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New Source Performance Standards/National Emission Standards for Hazardous Air Pollutants: U.S. Environmental Protection Agency Proposed Rule Removing Affirmative Defense Provisions from 18 Categories

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The United States Environmental Protection Agency (“EPA”) issued a pre-publication version of a proposed rule that would remove affirmative defense provisions from certain Clean Air Act New Source Performance Standards (“NSPS”) and National Emission Standards for Hazardous Air Pollutants (“NESHAP”).

NSPS and NESHAP categories are found in 40 C.F.R. Parts 60 and 63 Rules, respectively.

“Affirmative defense” provisions are components of a number of NSPS and NESHAPs.

EPA generally describes an “affirmative defense” in the context of these rules as 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.

The affirmative defense EPA is addressing is when a source has a malfunction event that results in non-compliance with an applicable NSPS or NESHAP provision. Malfunctions in such context are generally defined as:

...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.

EPA cites as its rationale for the proposed rule the District of Columbia Circuit Court of Appeals decision vacating a portion of a Section 112 regulation pertaining to the affirmative defense in the NESHAP for the Portland cement manufacturing industry. See *NRDC v. EPA* 749 F.3d 1055 (2014).

The D.C. Circuit is stated to have determined that EPA lacked authority to establish an affirmative defense for private civil suits. The Clean Air Act is argued to vest the authority over private suits exclusively with the courts. Therefore, EPA has been removing affirmative defense provisions from various Clean Air Act

NESHAP categories. Further, the agency has determined that the D.C. Circuit's rationale also applies to affirmative defense provisions in the Section 111 NSPS rules.

The source categories included in the proposed rule for removal of affirmative defense provisions include:

- NSPS Section 111
- Electric utilities steam generating units (boilers)
- Kraft pulp mills
- Nitric acid plants
- NESHAP Section 112
- Chemical manufacturing area sources
- Chromium electroplating
- Coal-and-oil-fired electric utility steam generating units
- Marine vessel loading operations
- Pesticide active ingredient production
- Pharmaceuticals production
- Polyether polyols production
- Polymers & resins IV
- Primary lead processing
- Printing and publishing surface coating
- Pulp and paper industry
- Secondary lead smelters
- Ship building and ship repair surface coating
- Steel pickling
- Wood furniture surface coating

A copy of the pre-publication proposed rule can be found [here](#).