

June 12, 2024

**MEMORANDUM**

TO: Docket ID No. EPA-HQ-OAR-2023-0509  
FROM: Michelle Bergin, Physical Scientist, U.S. EPA  
SUBJECT: Redline/Strikeout for proposed amendments to remove remaining affirmative defense provisions from rules under Clean Air Act (CAA) sections 111 and 112

The attachments to this memorandum, for the convenience of interested parties, present the edits necessary to incorporate the changes proposed for 18 rules in “Removal of Affirmative Defense Provisions from Specified New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants”.

The rules and provisions proposed for amendment are summarized in the Table below and the edits (strikeouts) are presented in each attachment as indicated. Only the provisions proposed to be amended are presented, and they are separated from un-edited text or provisions by the indicator “--- clip ---”.

| Source Category                                   | Part | Subpart | Affirmative Defense Provisions  | Attachment |
|---|------|---------|---------------------------------|------------|
| Clean Air Act section 111                         |      |         |                                 |            |
| Kraft Pulp Mills                                  | 60   | BBa     | 60.281a; 60.286a                | 1          |
| Electric Utility Steam Generating Units (Boilers) | 60   | Da      | 60.41Da; 60.48Da(s)             | 2          |
| Nitric Acid Plants                                | 60   | Ga      | 60.71a; 60.74a                  | 3          |
| Clean Air Act section 112                         |      |         |                                 |            |
| Steel Pickling                                    | 63   | CCC     | 63.1155(d); 63.1156             | 4          |
| Pharmaceuticals Production                        | 63   | GGG     | 63.1250(g)(4); 63.1251          | 5          |
| Shipbuilding and Ship Repair Surface Coating      | 63   | II      | 63.781(d); 63.782               | 6          |
| Wood Furniture Surface Coating                    | 63   | JJ      | 63.800(j); 63.801(a)            | 7          |
| Polymers & Resins IV                              | 63   | JJJ     | 63.1310(k); 63.1312(b)          | 8          |
| Printing and Publishing Surface Coating           | 63   | KK      | 63.820(c); 63.822(a)            | 9          |
| Pesticide Active Ingredient Production            | 63   | MMM     | 63.1360(k); 63.1361; 63.1362(i) | 10         |
| Chromium Electroplating                           | 63   | N       | 63.341; 63.342(b)(1)            | 11         |

|  |    |                |   |    |
|--|----|----------------|---|----|
| Polyether Polyols Production   | 63 | PPP            | 63.1420(i); 63.1423(b)                      | 12 |
| Pulp and Paper Industry  | 63 | S              | 63.441; 63.456                              | 13 |
| Primary Lead Processing  | 63 | TTT            | 63.1542; 63.1545(d);<br>63.1551             | 14 |
| Coal- and Oil-Fired Electric<br>Utility Steam Generating Units<br>(MATS) | 63 | UUUUU (5U)     | 63.10042 (definition only)                  | 15 |
| Chemical Manufacturing Area<br>sources                                   | 63 | VVVVVV<br>(6V) | 63.11501 title and (e);<br>63.11502(b)      | 16 |
| Secondary Lead Smelters  | 63 | X              | 2022 proposal pending (?)<br>63.542; 63.552 | 17 |
| Marine Vessel Loading<br>Operations                                      | 63 | Y              | 63.561; 63.562(e)(7)                        | 18 |

---

**Attachment 1:**

**40 CFR 60 Subpart BBa regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 60 → Subpart BBa

---

Title 40: Protection of Environment

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

---

**Subpart BBa— Standards of Performance for Kraft Pulp Mill Affected Sources for Which Construction, Reconstruction, or Modification Commenced After May 23, 2013**

---

**§ 60.281a Definitions.**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

**§ 60.286a [Reserved] ~~Affirmative defense for violations of emission standards during malfunction.~~** In response to an action to enforce the standards set forth in §§ 60.282a and 60.283a, you may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at § 60.2. Appropriate penalties may be assessed if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense must not be available for claims for injunctive relief.

