U.S. Environmental Protection Agency
EPA Docket Center
Mailcode 2922IT
Attn: Docket ID No. EPA-HQ-OAR-2016-0186
1200 Pennsylvania Avenue, NW
Washington, DC 20460

May 16, 2022

Re: Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and the Federal Operating Permit Program, 87 Fed. Reg. 19,042 (Apr. 1, 2022)

Dear Docket Clerk,

The GPA Midstream Association ("GPA Midstream") appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency ("EPA") in response to its proposal to remove the Title V emergency affirmative defense provisions from State and Federal operating permit programs. 87 Fed. Reg. 19,042 (April 1, 2022) ("2022 Proposed Rule").

GPA Midstream has served the U.S. energy industry since 1921 and has over 60 corporate members that directly employ more than 60,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 320,000 jobs across the U.S. economy. GPA Midstream members recover more than 80% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 380 natural gas processing facilities. In the 2018-2020 period, GPA Midstream members spent over $90 billion in capital improvements to serve the country's needs for reliable and affordable energy.

Summary

GPA Midstream urges EPA to withdraw the 2022 Proposed Rule, at least with respect to those emergency affirmative defenses currently contained in State Implementation Plans ("SIPs"), due to significant legal defects in its reasoning.[1] Chief among those defects include an inaccurate

[1] The 2022 Proposed Rule largely incorporates by reference a previously proposed rule at 81 Fed. Reg. 38,645 (June 14, 2016) ("2016 Proposed Rule" or, collectively with the 2022 Proposed Rule, the "Proposed Rule").

understanding of the holding in NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. 2014), and a failure to acknowledge a key decisions upholding the use of affirmative defenses in SIPs.

Key issues that EPA should address include the need to recognize the difference between an affirmative defense to reduce or eliminate civil penalties and an affirmative defense to liability. The Proposed Rule erroneously treats these distinct types of affirmative defenses as interchangeable. This error partially explains the Proposed Rule's misreading of the NRDC decision. EPA should also address the distinctions drawn by both the Clean Air Act ("CAA") and applicable decisions between enforcement programs under federal law, including administrative enforcement proceedings, and those established under SIPs. When properly understood, these authorities permit the use of the emergency affirmative defense found at 40 C.F.R. § 70.6(g) in SIPs and EPA administrative enforcement actions.

Finally, should EPA insist on finalizing the Proposed Rule, GPA Midstream urges it to maintain the regulatory definition of "emergency." An established regulatory definition will aid parties to an enforcement action, and the court, in determining whether a reduction in civil penalties is justified under Section 113(e) of the Clean Air Act. 42 U.S.C. § 713(e)

I. NRDC v. EPA is Distinguishable and Cannot Justify the Proposed Rulemaking

The NRDC decision has very limited precedential value and does not support the Proposed Rule. First, the Proposed Rule misunderstands the difference between an affirmative defense for the reduction of monetary penalties, as was considered in NRDC, and an affirmative defense to liability, as is found in 40 C.F.R. § 70.6(g). Second, the Proposed Rule cannot rely on NRDC for prohibiting an emergency affirmative defense in SIPs as the court explicitly disclaimed any ruling on that issue. Third, the Proposed Rule's claim that EPA itself is prohibited from considering affirmative defenses in administrative enforcement actions is directly contradicted by NRDC.

A. NRDC v. EPA Considered an Affirmative Defense for Civil Penalty Mitigation, not an Affirmative Defense to Liability

There are typically two types of affirmative defenses; one that alters the remedy for liability and one that absolves a defendant of liability. See, e.g., Menchaca v. Am. Med. Resp. of Ill., Inc., 6 F. Supp. 2d 971, 972 (N.D. Ill. 1998) (affirmative defense requires party to admit complaint's allegation but "assert that for some legal reason it is nonetheless excused from liability"). The NRDC decision invalidated former 40 C.F.R. § 63.1344, establishing an affirmative defense to reduce civil penalties that could be used only after a defendant was found liable. See 75 Fed. Reg. 54,970, 55,053 (Sept. 9, 2010) (affirmative defense available "for civil penalties" but the "affirmative defense shall not be available for claims of injunctive relief."). The NRDC court held that this was contrary to Section 304(a), assigning to the judiciary, not EPA, the authority "'to apply any appropriate civil penalties,'" and Section 113(e), establishing factors for the court's consideration in determining the amount of any civil penalty to be assessed after a finding of liability. 749 F.3d at 1063 (quoting 42 U.S.C. § 7604(a)).

