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Environmental Protection Agency
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Washington, DC 20460

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The Coalition for Responsible Waste Incineration (CRWI) appreciates the opportunity to submit comments on *Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program: Proposed rule*. 81 FR 38,645 (June 14, 2016). CRWI is a trade association comprised of 25 members representing companies that own and operate hazardous waste combustors and companies that provide equipment and services to the hazardous waste combustion industry.

Attached are specific comments on the proposed changes.

Thank you for the opportunity to comment on this proposed rule. If you have any questions, please contact me at (703-431-7343 or mel@crwi.org).

Sincerely yours,

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Specific Comments

EPA has long recognized that periods of startup, shutdown and malfunction (SSM) are much different from normal, steady-state operations. Most regulations are written to control emissions during steady-state operations. Since this represents the majority of the time a facility is in operation, most of the work on controlling emissions has concentrated on what happens during steady-state operations. However, early into the process, EPA recognized that transient periods will occur. Some are well defined in time and space, such as startup and shutdowns. The time and design for a startup can be planned well in advance. Likewise, most shutdowns can be planned in advance. However, some shutdowns occur in an emergency situation and the facility may not have the luxury of a long planning period. Moreover, even planned startups and shutdowns present conditions that render it difficult, if not impossible, to avoid exceeding operating parameter limits. Hence, the startup and shutdown exemptions are absolutely necessary. As for malfunctions, despite even the best design and maintenance, equipment will break and malfunctions will occur. Over the past 25 plus years, EPA has been evolving a strategy on how to handle these transient periods.

The official record begins in 1982 when EPA distributed a memorandum[1] from Kathleen Bennett, then Assistant Administrator for the Office of Air, Noise, and Radiation. This memo was in response to a request for clarification of EPA's policy on excessive emissions during startup, shutdown, maintenance, and malfunctions. Excessive emission provisions had been included in a number of State Implementation Plans (SIP) approved by the Agency in 1971 and 1972. Many of these plans were approved with fairly broad provisions for controlling excess emissions during these transitional periods. In 1978, EPA adopted a policy that defined all excess emissions as violations (Bennett Memo). However, they allowed states the discretion of deciding whether to take enforcement action on those violations. One problem with these policies was that there were no clear definitions and limitations of when to shield excess emissions. It was difficult to tell when the excess emissions were due to poor maintenance or design versus unavoidable malfunctions. In an attempt to rectify this, the memo from Assistant Administrator Bennett defined specific criteria that needed to be met when applying enforcement discretion for excess emissions during these transitional periods. Although not specifically labeled as such, this was the first delineation of an affirmative defense.

When EPA proposed the Part 70 regulations in 1991, it did not include provisions in state permits for handling emergencies that resulted in deviations. EPA received comments on the proposed rule requesting that some provisions be made for handling emergencies. Based on these requests, the Agency included the affirmative defense provisions that are currently in 40 CFR 70.6(g). EPA stated that these provisions were modeled after the NPDES provisions (57 FR 32,279, July 21, 1992). In the preamble for

[1] Bennett, K.M., Memo. *Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions*. September 28, 1982

this rule, EPA noted that the courts had ruled in favor of upset defenses for certain technology based standards (see *Marathon Oil Co. v. EPA* 565 F.2d 1253, 1273 (9th Cir. 1977)) but had decided that enforcement discretion was adequate for others (*Corn Refiners Ass'n, Inc. v. Costle,* 594 F.2d 1223, 1226 (8th Cir. 1979); *Weyerhaeuser Co. v. Castle, 590* F.2d 1011, 1056-58 (D.C. Cir. 1978)). The Agency also concluded that an upset defense would not be appropriate for risk based standards. In 1996, the Agency duplicated these requirements in the federal permits (61 FR 34,202, July 1, 1996).

In 2010, EPA approved Texas' SIP that allowed the use of an affirmative defense for unplanned startup, shutdown, and malfunction events but did not approve the use of an affirmative defense for planned startups and shutdowns. Both industry and the environmental groups challenged this action in the U.S. Court of Appeals for the Fifth Circuit. The environmental groups challenged the use of an affirmative defense for unplanned events while industry challenged the failure to use an affirmative defense for planned events. In *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013), the court denied all petitions allowing EPA's selective use of affirmative defenses to stand. This was the first ruling where an affirmative defense was challenged and the Fifth Circuit sided with the Agency on their use of an affirmative defense for unplanned events.