~~(a) Assertion of affirmative defense. To establish the affirmative defense in any action to enforce such a standard, you must timely meet the reporting requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:~~

~~(1) The violation:~~

~~(i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and~~

~~(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and~~

~~(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and~~

~~(iv) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and~~

~~(2) Repairs were made as expeditiously as possible when a violation occurred; and~~

~~(3) The frequency, amount, and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and~~

~~(4) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and~~

~~(5) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and~~

~~(6) All emission monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and~~

~~(7) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and~~

~~(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and~~

~~(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis must also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.~~

~~(b) Report. The owner or operator seeking to assert an affirmative defense must submit a written report to the Administrator with all necessary supporting documentation that explains how it has met the requirements set forth in paragraph (a) of this section. This affirmative defense report must be included in the first periodic compliance, deviation report or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.~~

---

## Attachment 2:

### 40 CFR 60 Subpart Da regulatory text with proposed amendments in redline/strikeout

---

Title 40 → Chapter I → Subchapter C → Part 60 → Subpart Da

---

Title 40: Protection of Environment

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

---

**Subpart Da—Standards of Performance for Electric Utility Steam Generating Units**

---

**§ 60.41Da Definitions.**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

**§ 60.48Da Compliance provisions.**

--- clip ---

~~(s) [Reserved] Affirmative defense for exceedance of emissions limit during malfunction. In response to an action to enforce the standards set forth in paragraph §§ 60.42Da, 60.43Da, 60.44Da, and 60.45Da, you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined at 40 CFR 60.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense as specified in paragraphs (s)(1) and (2) of this section. The affirmative defense shall not be available for claims for injunctive relief.~~

~~(1) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (s)(2) of this section, and must prove by a preponderance of evidence that:~~

~~(i) The excess emissions:~~

~~(A) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner; and~~

~~(B) Could not have been prevented through careful planning, proper design, or better operation and maintenance practices; and~~

~~(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and~~

~~(D) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and~~

~~(ii) Repairs were made as expeditiously as possible when the applicable emissions limits were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and~~

~~(iii) The frequency, amount, and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and~~

~~(iv) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and~~

~~(v) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment, and human health; and~~

~~(vi) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and~~

~~(vii) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and~~

~~(viii) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and~~

~~(ix) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.~~

~~(2) Notification. The owner or operator of the affected source experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction or, if it is not possible to determine within two business days whether the malfunction caused or contributed to an exceedance, no later than two business days after the owner or operator knew or should have known that the malfunction caused or contributed to an exceedance, but, in no event later than two business days after the end of the averaging period, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in § 63.9991 to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (s)(1) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45-day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.~~

---

### **Attachment 3:**

#### **40 CFR 60 Subpart Ga regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 60 → Subpart Ga

---

Title 40: Protection of Environment

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

---

#### **Subpart Ga— Standards of Performance for Nitric Acid Plants for Which Construction, Reconstruction, or Modification Commenced After October 14, 2011**

---

#### **§ 60.71a Definitions.**

--- clip ---

Affirmative defense—means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

--- clip ---

**§ 60.74a [Reserved] Affirmative defense for violations of emission standards during malfunction.** In response to an action to enforce the standards set forth in [§ 60.72a](#), you may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at [40 CFR 60.2](#). Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a standard, you must timely meet the reporting requirements in [paragraph \(b\)](#) of this section, and must prove by a preponderance of evidence that:

(1) The violation:

- (i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and
- (ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and
- (iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and
- (iv) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when a violation occurred. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount, and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(4) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected facility was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction

event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.

