CHAPTER XIII: EPA'S AFFIRMATIVE DEFENSE FOR MALFUNCTIONS IS UNLAWFUL.

Although EPA has eliminated its unlawful compliance exemption for periods of startup, shutdown, and malfunction, the agency's final rule includes an "affirmative defense to penalties that purports to bar courts from imposing any penalties on sources that violate their emission standards during a malfunction and satisfy certain agency created conditions related to preventing malfunctions and controlling malfunction emissions. 76 Fed. Reg. at 25029 (affirmative defense for 112 standards); 25064 (affirmative defense for 111 standards).

The Clean Air Act makes clear how the courts are to assess civil penalties, whether a case is brought by EPA or a citizen. 42 U.S.C. § 7413(e). Congress intended citizens to be able to enforce emission standards under the CAA using the full range of civil enforcement mechanisms available to the government, and, in the HAP context, subject only to the limitation that government not be "diligently prosecuting" its own civil enforcement action, CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B). EPA's rule proposal, by shifting this careful balance and contravening these mandates, violates the CAA.

The affirmative defense that EPA proposes to allow in case of malfunctions goes directly against congressional intent in two ways. First, Congress expressed a clear intent as to how judges should determine the size of civil penalties whenever they are sought and thus Congress flatly barred EPA from limiting when civil penalties can be assessed. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In this proposal, EPA acts outside of its delegated authority to limit civil penalties available in citizen suits or its own enforcement actions. Second, the proposal will impermissibly chill citizen participation, and the ability to win an effective, deterrent remedy, in CAA enforcement actions.

The affirmative defense is fatally flawed because EPA cannot decide when civil penalties will not be allowed. The CAA itself spells out the only limits that Congress intended to impose on citizens' ability to seek and recover penalties in enforcement suits under CAA § 304, 42 U.S.C. § 7604. See 42 U.S.C. § 7413(e). By

attempting to impose additional agency-created limits, EPA exceeds its authority.

Congressional intent on civil penalties is clear-they are a remedy available to citizen plaintiffs, and the Act gives judges a list of factors to consider in assessing them. As such, EPA cannot interpret the statute to contravene that intent. By attempting to rewrite this provision, via regulation, EPA has done just that.

The CAA grants EPA minimal discretion that only applies to administrative penalties, allowing EPA to "compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under [subsection 113(d)]." 42 U.S.C. § 7413(d)(2)(B). However, there is no similar grant of authority to EPA to compromise, modify or limit civil penalties that a court may impose under section 113(e) or section 304. Section 304(a), 42 U.S.C. § 7604(a), grants courts the sole authority "to apply appropriate civil penalties" in citizen suits. The explicit reference to EPA's ability to modify penalties in one subsection and its absence in the other subsection of the same provision can only be understood as an intentional decision by Congress that EPA cannot contravene by rule.

Citizen participation in CAA enforcement also will be hampered, in violation of citizens' rights to protect themselves from pollution and in direct conflict with congressional intent. The affirmative defense would likely be used on a routine basis by polluters seeking to avoid penalties, just as the malfunction exemption was. As a result, citizens who seek civil penalties against polluters in order to protect themselves and achieve the Act's goals may be forced to engage in fact-intensive disputes over the cause of emission violations and adequacy of responsive measures - an outcome Congress intended to prevent with the simple straightforward enforcement and penalty provisions in the Clean Air Act. As a result, enforcement of the Act could suffer, for civil penalties provide a powerful deterrent to violators as Congress intended.

Thus, the affirmative defense also runs counter to two clearly expressed intentions of Congress: (1) the burden it places on citizens makes it less likely that they will enforce the Act, see, e.g., *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986); and (2) several of the factors at issue in the

affirmative defense undercut Congress's intent that citizen suit enforcement should avoid re-delving into "technological or other considerations," *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Both result from the technical burden EPA imposes on citizens with the affirmative defense, and both render the defense impermissible.

In addition to these problems, there is simply no need for an affirmative defense to penalties to be written into the regulations and cause the harm that will result. EPA has discretion to decide what cases to prosecute, to consider settlements, and to request civil penalties in a case-by-case manner, as long as it acts consistent with the Clean Air Act to protect clean air as its top priority, see 42 U.S.C. § 7401. Promulgating this affirmative defense is equivalent to giving polluters "get out of jail free" cards for serious emission exceedances and MACT violations. Polluters are likely to claim that any violation of the standard is due to a malfunction in order to evade the requirements. Allowing polluters to evade financial penalties - which are the real teeth of the standards - through this type of measure is likely to lead to polluters simply ignoring or factoring potential standard violations into their cost of doing business, rather than actually trying to prevent malfunctions and violations of the standards as a way to avoid financial losses from the application of penalties.

Assuming arguendo that EPA had authority to promulgate any type of affirmative defense to penalties for malfunctions, EPA should also promulgate the following provisions:

1. A specific amount of compensatory damages should apply to each reported malfunction. These funds should be dedicated to enforcement, inspections, and monitoring in the local community around the specific facility, to create greater assurance that malfunctions will not happen again.

2. EPA should modify the regulations so that the affirmative defense cannot be used by a specific facility or company more than once within a set period of time, such as 10 years. The affirmative defense should become automatically unavailable to a facility that has previously had a malfunction within the last 10 years, to ensure that this defense does not swallow the value of the standards.

3. EPA should promulgate specific public reporting and notification requirements for malfunctions, or any emission exceedance that occurs of which an operator is aware. Specifically, EPA should require that when a facility provides EPA with a notification of a malfunction or emission standard exceedance under the regulations, this notice will be made publicly available on EPA's website within 14 days. In addition, EPA should promulgate the requirement that when such notification is made, the facility must also provide for community notification of the malfunction or emission standard exceedance within 2 business days, through an appropriate public forum that is designed to reach residents who live near the facility, including but not limited to a notice on the facility's own website (if it has one), a written notice to the local municipality and local school district, a press release to the local newspaper, radio, and TV news station that contains information community members may need to protect themselves and their families from the additional air pollution.