The use of an affirmative defense was subsequently challenged in the U.S. Court of Appeals for the District of Columbia Circuit (*NRDC* v. *EPA*, 749 F.3d 1055 (D.C. Cir. 2014)) where the environmental groups argued that the use of an affirmative defense was prohibited for citizen suits by the statute. The court agreed and vacated the affirmative defense provisions for the Portland Cement MACT rule (Part 63, subpart LLL). Based on this ruling, EPA is proposing to remove the emergency provisions in 40 CFR 70.6(g) and 71.6(g). In the preamble of the proposed rule (81 FR 38,648), the Agency states:

> In the 2014 *NRDC* v. *EPA* [9] case, the United States Court of Appeals for the D.C. Circuit vacated an affirmative defense provision applicable to malfunction events. In 2010, the EPA included an affirmative defense within its National Emission Standards for Hazardous Air Pollutants (NESHAP) for Portland cement facilities, promulgated under CAA section 112.[10] This provision created an affirmative defense that sources could assert in civil enforcement proceedings when violations of emission limitations occurred because of qualifying unavoidable malfunctions. The D.C. Circuit held that this affirmative defense provision exceeded the EPA's statutory authority and that only the courts have the authority to decide whether to assess penalties for violations in civil suits. As the court explained:
>
> > By its terms, Section 304(a) clearly vests authority over private suits in the *courts,* not EPA. As the language of the statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are "appropriate." By

> contrast, EPA's ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court. . . . [U]nder this statute, deciding whether penalties are "appropriate" in a given private civil suit is a job for the courts, not for EPA.[11]

> The D.C. Circuit therefore concluded that the EPA lacked the authority to create an affirmative defense in private civil suits that would purport to alter the jurisdiction of the court to assess civil penalties for violations. Although this case was based on EPA regulations promulgated under CAA section 112, the court's holding was not based on section 112, but rather on sections 304(a) and 113(e)(1). Therefore, and as discussed further in Section IV of this document, the EPA interprets the decision to be relevant to all similar affirmative defense provisions, such as those found in part 70 and part 71, that may interfere with the authority of courts to assess penalties or to impose other remedies authorized in CAA section 113(b) in civil enforcement suits. This proposed rulemaking seeks to ensure that the EPA's part 70 and part 71 regulations are consistent with the enforcement structure of the CAA in accordance with the reasoning of the *NRDC* v. *EPA* decision.[12]

Footnotes omitted.

A key point the Agency fails to mention in the preamble of this proposed rule is that at the end of the *NRDC* decision, the District of Columbia court specifically pointed to *Luminant* and stated "We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan." Thus the Court of Appeals for the District of Columbia Circuit specifically separated the *NRDC* ruling from the *Luminant* ruling.

CRWI encourages the Agency to reconsider its decision to remove the affirmative defense provisions in paragraphs 70.6(g) and 71.6(g) for the following reasons:

1. The reasons for including an affirmative defense in the state and federal permits program have sound logical and practical bases that the Agency has developed over the past 25 plus years;

2. We believe that the Agency is inappropriately applying the *NRDC* ruling to all uses of an affirmative defense;

3. The *Luminant* ruling more directly points to the use of an affirmative defense for an emergency since an emergency is an "unplanned event;" and

4. The rationale for planned startup and shutdown exemptions is sound and necessary as exceedances are unavoidable.

Detailed discussion on these reasons.

1. The Agency has a logical and practical basis for its affirmative defense policy.

   As stated earlier, the first formal documentation of the use of an "affirmative defense" provision was developed by Assistant Administrator Kathleen Bennett in 1982. This was followed up with a memo[2] from Steven Herman, then Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, then Assistant Administrator for Air and Radiation, that further defined the criteria required for an affirmative defense. These criteria were refined and modified over the next several years and were codified in at least 13 final rules between 2010 and 2014. EPA obviously spent a great deal of time developing and implementing the concept over a larger number of rules. Thus, the Agency must have believed that the concept of an affirmative defense was both logical and practical.