~~(b) **Report.** The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator with all necessary supporting documentation, that it has met the requirements set forth in [paragraph \(a\)](#) of this section. This affirmative defense report shall be included in the first periodic compliance, deviation report or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.~~

---

#### Attachment 4:

#### 40 CFR 63 Subpart CCC regulatory text with proposed amendments in redline/strikeout

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart CCC

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

#### Subpart CCC—National Emission Standards for Hazardous Air Pollutants for Steel Pickling—HCl Process Facilities and Hydrochloric Acid Regeneration Plants

---

#### § 63.1155 Applicability.

--- clip ---

~~(d) [Reserved]—In response to an action to enforce the standards set forth in this subpart, the owner or operator may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by a malfunction, as defined in [§ 63.2](#). Appropriate penalties may be assessed, however, if the owner or operator fails to meet the burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.~~

~~(1) To establish the affirmative defense in any action to enforce such a standard, the owner or operator must timely meet the reporting requirements of [paragraph \(d\)\(2\)](#) of this section, and must prove by a preponderance of evidence that:~~

~~(i) The violation was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal and usual manner; and could not have been prevented through careful planning, proper design, or better operation and maintenance practices; and did not stem from any activity or event that could have been foreseen and avoided, or~~



planned for; and was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(ii) Repairs were made as expeditiously as possible when exceeded violation occurred. Off shift and overtime labor were used, to the extent practicable to make these repairs; and

(iii) The frequency, amount, and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(iv) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(v) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and

(vi) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(vii) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(viii) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(ix) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using the best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(2) **Report.** The owner of operator seeking to assert an affirmative defense shall submit a written report to the Administrator with all necessary supporting documentation, that it has met the requirements set forth in [paragraph \(d\)\(1\)](#) of this section. This affirmative defense report shall be included in the first periodic compliance, deviation report or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmation defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.

### § 63.1156 Definitions.

--- clip ---

Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

--- clip ---

---

## Attachment 5:

### 40 CFR 63 Subpart GGG regulatory text with proposed amendments in redline/strikeout

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart GGG — National Emission Standards for Pharmaceuticals Production**

---

--- clip ---

~~§ 63.1250(g)(4) [Reserved] In response to an action to enforce the standards set forth in this subpart, an owner or operator may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by a malfunction, as defined in § 63.2. Appropriate penalties may be assessed, however, if owner or operator fails to meet the burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.~~

~~(i) To establish the affirmative defense in any action to enforce such a limit, the owners or operators of a facility must timely meet the notification requirements of paragraph (g)(4)(ii) of this section, and must prove by a preponderance of evidence that:~~

~~(A) The excess emissions were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, or a process to operate in a normal and usual manner; and could not have been prevented through careful planning, proper design, or better operation and maintenance practices; and did not stem from any activity or event that could have been foreseen and avoided, or planned for; and were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;~~

~~(B) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs;~~

~~(C) The frequency, amount, and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;~~

~~(D) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;~~

~~(E) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment, and human health;~~

~~(F) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices;~~

~~(G) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs;~~

~~(H) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and~~

~~(I) The owner or operator has prepared a written root cause analysis, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using the best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.~~

~~(ii) Notification. The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than 2 business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (g)(4)(i) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.~~

--- clip ---

#### **§ 63.1251 Definitions.**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

---

### **Attachment 6:**

#### **40 CFR 63 Subpart II regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart II

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart II — National Emission Standards for Shipbuilding and Ship Repair (Surface Coating)**

---

--- clip ---

~~§ 63.781(d) [Reserved] If you are authorized in accordance with 40 CFR 63.783(e) to use an add-on control system as an alternative means of limiting emissions from coating operations, in response to an action to enforce the standards set forth in this subpart, you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by a malfunction, as defined in 40 CFR 63.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available in response to claims for injunctive relief.~~

~~(1) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (d)(2) of this section, and must prove by a preponderance of evidence that:~~

~~(i) The excess emissions:~~

~~(A) Were caused by a sudden, infrequent and unavoidable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner; and~~

~~(B) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and~~

~~(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and~~

~~(D) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and~~

~~(ii) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and~~

~~(iii) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and~~

~~(iv) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury or severe property damage; and~~

~~(v) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and~~

~~(vi) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and~~

~~(vii) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and~~

~~(viii) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and~~

~~(ix) A written root cause analysis has been prepared, the purpose of which is to determine, correct and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.~~

~~(2) Notification. The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than 2 business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (d)(1) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.~~

