

## FACT SHEET

### Proposed Removal of Affirmative Defense Provisions from Specified New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants

#### ACTION

- On June 24, 2024, the U.S. Environmental Protection Agency (EPA) proposed to remove affirmative defense provisions from certain Clean Air Act (CAA) New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP). 89 FR 52425
- The EPA is proposing to remove the affirmative defense provisions associated with violation of emission standards due to malfunctions from 18 air pollution rules.
- The affirmative defense prevented the assessment of civil penalties when a source violated an emission standard during a malfunction, provided a prescribed set of actions was properly followed.

#### BACKGROUND

- In 2008, the D.C. Circuit in *Sierra Club v. EPA* vacated exemptions to emissions standards during periods of startup, shutdown, and malfunction (SSM). In response to this decision, the EPA began removing the exemptions.
- In response to the removal of SSM exemptions, commenters urged the EPA to not hold facilities to normal operation emission standards during periods of malfunction. In response to these comments, the EPA began adding an 'affirmative defense' to CAA section 111 and 112 rules.
- This affirmative defense prevented the assessment of civil penalties when a source violated an emission standard during a malfunction, provided a prescribed set of actions was properly followed. A malfunction was defined as "a 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."
- Subsequently, in 2014, the D.C. Circuit in *NRDC v. EPA* vacated affirmative defense provisions in a CAA section 112 rule. The court held that under the CAA, the authority to determine civil penalty amounts in such cases lies exclusively with the courts, not with the EPA.
- Although the court decision addressed a CAA section 112 rule, the EPA determined that the rationale also applies to CAA section 111. The EPA has been removing these provisions from CAA section 111 and 112 rules as they were amended for other reasons ever since. Also in 2014, the EPA granted a petition filed by Sierra Club for additional removals from multiple CAA rules.
- This action proposes to remove remaining affirmative defense provisions from 18 CAA section 111 and 112 rules efficiently within one action.

The source categories included in this proposal for removal of remaining affirmative defense provisions in CAA section 111 and 112 rules include the following:

Source Category	*Subpart
<b>Clean Air Act section 111 (40 CFR Part 60)</b>	
Electric Utility Steam Generating Units (Boilers)	Da
Kraft Pulp Mills	BBa
Nitric Acid Plants	Ga
<b>Clean Air Act section 112 (40 CFR Part 63)</b>	
Chemical Manufacturing Area Sources	VVVVVV (6V)
Chromium Electroplating	N
Coal- and Oil-Fired Electric Utility Steam Generating Units (MATS)	UUUUU (5U)
Marine Vessel Loading Operations	Y
Pesticide Active Ingredient Production	MMM
Pharmaceuticals Production	GGG
Polyether Polyols Production	PPP
Polymers & Resins IV	JJJ
Primary Lead Processing	TTT
Printing and Publishing Surface Coating	KK
Pulp and Paper Industry	S
Secondary Lead Smelters	X
Shipbuilding and Ship Repair Surface Coating	II
Steel Pickling	CCC
Wood Furniture Surface Coating	JJ

\* You can find 40 CFR Part 60 and Part 63 in the Code of Federal Regulations at: <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-C> .

## HOW TO COMMENT

- The EPA will accept comment on the proposal for 45 days after publication in the *Federal Register*.
- Comments, identified by Docket ID No. EPA-HQ-OAR-2023-0509, may be submitted by one of the following methods:
  - Go to <https://www.regulations.gov/> and follow the online instructions for submitting comments.
  - Send comments by email to: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), Attention Docket ID No. EPA-HQ-OAR-2023-0509.
  - Fax your comments to: (202) 566-9744, Attention Docket ID No. EPA-HQ-OAR-2023-0509.

- Mail your comments to: EPA Docket Center, Environmental Protection Agency, Mail Code: 28221T, 1200 Pennsylvania Ave., NW, Washington, DC 20460, Attention Docket ID No. EPA-HQ-OAR-2023-0509.
- Deliver comments in person to: EPA Docket Center, 1301 Constitution Ave., NW, Room 3334, Washington, DC. Note: In-person deliveries (including courier deliveries) are only accepted during the Docket's normal hours of operation. Special arrangements should be made for deliveries of boxed information.

#### **FOR MORE INFORMATION**

- Interested parties can download a copy of the proposed rule notice from EPA's website at the following address: <https://www.epa.gov/stationary-sources-air-pollution/removal-affirmative-defense-provisions-specified-new-source>
- Today's action and other background information are also available electronically at <https://www.regulations.gov>, EPA's electronic public docket and comment system, or in hardcopy at the EPA Docket Center's Public Reading Room.
  - The Public Reading Room is located at the EPA Headquarters library, room number 3334 in the WJC West Building, 1301 Constitution Avenue, NW, Washington, DC. Hours of operation are 8:30 a.m. to 4:30 p.m. eastern standard time, Monday through Friday, excluding federal holidays.
  - Visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor materials will be processed through an X-ray machine as well. Visitors will be provided a badge that must be visible at all times.
  - Materials for this proposed action can be accessed using Docket ID No. EPA-HQ-OAR-2023-0509.