



Startup Shutdown Malfunction (SSM) & Affirmative Defense Policy Update

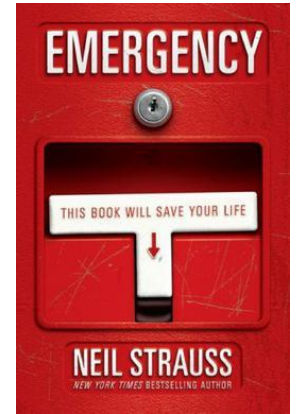
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Outline

- ▶ APC&E Rule 19, Rule 19.601 UPSET CONDITIONS
- ▶ APC&E Rule 19, Rule 19.602 EMERGENCY CONDITIONS
- ▶ SSM/Affirmative Defense Policy Update



Rule 19.601 Upset Conditions

- ▶ Defined as exceedences of applicable emission limitations lasting 30 or more minutes, in the aggregate, during a 24-hour period, unless otherwise specified in an applicable permit or rule.
 - *Minutes? How do I measure/calculate minutes of emissions?*
 - *Only units with CEMS can determine minutes of emissions*
 - *Otherwise permittees typically report if hourly emissions (lb/hr), calculated or measured, exceed the limit*
- ▶ All upset conditions, resulting in violation...shall be reported...
 - *You must report!*
- ▶ Any source exceeding an emission limit...shall be deemed in violation of said Plan or permit and shall be subject to enforcement action.
 - *Guilty, until proven innocent.*

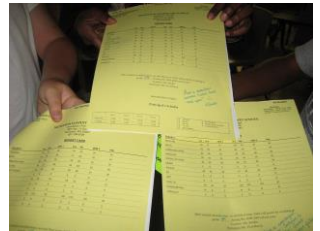


Rule 19.601 Upset Conditions (cont'd)

The Department may forego enforcement action for federally regulated air pollutant emissions given that the person responsible for the source of the excess emissions does the following:



- Demonstrates to the satisfaction of the Department that the emissions resulted from:
 - ◆ **equipment malfunction or upset** and are **not the result of negligence or improper maintenance**; or physical constraints on the ability of a source to comply with the emission standard, limitation or rate during startup or shutdown;
 - ◆ And that **all reasonable measures** have been taken to immediately minimize or eliminate the excess emissions.
- ▶ Reports such occurrence or upset or breakdown of equipment to the Department by the end of the next business day...



Rule 19.602 Emergency Conditions

- ▶ Covers situations that are “sudden and reasonably unforeseeable events beyond the control of the source...”
 - Natural disasters
 - Power outages (*unless they are common and foreseeable?*)
- ▶ Only addresses “technology-based emission limitation”, e.g. NSPS, BACT, MACT
- ▶ Protection from enforcement/penalties? Rule 19, Sec. 19.602(A)

(A) An emergency constitutes a complete affirmative defense to an action brought for non-compliance with such technology-based limitations if the following conditions are met. The affirmative defense of emergency shall demonstrate through properly signed contemporaneous operating logs, or such other relevant evidence that:



Affirmative Defense and 2015 SSM SIP Call

- ▶ Affirmative defense for Excess Emissions from malfunctions not permissible [NRDC v. EPA, April 2014]
- ▶ 2015 SSM SIP Call from US EPA
 - Arkansas 1 of 36 states declared as having “substantially inadequate” SSM rules in their SIP
 - ◆ *Regulation 19.602 Emergency Conditions* was named (“regulation” not “rule” back then)
 - ◆ “complete affirmative defense” is impermissible or too broad
- ▶ DEQ initiated rulemaking Apr 2016 but withdrawn Sep 2018
 - Many legal challenges filed
 - Note that President Trump inaugurated Jan 2017; EPA Policy shifted



Reversal of SSM/Affirmative Defense Policy?

- ▶ **Apr 2017:** Court grants EPA's request to postpone the legal challenges
 - "...prior positions taken by the Agency to the SSM Action may not necessarily reflect its ultimate conclusions..."
- ▶ **Jan 2020:** EPA R6 withdraws inadequacy finding for Texas SIP
- ▶ **Apr 2020:** EPA R4 adopts alternative SSM policy, approves North Carolina SIP, withdraws NC from SIP Call
- ▶ **Oct 9 2020:** New EPA policy *Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans*
 - Restates positions from TX and NC SIP actions, reverses 2015 policy
 - *BUT* subsequent actions will consider the 2015 SIP call w.r.t. each state SIP
 - Individual state SIP actions subject to Notice+Comment and legal review
- ▶ **Jan 2021:** A new federal (EPA) administration takes over – *Stay tuned!*



*Thank You for attending the
2020 AEF (Virtual) Convention!*



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