Section 70.6(g)(2) is clearly different. It establishes an affirmative defense to liability, not for a mere reduction in penalties: "An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations…." If the affirmative

defense is proven, the defendant will be found not liable, and not subject to any remedy, even though the emission limit at issue (1) applied to the defendant at the time of the emergency, and (2) there is no dispute that the defendant violated the emission limit. None of NRDC's reasoning applies to Section 70.6(g)(2) as nothing in the emergency affirmative defense encroaches on a court's authority to determine the amount of a civil penalty. Where an affirmative defense precludes a finding of liability, neither CAA Sections 113(e)(1) nor 304 are implicated. This alone justifies withdrawal of the 2022 Proposed Rule and the allowance of the emergency affirmative defense in all federal and state applications.

The 2016 Proposed Rule, however, asserts that the CAA prohibits any affirmative defense. Despite failing to acknowledge any distinction between the two types of affirmative defenses, or seeming to understand the type of affirmative defense at issue in NRDC, the 2016 Proposed Rule claims that EPA may not "limit or eliminate the authority of federal courts to determine liability or to impose remedies through factual considerations that differ from, or are contrary to, the explicit grants of authority in section 113(b) and section 113(e)." 81 Fed. Reg. at 38,650. There is no legal support for this interpretation. As noted above, the question of whether EPA can maintain an affirmative defense for liability (as opposed to reduced civil penalties) is not addressed by either Section 113(e) or the NRDC opinion. The 2016 Proposed Rule claims that "section 113(b) provides courts with explicit jurisdiction to determine liability … in judicial enforcement proceedings," id., but this is simply wrong. Section 113(b) does nothing more than authorize EPA to "commence a civil action" for civil penalties or injunctive relief for certain violations. 42 U.S.C. § 7413(b). Nothing in that section can be reasonably read to restrict the use of affirmative defenses and the 2016 Proposed Rule declines to identify any language in Section 113(b) supporting EPA's interpretation.

B. NRDC v. EPA Explicitly Disclaimed Consideration of Affirmative Defenses in State Implementation Plans

The NRDC case was limited to review of an affirmative defense provision to reduce civil penalties for hazardous air pollutant violations from Portland Cement sources. 749 F.3d at 1057. SIPs were not at issue. In a footnote, the court stated: "We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan." Id. at 1064, n. 2. Therefore, the 2022 Proposed Rule's claim that NRDC supports EPA's proposal to remove the affirmative defense provision from SIPs is contradicted by NRDC itself.

The Proposed Rule's claim that the Act's "enforcement structure" supports EPA's interpretation is also incorrect. The CAA delegates to each State the responsibility to implement, maintain, and enforce the National Ambient Air Quality Standards by establishing their own air pollution control programs. 42 U.S.C. § 7410(a)(1)-(2). The Supreme Court acknowledged that the CAA provides States with "wide discretion" in creating their SIPs. Union Elec. Co. v. EPA, 427 U.S. 246, 250 (1976). States submit their SIPs to EPA for review, however, EPA is required to approve them if they meet the minimum requirements listed at 42 U.S.C. § 7410(a)(2). 42 U.S.C. § 7410(k)(3). Among those minimum requirements listed is that a SIP must "include enforceable emission limitations or other control measures, means, or techniques," 42 U.S.C. § 7410(2)(A), "include[ing] a program to provide for the enforcement of the measures described in subparagraph (A)," id. § 7410(C), and "adequate provisions (i) prohibiting … any source … within the State from emitting any air pollutant in amounts which will (I) contribute significantly to nonattainment

in, or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in" another State's SIP. Id. § 7410(D)(i). The Proposed Rule provides no explanation of why the inclusion of an emergency affirmative defense violates any of these requirements.

Even if Sections 113 and 304 were relevant to an affirmative defense to liability (which they are not), the Clean Air Act requires SIPs to include enforcement programs that are separate from those found in Sections 113 and 304. Under 42 U.S.C. § 7661a(b)(5)(E), State programs must have "adequate authority" to "enforce permits … including authority to recover civil penalties in a maximum of not less than $10,000 per day for each violation, and provide appropriate criminal penalties." This alone indicates an intentional difference between SIP enforcement programs and their federal counterparts, as the federal enforcement requirements authorize maximum civil penalties of $25,000 per day for each violation and are adjusted upwards under federal law for inflation. See 87 Fed. Reg. 1,676 (Jan. 12, 2022) (civil monetary penalty inflation adjustment increasing maximum civil penalties under CAA Section 7413(b) to $109,024 per day per violation). State enforcement programs are not similarly adjusted by federal rule. Thus, Congress did not intend for State enforcement programs to be mere copies of the federal enforcement program, precluding any purported need to harmonize them for consistency.

The CAA's "'cooperative federalism' structure is a defining feature of the statute." GenOn Rema, LLC v. USEPA, 722 F.3d 513, 516 (3d Cir. 2013). EPA is "relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations" and it has "no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2)…." Train v. NRDC, 421 U.S. 60, 79 (1975). Given the express disclaimer regarding SIPs in NRDC, the substantive differences between the affirmative defense at issue there and the emergency affirmative defense at 40 C.F.R. § 70.6(g), and EPA's role under Section 110, the Proposed Rule provides no valid justification for prohibiting States from adopting an emergency affirmative defense in their SIPs.