## **§ 63.782 Definitions.**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

---

### **Attachment 7:**

#### **40 CFR 63 Subpart JJ regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart JJ

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart JJ — National Emission Standards for Wood Furniture Manufacturing Operations**

---

--- clip ---

~~§ 63.800(j) [Reserved] If the owner or operator, in accordance with 40 CFR 63.804, uses a control system as a means of limiting emissions, in response to an action to enforce the standards set forth in this subpart, you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined in 40 CFR 63.2. Appropriate penalties may be assessed, however, if the respondent fails to meet its burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.~~

~~(1) To establish the affirmative defense in any action to enforce such a limit, the owner or operator must timely meet the notification requirements in paragraph (j)(2) of this section, and must prove by a preponderance of evidence that:~~

~~(i) The excess emissions:~~

~~(A) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner; and~~

~~(B) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and~~

~~(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and~~

~~(D) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and~~

~~(ii) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and~~

~~(iii) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and~~

~~(iv) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and~~

~~(v) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment, and human health; and~~

~~(vi) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and~~

~~(vii) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and~~

~~(viii) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and~~

~~(ix) A written root cause analysis has been prepared, the purpose of which is to determine, correct and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.~~

~~(2) Notification. The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than 2 business days after the initial occurrence of the~~

~~malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (h)(1) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.~~

**§ 63.801(a)**

~~--- clip ---~~

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

~~--- clip ---~~

---

**Attachment 8:**

**40 CFR 63 Subpart JJJ regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart JJJ

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart JJJ — National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins**

---

~~--- clip ---~~

~~§ 63.1310(k) [Reserved] Affirmative defense for violation of emission standards during malfunction. In response to an action to enforce the standards set forth in this subpart, the owner or operator may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at § 63.2. Appropriate penalties may be assessed if the owner or operator fails to meet their burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.~~

~~(1) Assertion of affirmative defense. To establish the affirmative defense in any action to enforce such a standard, the owner or operator must timely meet the reporting requirements in paragraph (k)(2) of this section, and must prove by a preponderance of evidence that:~~

~~(i) The violation:~~

~~(A) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and~~

~~(B) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and~~

~~(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and~~

~~(D) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and~~

~~(ii) Repairs were made as expeditiously as possible when a violation occurred; and~~

~~(iii) The frequency, amount, and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and~~

~~(iv) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and~~

~~(v) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and~~

~~(vi) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and~~

~~(vii) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and~~

~~(viii) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and~~

~~(ix) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.~~

~~(2) Report. The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator, with all necessary supporting documentation, that explains how it has met the requirements set forth in paragraph (k)(1) of this section. This affirmative defense report shall be included in the first periodic compliance report, deviation report, or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance report, deviation report, or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance report, deviation report, or excess emission report due after the initial occurrence of the violation of the relevant standard.~~



**§ 63.1312(b)**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

---

**Attachment 9:**

**40 CFR 63 Subpart KK regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart KK

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart KK — National Emission Standards for the Printing and Publishing Industry**

---

--- clip ---

~~§ 63.820(c) [Reserved] In response to an action to enforce the standards set forth in this subpart, an owner or operator may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by a malfunction, as defined in § 63.2. Appropriate penalties may be assessed, however, if the owner or operator fails to meet the burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.~~

~~(1) To establish the affirmative defense in any action to enforce such a limit, the owners or operators of a facility must timely meet the notification requirements of paragraph (c)(2) of this section, and must prove by a preponderance of evidence that:~~

~~(i) The excess emissions were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, or a process to operate in a normal or usual manner; and could not have been prevented through careful planning, proper design or better operation and maintenance practices; and did not stem from any activity or event that could have been foreseen and avoided, or planned for; and were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;~~

~~(ii) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs;~~

- ~~(iii) The frequency, amount, and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;~~
- ~~(iv) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;~~
- ~~(v) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment, and human health;~~
- ~~(vi) All emissions monitoring and control systems were kept in operation, if at all possible, consistent with safety and good air pollution control practices;~~
- ~~(vii) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs;~~
- ~~(viii) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and~~
- ~~(ix) The owner or operator has prepared a written root cause analysis, the purpose of which is to determine, correct and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using the best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.~~

