Shutdown, Malfunction Exemptions: Might They Live Again?

May 7, 2019 | [Environmental](#), [Air Emissions](#)



**Anthony C. Sullivan**  
Partner

EPA is apparently stepping back from its complete rejection of Clean Air Act exemptions for startup, shutdown and malfunction events.

Back in 2015, EPA published a final regulatory action under the Clean Air Act (CAA) requiring 36 states to [remove provisions from their State Implementation Plans](#) (SIPs) that allowed exemptions from emissions limitations during startup, shutdown and malfunction (SSM) events. This action also required 17 states to remove affirmative defenses from the SSM provisions of their SIPs.

EPA first proposed that action in 2013 as a result of the Sierra Club's 2011 petition following the environmental organization's successful challenge to EPA's General Provisions regarding SSM exemptions for National Emission Standards for Hazardous Air Pollutants (NESHAPs) in [Sierra Club v. EPA](#).

EPA supplemented and revised the original proposal in 2014, after the D.C. Circuit Court held in [NRDC v. EPA](#) that EPA may not create an affirmative defense against civil penalties for toxic air emissions by Portland cement manufacturers, even in the event of an unavoidable malfunction. Although the holding in that case only applied to CAA citizen suits, EPA extended this holding to all SIPs rendering those that contain affirmative defenses in their SSM provisions invalid because they could potentially limit the jurisdiction of federal courts to assess civil penalties under the CAA.

However, apparently the agency is reconsidering its position. In the [April 29](#),

### RELATED PRACTICE AREAS

Environmental  
Environmental Crimes and Investigations

### RELATED TOPICS

Air Emissions  
Clean Air Act  
Environmental Protection Agency (EPA)

2019, [Federal Register](#), EPA published a proposal to rescind a finding that the Texas SIP is inadequate due to its affirmative defense provisions. These provisions allow a defense to an enforcement action for excess air emissions that result from “upset” defense events.

Many states had petitioned EPA for reconsideration of the prior Obama Administration policy. The April 29 Federal Register Notice argues that the D.C. Circuit Court of Appeals only applied to federal rules and not to state SIPs. In the April 29 proposal, EPA stated”

“Upon further analysis, EPA Region 6 believes the policy position on affirmative defense SIP provisions for malfunctions as upheld by the Fifth Circuit’s *Luminant* decision should be maintained and that it is not appropriate to extend the D.C. Circuit’s reasoning in *NRDC* to the affirmative defense provisions in the Texas SIP. As the EPA acknowledged in the 2015 SSM SIP Action, the CAA does not speak directly to the question of whether affirmative defense provisions are permissible in action 110 SIPs.... [T]he *NRDC* decision did not foreclose EPA’s ability to allow for affirmative defense provisions in section 110 SIPs, particularly in light of the Fifth Circuit’s precedent upholding the EPA’s prior approval of the Texas provisions at issue here.”

While this proposal would only apply specifically to Texas, the implication is that other states could also develop approvable state SIPs that include startup/shutdown, malfunction and upset defenses for state standards. The approach of approving state SIPs that include SSM for state rules may have limited effect, since the EPA continues to take such exemptions out of its rules when new standards are developed, but this approach suggests a new strategy for implementing deregulatory goals under the CAA. Comments on the proposed reversal are due on or before June 28, 2019.