C. NRDC Allowed for Affirmative Defenses in Administrative Cases

The Proposed Rule provides no rationale for prohibiting the emergency affirmative defense in EPA administrative enforcement actions. NRDC expressly stated that it would be permitted: "By contrast, EPA's ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties by a court." 749 F.3d at 1063 (citing 42 U.S.C. 7413(d)(2)(B)). The 2016 Proposed Rule quoted this language twice, 81 Fed. Reg. at 38,648, 38,650, before claiming that Sections 113(e) and 304 preclude EPA from considering affirmative defenses in administrative enforcement actions. Id. at 38,650. This is incorrect.

First, as noted above, the emergency affirmative defense goes to questions of liability, not civil penalties. Thus, Section 113(e) does not apply at all.

Second, Section 304(a) pertains to citizen suits in federal district courts. Thus, it has no application to administrative enforcement actions.

Third, NRDC held that an attempt by EPA to constrain the judiciary in determining civil penalties violated the separation of powers. 749 F.3d 1055. No such concern is raised in how EPA administrative law judges determine administrative penalties.

Fourth, NRDC noted that EPA is free to recognize administrative defenses in administrative enforcement proceedings as the Clean Air Act allows EPA to "'compromise, modify, or remit, with or without conditions, any administrative penalty.'" 749 F.3d at 1063 (quoting 42 U.S.C. § 7413(d)(2)(B)). The Proposed Rule never addresses this reasoning or Section 113(d)(2)(B). Nor does it address Section 113(e)'s allowance for EPA to consider any "such other factors as justice may require." EPA has long recognized that it is fundamentally unfair to penalize a source for unavoidable emissions, as have courts. See, e.g., Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 433 (D.C. Cir. 1973) (provisions for equipment malfunctions are "necessary to preserve the reasonableness of the standards as a whole" as "the record does not support the 'never to be exceeded' standard currently in force."). Indeed, it would be unjust to penalize a source for emissions that were beyond its control as this neither serves the purposes of punishment nor deterrence. The Proposed Rule, however, provides no explanation as to why, after decades of finding an affirmative defense for emergency-related emissions to be necessary, justice no longer requires it.[2]

Fifth, the assertion that EPA is bound to considering only those factors listed in Section 113(e) when determining administrative penalties, 81 Fed. Reg. at 38,650, contradicts EPA's current use of various administrative penalty policies. EPA Administrative Law Judges and the Environmental Appeals Board rely on these policies – not Section 113(e) – in determining administrative penalties. See, e.g., In re: City of Wilkes-Barre, A.R., 13 E.A.D. 332 (2006) (overturning administrative law judge's civil penalty assessment for failure to adhere to EPA's Clean Air Act Stationary Source Civil Penalty Policy); see also, Memorandum from Susan Shinkman, Dir. Office of Civil Enforcement, to EPA Reg. Counsel, "Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action" (June 29, 2015); Memorandum from Robert Van Heuvelen, Dir., Office of Regulatory Enforcement, to EPA Reg. Counsel, "Guidance on Use of Penalty Policies in Administrative Litigation" (Dec. 15, 1995).

EPA has used policies governing administrative penalties for decades without any consideration of Section 113(e) and it continues to do so today. The Proposed Rule does not consider these contradictory practices and gives no indication that EPA will now abandon these policies and guidance documents in administrative proceedings. Cf. Speedrack Prods. Gp., Ltd. v. NLRB, 114 F.3d 1276, 1279 (D.C. Cir. 1997) (agency cannot "ignore[ ] its own precedent without offering any explanation as to why this precedent was inapplicable."). EPA's new interpretation of how Section 113(e) limits its own authority appears to be arbitrarily selective in prohibiting only the use of the emergency affirmative defense.

II. The Proposed Rule Ignores Contrary Decisions Upholding Affirmative Defenses

Shortly before the NRDC decision, the Fifth Circuit held that an affirmative defense for uncontrollable upsets was consistent with CAA Sections 110 and 113(e), rejecting challenges that

[2] EPA's recognition that an exemption or affirmative defense for unavoidable emissions events dates back to at least 1982. See Memorandum from K. Bennett, EPA Asst. Admin., to EPA Reg. Administrators, "Policy on Excess Emissions During Startup, Shutdown, Maintenance and Malfunctions" (Sept. 28, 1982) at 1.

raised the same arguments EPA now claims to compel a contrary interpretation. Luminant Generation Co. LLC v. U.S. EPA, 714 F.3d 841 (5th Cir. 2013). There, the environmental group "Petitioners argue[d] that the final rule conflicts with the plain language of the Act authorizing civil penalties in EPA and citizen suit enforcement actions" as it was inconsistent with Section 113(e). Id. at 851. The court agreed with EPA's interpretation that Section 113(e) allows for an affirmative defense "because the criteria a source must prove when asserting the affirmative defense are consistent with the penalty assessment criteria identified in section 7413(e), which are considered by the courts and the EPA in determining whether or not to assess a civil penalty for violations and, if so, the amount." Id. at 852.