~~(2) Notification. The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than 2 business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (c)(1) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.~~

#### **§ 63.822(a)**

~~--- clip ---~~

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

~~--- clip ---~~

---

**Attachment 10:**

**40 CFR 63 Subpart MMM regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart MMM

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart MMM — National Emission Standards for Hazardous Air Pollutants for Pesticide Active Ingredient Production**

---

--- clip ---

~~§ 63.1360(k) [Reserved] Affirmative defense for violation of emission standards during malfunction. In response to an action to enforce the standards set forth in this subpart, the owner or operator may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at § 63.2. Appropriate penalties may be assessed if the owner or operator fails to meet their burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.~~

~~(1) Assertion of affirmative defense. To establish the affirmative defense in any action to enforce such a standard, the owner or operator must timely meet the reporting requirements in paragraph (k)(2) of this section, and must prove by a preponderance of evidence that:~~

~~(i) The violation:~~

~~(A) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and~~

~~(B) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and~~

~~(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and~~

~~(D) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and~~

~~(ii) Repairs were made as expeditiously as possible when a violation occurred; and~~

~~(iii) The frequency, amount, and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and~~

~~(iv) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and~~

- ~~(v) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and~~
- ~~(vi) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and~~
- ~~(vii) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and~~
- ~~(viii) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and~~
- ~~(ix) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.~~

~~(2) Report. The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator, with all necessary supporting documentation, that explains how it has met the requirements set forth in paragraph (k)(1) of this section. This affirmative defense report shall be included in the first periodic compliance report, deviation report, or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.~~

### **§ 63.1361 Definitions.**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

--- clip ---

**§ 63.1362(i) Opening of a safety device.** The owner or operator that opens a safety device, as defined in § 63.1361, is not exempt from applicable standards in order to avoid unsafe conditions. If opening a safety device results in the failure to meet any applicable standard, the owner or operator must still comply with the general duty to minimize emissions. If opening a safety device results in a deviation or excess emissions, such events must be reported as specified in § 63.1368(i). ~~If the owner or operator attributes the event to a malfunction and intends to assert an affirmative defense, the owner or operator is subject to § 63.1360(k).~~

--- clip ---

---

**Attachment 11:**  
**40 CFR 63 Subpart N regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart N

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart N — National Emission Standards for Chromium Emissions From Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks**

---

**§ 63.341(a)**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

**§ 63.342(b)(1)** [Reserved] ~~The emission limitations in this section apply during tank operation as defined in § 63.341, and during periods of startup and shutdown as these are routine occurrences for affected sources subject to this subpart. In response to an action to enforce the standards set forth in this subpart, the owner or operator may assert a defense to a claim for civil penalties for violations of such standards that are caused by a malfunction, as defined in 40 CFR 63.2. Appropriate penalties may be assessed, however, if the owner or operator fails to meet the burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief. (i) To establish the affirmative defense in any action to enforce such a standard, the owner or operator must timely meet the reporting requirements of paragraph (b)(1)(ii) of this section, and must prove by a preponderance of evidence that:~~

~~(A) The violation was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal and usual manner; and could not have been prevented through careful planning, proper design or better operation and maintenance practices; and did not stem from any activity or event that could have been foreseen and avoided, or planned for; and was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and (B) Repairs were made as expeditiously as possible when exceeded violation occurred. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and~~

- ~~(C) The frequency, amount and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and~~
- ~~(D) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and~~
- ~~(E) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and~~
- ~~(F) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and~~
- ~~(G) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and~~
- ~~(H) At all times, the affected sources were operated in a manner consistent with good practices for minimizing emissions; and~~
- ~~(I) A written root cause analysis was prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using the best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.~~
- ~~(ii) Report. The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator with all necessary supporting documentation, that it has met the requirements set forth in paragraph (i) of this section. This affirmative defense report shall be included in the first periodic compliance, deviation report or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmation defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.~~

