Industrial Energy Consumers of America
The Voice of the Industrial Energy Consumers

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March 13, 2017

The Honorable John Barrasso
Chairman
Committee on Environment and Public Works
U.S. Senate
Washington, DC 20510

The Honorable Greg Walden
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Thomas Carper
Ranking Member
Committee on Environment and Public Works
U.S. Senate
Washington, DC 20510

The Honorable Frank Pallone
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Re: Restore Exemptions and Affirmative Defense Provisions Addressing Startup, Shutdown, and Malfunction (SSM) Events at Manufacturing Facilities

Dear Committee Chairmen and Ranking Members:

This letter respectfully requests members of Congress to take action to restore the exemptions and affirmative defense provisions for startup, shutdown, and malfunction (SSM) events at manufacturing facilities. Unless Congress takes action quickly, every manufacturing company in the country operating under a Title V air permit could be subjected to unnecessary citizen suits and potential civil penalties as they shutdown and start-up their equipment in order to conduct maintenance activities and other planned and unplanned outages.

The Industrial Energy Consumers of America (IECA) is a nonpartisan association of leading manufacturing companies with approximately $1.0 trillion in annual sales and with more than 1.6 million employees worldwide. IECA membership represents a diverse set of industries including: chemicals, plastics, steel, iron ore, aluminum, paper, food processing, fertilizer, insulation, glass, industrial gases, pharmaceutical, building products, automotive, brewing, independent oil refining, and cement manufacturing.

From the inception of the Clean Air Act, EPA promulgated regulations and approved State Implementation Plans (SIPs) that granted exemptions and affirmative defense provisions for emissions during SSM events. But through an overly broad and unsupportable interpretation of two recent court decisions – *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir.

2008) and *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) – EPA abruptly changed course and began a systemic process of eliminating existing SSM exemptions and affirmative defense provisions from various Clean Air Act regulations and previously-approved SIPs.

Congress never intended for the EPA to eliminate SSM emergency exemptions that have existed and been successfully implemented for over 30 years. These exemptions provide certainty and flexibility for companies to lawfully maintain their equipment and, most importantly, to protect the safety of their workers and the surrounding communities without violating air permits.

IECA urges Congress to reestablish these important exemptions that EPA has removed from the Clean Air Act regulations following EPA's strained interpretations of *Sierra Club* and *NRDC*. A permanent solution cannot easily be accommodated through the executive branch action alone, because any executive action will most certainly result in long drawn-out litigation. For instance, EPA's decision to eliminate SSM exemptions from many SIPs is currently in litigation at the federal court. *See Walter Coke v. EPA* (D.C. Cir. No. 15-1166). IECA is simply requesting that Congress clarify its original intent to allow for SSM exemptions under the Clean Air Act.

The CAA has always provided flexibility and regulatory certainty for SSM exemptions. From the beginning of the Clean Air Act, companies have been granted flexibility and regulatory certainty during periods of SSM. Now, there is absolute certainty that more and more companies will be forced to defend costly citizen suits and potential civil penalties for SSM activities that cannot be avoided. Without the exemptions, even if EPA and/or a state regulatory agency use enforcement discretion and decide not to pursue enforcement action based on a reasoned analysis of the facts surrounding the SSM event, citizens could still bring civil actions wasting court, EPA, and company resources. Further, unresolved recurring air violations can directly impact a company's ability to secure future air permits to operate and/or expand production facilities, threatening commercial viability in the long-term. It is a vicious circle.

Exemptions still require companies to minimize emissions. It is important to note that under the long-standing exemptions for SSM events under the Clean Air Act, companies were still required to minimize emissions during such events and in many cases perform corrective actions to prevent reoccurrence of the events. However, sometimes excess emissions during SSM events are unavoidable. Without the exemptions, even though a company does everything right, it could still be in violation of the Clean Air Act and penalized. That is the potential consequence of inaction by Congress.

Equipment must be periodically shutdown for safety of employees and community. For safety reasons and to ensure that facilities continue to operate efficiently and in compliance with the Clean Air Act, process equipment must be periodically shutdown for maintenance. This is a major decision on the part of any company and requires significant planning and expenses. During maintenance activities, products that would otherwise be produced by the facility to supply customers must be accommodated through other means. While equipment is shutdown for maintenance, the equipment and processes are examined,

repaired and/or replaced, including equipment needed to ensure air quality compliance, such as air emissions monitors and devices used to capture and control air emissions.

As equipment cycles through shutdown and start up periods, emissions can rise to levels that exceed air permit limits and other federal standards established for normal operating conditions for a short period of time. Specific emission limits and conditions were never established to account for these short periods, because emissions during these events are in most cases unavoidable. During start up, equipment cannot go from 0-60 mph and constantly operate at steady-state conditions. While there are several major pieces of equipment and processes that work together in harmony when in full and normal operation, they often require different start-up conditions as they ramp-up to normal full-load capacity. In fact, the original equipment manufacturers (OEMs) will not guarantee the performance of the equipment unless very specific start-up procedures are used and implemented. Further, OEMs only guarantee emissions performance of the equipment during normal steady state operation. It is to the economic advantage of every company to shutdown and restart the facilities as quickly and as safely as possible. In addition, the OEMs establish certain required procedures to prevent and mitigate catastrophic failure of their equipment.

Process malfunction emissions are included in the SSM exemption. Emissions due to equipment or process malfunction are also included in the long-standing SSM exemptions. The EPA regulations, at 40 C.F.R. § 63.2, define a malfunction as "any sudden, infrequent, ***and not reasonably preventable failure*** of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded" (emphasis added). By its very definition, a malfunction cannot reasonably be avoided or prevented. The only way to potentially prevent emissions due to equipment malfunction is through routine maintenance actions that often require the equipment to shutdown and start up. Further, Section 112(r) of the Clean Air Act specifically requires many facilities to maintain their equipment to prevent accidental releases of hazardous substances. It makes no sense to require a facility to shutdown and perform maintenance to comply with Section 112(r) of the Clean Air Act and then penalize that same facility for unavoidable emissions during the shutdown and subsequent startup. In drafting the Clean Air Act, Congress never intended for companies to choose between safety and environmental compliance.

Facility emissions are reported to authorities and available to the public. Please note that facilities have methods of monitoring their emissions, and they are required to report this information to the appropriate local, state, and federal agencies as part of their compliance obligations. The information is also available publicly through a very transparent reporting scheme. Further, the long-standing SSM exemptions have never been a free pass to pollute. Facilities still have to demonstrate that they follow procedures, maintain their equipment, and minimize emissions throughout the SSM event. Without the SSM exemptions, facilities that do everything the right way may be forced to defend a citizen suit and face potential civil penalties. This unproductive and wasteful approach was clearly never the intent of Congress in passing the Clean Air Act.

Congress is urged to act. For all of these reasons and based upon the realities of manufacturing operations, regulators have historically and explicitly excluded emissions that occur during SSM events from being regulated in the same manner as emissions that occur during normal operations. IECA is seeking the reinstatement of these exclusions.

We respectfully urge the Congress to restore the exemptions and affirmative defense provisions for SSM events. A quick action by Congress is necessary to provide a remedy for the manufacturing facilities and ensure regulatory certainty. We look forward to working with you to prevent the potential for thousands of costly citizen suits, which will unnecessarily overwhelm the judicial system.

Sincerely,

Paul N. Cicio
President

cc: Senate Committee on Environment and Public Works
House Committee on Energy and Commerce
The Honorable Scott Pruitt, EPA Administrator