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Oil and Natural Gas Production Facility/Natural Gas Transmission/Storage Facility NESHAP Categories: U.S. Environmental Protection Agency Final Rule Removing Affirmative Defense Provisions

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The United States Environmental Protection Agency (“EPA”) issued a final rule in the October 22nd Federal Register that removes the emergency defense provisions in the Clean Air Act National Emissions Standards for Hazardous Air Pollutants (“NESHAP”) for the following source categories:

- Oil and natural gas production.
- Natural gas transmission and storage.

See 89 Fed. Reg. 84291.

The NAICS affected by this final rule include:

- Crude Petroleum and Natural Gas Extraction (211111).
- Natural Gas Liquid Extraction (211112).
- Natural Gas Distribution of Crude Oil (221210).
- Pipeline Distribution of Crude Oil (486110).
- Pipeline Transportation of Natural Gas (486210).

“Affirmative defense” provisions have been components of a number of Clean Air Act NESHAPs and New Source Performance Standards.

EPA has generally described “affirmative defense” in the context of such rules as meaning:

...in the context of an enforcement proceeding, a response or defense put forward by 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 has addressed is when a source has a malfunction that results in non-compliance with an applicable 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 has cited as its rationale for this rule the District of Columbia Circuit Court of Appeals decision vacating a portion of a Section 112 regulation pertaining to an affirmative defense in the NESHAP for the Portland cement manufacturing industry. See *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir., 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 defenses from 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 New Source Performance Standard rules.

The preamble to the final rule notes that a commenter requested that EPA retain the affirmative defense provisions in the Oil and Gas NESHAP. The commenter argued that the previously referenced decision in *NRDC v. EPA* does not compel the agency to remove the affirmative defense at issue in that decision provided defense against civil penalties after liability had been established. Therefore, the commenter argued that in contrast, the affirmative defense in the Oil and Gas category provides for a defense against liability as opposed to civil penalties. Therefore, it is stated to be unaffected by the *NRDC* decision. It further argued that:

...to the extent the EPA is asserting that there is no distinction between an affirmative defense to liability and an affirmative defense to penalties at issue in *NRDC*, such a position is "ill-considered" and "wholly unsupported."

The EPA rejects both this argument raised by the commenter and others. It responds that the commenter's interpretation of the affirmative defense in the Oil and Gas NESHAP is incorrect as it contradicts the clear language of the affirmative defense in the relevant NESHAPs. The agency quotes language stating that:

...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.

This is stated to be the same wording as the affirmative defense in the *NRDC* decision.

A copy of the Federal Register notice can be downloaded [here](#).