---

### **Attachment 12:**

#### **40 CFR 63 Subpart PPP regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart PPP

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

#### **Subpart PPP — National Emission Standards for Hazardous Air Pollutant Emissions for Polyether Polyols Production**

---

--- clip ---

~~§ 63.1420(i) [Reserved] Affirmative defense for violation of emission standards during malfunction. In response to an action to enforce the standards set forth in this subpart, the owner or operator may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at § 63.2. Appropriate penalties may be assessed if the owner or operator fails to meet their burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.~~

~~(1) Assertion of affirmative defense. To establish the affirmative defense in any action to enforce such a standard, the owner or operator must timely meet the reporting requirements in paragraph (i)(2) of this section, and must prove by a preponderance of evidence that:~~

~~(i) The violation:~~

~~(A) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and~~

~~(B) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and~~

~~(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and~~

~~(D) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and~~

~~(ii) Repairs were made as expeditiously as possible when a violation occurred; and~~

~~(iii) The frequency, amount, and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and~~

~~(iv) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and~~

~~(v) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and~~

~~(vi) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and~~

~~(vii) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and~~

~~(viii) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and~~

~~(ix) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.~~

~~(2) Report. The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator, with all necessary supporting documentation, that explains how it has met the requirements set forth in paragraph (i)(1) of this section. This affirmative defense report shall be included in the first periodic compliance report, deviation report, or excess emission report otherwise~~

~~required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.~~

**§ 63.1423(b)**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

---

**Attachment 13:**

**40 CFR 63 Subpart S regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart S

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart S — National Emission Standards for Hazardous Air Pollutants from the Pulp and Paper Industry**

---

**§ 63.441**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

**§ 63.456 [Reserved] Affirmative defense for violation of emission standards during malfunction.**



In response to an action to enforce the standards set forth in §§ 63.443(e) and (d), 63.444(b) and (e), 63.445(b) and (e), 63.446(c), (d), and (e), 63.447(b) or § 63.450(d), the owner or operator may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed, however, if the owner or operator fails to meet the burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a standard, the owner or operator must timely meet the reporting requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The violation:

(i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner, and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when a violation occurred. Off shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(4) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.

(b) Report. The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. This affirmative defense report shall be included in the first

~~periodic compliance, deviation report or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.~~

---

#### Attachment 14:

#### 40 CFR 63 Subpart TTT regulatory text with proposed amendments in redline/strikeout

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart TTT

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

#### Subpart TTT — National Emission Standards for Hazardous Air Pollutants for Primary Lead Smelting

---

##### § 63.1542 Definitions.

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

--- clip ---

§ 63.1545(d) Each owner or operator of an existing primary lead processor must comply with the requirements of §§ 63.1547(g)(1) and (2), ~~63.1551~~, and Table 1 of Subpart TTT of Part 63 on November 15, 2011.

§ 63.1551 [Reserved] ~~Affirmative defense for exceedance of emission limit during malfunction. In response to an action to enforce the standards set forth in this subpart you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed, however, if you fail to meet your~~

burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

~~(a) Affirmative defense. To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:~~

~~(1) The excess emissions:~~

~~(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner, and~~

~~(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and~~

~~(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and~~

~~(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and~~

~~(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and~~

~~(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and~~

~~(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and~~

~~(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and~~

~~(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and~~

~~(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and~~

~~(8) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and~~

~~(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.~~

~~(b) Notification. The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standards in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in~~

paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45-day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.