The key point of Luminant is that such an affirmative defense is consistent with the CAA, and thus, a SIP that included the affirmative defense would "meet[ ] all of the applicable requirements" for approval under 42 U.S.C. § 7410(k)(3), as discussed above. Should a State maintain the emergency affirmative defense in its implementation plan, then EPA "shall approve" it.[3] Luminant is not an outlier, as other courts have reached the same conclusion. See Montana Sulphur & Chem. Co. v. USEPA, 666 F.3d 1174 (9th Cir. 2012) (affirmative defense for flaring in Montana SIP); Ariz. Pub. Serv. Co. v. USEPA, 562 F.3d 1116 (10th Cir. 2009) (affirmative defense for excess emissions caused by malfunctions).

Importantly, the Proposed Rule never attempts to explain why EPA believes that the Fifth Circuit's decision in Luminant is now wrong. In fact, neither the 2022 Proposed Rule nor the 2016 Proposed Rule even mention Luminant. Nor do they mention the Section 110 criteria for SIP approval, much less provide a reasoned explanation of why Section 110 would prohibit a SIP from including the emergency affirmative defense. Thus, the Proposed Rule not only ignores contradictory court decisions, but it ignores the only section of the Clean Air Act that is relevant to what States may or may not include in their SIPs. Where "a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument." LeMoyne-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004).

The NRDC decision explicitly recognized that "[t]he Fifth Circuit recently upheld EPA's partial approval of an affirmative defense provision in a State Implementation Plan. See Luminant Generation Co. v. EPA, 714 F.3d 841 (5th Cir. 2013). We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan." 749 F.3d at 1064, n. 2. Despite this, the Proposed Rule relies heavily on NRDC as effectively compelling the rescission of the emergency affirmative defense under both federal and state programs. 87 Fed. Reg. at 19,044. Thus, the Proposed Rule's claim that approving a SIP containing an affirmative defense is "inconsistent with the rationale of NRDC and the enforcement structure of the CAA," 87 Fed. Reg. at 19,044, is wrong on two levels. First, the NRDC decision explicitly disclaimed

[3] This makes EPA's stated rationale of needing to "harmonize the enforcement and implementation of emission limitations across different CAA programs" inapplicable. 87 Fed. Reg. at 19,042. Congress did not express any desire to see federal and state programs "harmonized." As noted above, States are provided substantial discretion to enact their own programs that EPA "shall approve" if they meet the basic criteria of Section 110(a)(2). EPA "shall approve" these programs regardless of whether there are differences between federal and state programs or whether EPA would have preferred States to enact a somewhat different enforcement regime. Further, EPA's rationale of harmonizing emission limitations across different Clean Air Act programs makes little sense because other startup, shutdown, and malfunction affirmative defenses remain in effect. See, e.g., 40 C.F.R. § 60.8(c) (New Source Performance Standards); 40 C.F.R. § 63.1111(a)(2) (Generic Maximum Achievable Control Technology standards); 40 C.F.R. § 63.8226(a) (National Emission Standards for Hazardous Air Pollutants, Mercury Cell Chlor-Alkali Plants).

that its holding prohibited SIP affirmative defenses. Second, other courts that have actually reached the question came to contrary conclusions. "An agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'" Ramaprakash v. FAA, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting Columbia Broad. Sys. v. FCC, 454 F.2d 1018, 1027 (D.C. Cir. 1971)). EPA must explain how the Proposed Rule can be finalized in the face of such clearly contradictory legal authorities.

III. EPA Should Maintain the Regulatory Definition of "Emergency"

The 2016 Proposed Rule asserts that, despite the absence of an emergency affirmative defense, sources subject to an enforcement action or citizen suit for an emergency emissions event should appeal to the court's discretion under Sections 113(b) and 304(a). 81 Fed. Reg. at 38,654. If EPA is determined to eliminate the emergency affirmative defense, it should at least maintain the regulatory definition of "emergency" at 40 C.F.R. § 70.6(g)(1). This will provide courts and parties with a consistent, regulatory definition of "emergency" for purposes of briefing civil penalties. Otherwise, the court and the parties will have to litigate the definition of "emergency" on an ad hoc basis, leading to potential inconsistencies among courts.

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GPA Midstream appreciates the opportunity to submit these comments in response to EPA's request and is standing by to answer any questions that it may have.

Respectfully submitted,

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GPA Midstream Association