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# Removal of Affirmative Defense Provisions/NESHAP: U.S. Environmental Protection Agency Proposal Addressing Oil and Natural Gas Production/Natural Gas Transmission Storage Source Categories

12/05/2023

The United States Environmental Protection Agency (“EPA”) published in the December 1st Federal Register proposed amendments to the Clean Air Act National Emission Standards for Hazardous Air Pollutants for the oil and gas industry. See 88 Fed. Reg. 83889.

EPA is proposing to remove the affirmative defense provisions of the National Emission Standards for Hazardous Air Pollutants (“NESHAPs”) for the following source categories:

- Oil and Natural Gas Production
- Natural Gas Transmission and Storage

The referenced provisions allow owners and operators to assert an affirmative defense to civil penalties for violations caused by malfunctions. See 40 CFR 63.762 and 63.1672.

Malfunctions are defined as:

. . . sudden, infrequent, and not reasonably preventable failure of air pollutant control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner.

EPA states that under the affirmative defense provision a source that demonstrates in a judicial or administrative proceeding that it had met the requirements of this defense then civil penalties would not be assessed.

The agency discusses the United States Court of Appeals for the District of Columbia Circuit decision in 2004 that vacated the affirmative defense in one of the Clean Air Act Section 112 NESHAPs. See *Natural Resource Defense Council v. EPA*, 749 F.3d 1055. The decision is described as determining that EPA lacked authority to establish an affirmative defense for private civil suits. It is further stated to have held that under the Clean Air Act the authority to determine civil penalty amounts was specifically provided to the courts as opposed to EPA.

This judicial decision is cited as EPA's reason for proposing to remove the affirmative defense provisions for these NESHAP source categories.

The federal agency further states:

. . . if a source is unable to comply with emissions standards as a result of a malfunction, the EPA may use its case-by-case enforcement discretion to provide flexibility, as appropriate. Further, as the D.C. Circuit recognized, in a citizen enforcement action brought under CAA section 304(a), the court has the discretion to consider any defense raised and determine whether penalties are appropriate.

A copy of the proposed rule can be downloaded [here](#).