---

**Attachment 15:**

**40 CFR 63 Subpart UUUUU regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart UUUUU

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart UUUUU (5U) — National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units**

---

**§ 63.10042 What definitions apply to this subpart?**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

---

**Attachment 16:**

**40 CFR 63 Subpart VVVVVV regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart VVVVVV

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

**Subpart VVVVVV (6V) — National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources**

---

**§ 63.11501 What are the notification, recordkeeping, and reporting requirements, and how may I assert an affirmative defense for violation of emission standards during malfunction?**

--- clip ---

(e) [Reserved] Affirmative defense for violation of emission standards during malfunction. In response to an action to enforce the standards set forth in §§ 63.11495 through 63.11499, you may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(1) To establish the affirmative defense in any action to enforce such a standard, you must timely meet the notification requirements in paragraph (e)(2) of this section, and must prove by a preponderance of evidence that:

(i) The violation:

(A) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and

(B) Could not have been prevented through careful planning, proper design, or better operation and maintenance practices; and

(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(D) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(ii) Repairs were made as expeditiously as possible when a violation occurred. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(iii) The frequency, amount, and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(iv) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(v) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment and human health; and

(vi) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(vii) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(viii) At all times, the affected CPMU was operated in a manner consistent with good practices for minimizing emissions; and

(ix) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at

issue. The analysis must also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.

(2) Report. If you seek to assert an affirmative defense, you must submit a written report to the Administrator, with all necessary supporting documentation, that you have met the requirements set forth in paragraph (e)(1) of this section. This affirmative defense report must be included in the first periodic compliance report, deviation report, or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance report, deviation report, or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance report, deviation report, or excess emission report due after the initial occurrence of the violation of the relevant standard.

### § 63.11502(b)

--- clip ---

Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

---

## Attachment 17:

### 40 CFR 63 Subpart X regulatory text with proposed amendments in redline/strikeout

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart X

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

### Subpart X — National Emission Standards For Hazardous Air Pollutants From Secondary Lead Smelting

---

### § 63.542 Definitions.

--- clip ---

Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

--- clip ---

~~§ 63.552 [Reserved] Affirmative defense to civil penalties for exceedance of emissions limit during malfunction.~~

~~In response to an action to enforce the standards set forth in this subpart, you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined at § 63.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.~~

~~(a) Affirmative defense. To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:~~

~~(1) The excess emissions:~~

~~(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner.~~

~~(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices.~~

~~(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for.~~

~~(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance.~~

~~(2) Repairs were made as expeditiously as possible when the applicable emissions limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs.~~

~~(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions.~~

~~(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage.~~

~~(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health.~~

~~(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices.~~

~~(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs.~~

~~(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions.~~

~~(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.~~

~~(b) Notification. The owner or operator of the affected source experiencing an exceedance of its emissions limit(s) during a malfunction, shall notify the Administrator by telephone or facsimile~~

~~transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction, it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense, shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.~~

---

### **Attachment 18:**

#### **40 CFR 63 Subpart Y regulatory text with proposed amendments in redline/strikeout**

---

Title 40 → Chapter I → Subchapter C → Part 63 → Subpart Y

---

Title 40: Protection of Environment

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

---

#### **Subpart Y — National Emission Standards for Marine Tank Vessel Loading Operations**

---

##### **§ 63.561 Definitions.**

--- clip ---

~~Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.~~

--- clip ---

--- clip ---

~~§ 63.562(e)(7) In response to an action to enforce the standards set forth in this subpart, you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by a malfunction, as defined in § 63.2. Appropriate penalties may be assessed, however, if the respondent fails to meet its burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.~~



(i) To establish the affirmative defense in any action to enforce such a limit, the owners or operators of a facility must timely meet the notification requirements of paragraph (e)(7)(ii) of this section, and must prove by a preponderance of evidence that:

(A) The excess emissions were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, or a process to operate in a normal and usual manner; and could not have been prevented through careful planning, proper design or better operation and maintenance practices; and did not stem from any activity or event that could have been foreseen and avoided, or planned for; and were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(B) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs;

(C) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(D) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(E) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment, and human health;

(F) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices;

(G) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs;

(H) At all times, the affected facility was operated in a manner consistent with good practices for minimizing emissions; and

(I) The owner or operator has prepared a written root cause analysis, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using the best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(ii) Notification. The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than 2 business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (e)(7)(i) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or

operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.

---

END OF FILE