2. The NRDC ruling does not apply to all uses of an affirmative defense.

   CRWI believes that section 304(a) of the Clean Air Act makes it clear that the district court has the authority to assess civil penalties for private (citizen) suits. The NRDC made this section of the Clean Air Act the center of their arguments against the use of an affirmative defense in the Portland Cement MACT (*NRDC v. EPA*) and the U.S. Appeals Court for the District of Columbia Circuit agreed with them. However, the process of assessing civil penalties under section 304 (citizen suits) is much different from assessing civil penalties under federal authority under section 113. When an individual or group chooses to file a citizen suit under section 304, they must do so in the district court. EPA or the local permitting authority is not involved in the process. The individual or group will allege violations and the facility is allowed to defend itself. As the court noted in *NRDC*, EPA's role in such an action is limited to being an intervenor (*NRDC* at 16).

   By contrast, under section 113(b) or (d), EPA initiates the enforcement. Here the Agency is given discretion on how and whether to initiate any enforcement action ((b) – "The Administrator shall, … as appropriate, commence a civil action…" (d) – "The Administrator may issue an administrative order…"). Under 113, the agency is allowed to negotiate injunctive relief, civil penalties, and supplemental environmental projects as a way of addressing alleged violations. Most of the time, the parties come to an agreement and the courts are never involved in those negotiations. It is only in the case where the parties cannot agree that courts become involved. Section 113(b) acknowledges this fact: "Any action under this subsection may be brought in the district court…" As a routine matter, the Agency uses "enforcement

[2] Herman, S.A., and R. Perciasepe. Memo. *State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown*. September 20, 1999.

discretion" to decide which alleged violations to pursue and which ones do not merit enforcement action. Often that decision is made on the same principles as codified in an affirmative defense.

EPA has interpreted the *NRDC* ruling as if it applies to all circumstances where an affirmative defense is used. We believe what the court actually said is that it is not allowed under a citizen suit. In the preamble of this proposed rule, the Agency only uses part of the court language from the ruling to justify its decision. We believe if the full two paragraphs (*NRDC* at 16) from the opinion are examined more closely, it becomes clear that the court is only addressing citizen or private suits and not all uses of an affirmative defense.

> Section 304(a) creates a private right of action, and as the Supreme Court has explained, "the Judiciary, not any executive agency, determines 'the scope' – *including the available remedies* – 'of judicial power vested by' statutes establishing private rights of action." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013) (emphasis added) (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)). Section 304(a) is in keeping with that principle. By its terms, Section 304(a) clearly vests authority over private suits in the *courts*, not EPA. As the language of the statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are "appropriate." By contrast, EPA's ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court. *See* 42 U.S.C. § 7413(d)(2)(B) (Administrator may "compromise, modify, or remit, with or without conditions, any administrative penalty"). To the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor. *See id.* § 7604(c)(2). EPA also of course could seek to participate as an amicus curiae.
>
> EPA argues that its proposed affirmative defense simply fleshes out the statutory requirement that penalties be applied only when "appropriate." But under this statute, deciding whether penalties are "appropriate" in a given private civil suit is a job for the courts, not for EPA. When a private suit is filed, the defendant can argue that penalties should not be assessed, based on the factors in Section 113(e)(1) such as the defendant's "full compliance history and good faith efforts to comply." *Id.* § 7413(e)(1). EPA can support that argument as intervenor or amicus, to the extent such status is deemed appropriate by the relevant court. But under the statutory scheme, the decision whether to accept the defendant's argument is for the court in the first instance, not for EPA.

CRWI believes that EPA's view of the ruling is too broad and the *NRDC* ruling does not require the Agency to remove all affirmative defense language. While we agree that it applies to private or citizen suits, the *NRDC* ruling does not require it to be applied to all uses of an affirmative defense. In fact at the end of the opinion

(footnote 2), the court acknowledged a U.S. Appeals Court for the Firth Circuit partially upheld the use of an affirmative defense in State Implementation Plans and specifically stated that this issue was not being addressed in the *NRDC* opinion. Here the court states:

> The Fifth Circuit recently upheld EPA's partial approval of an affirmative defense provision in a State Implementation Plan. *See Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013). We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan.

3. The *Luminant* ruling is a more appropriate basis for the use of an affirmative defense for emergencies.

   When EPA approved Texas' SIP in 2010, they allowed an affirmative defense for unplanned startup, shutdown, and malfunction events. The Fifth Circuit court denied the petition challenging this, stating:

   > Consequently, we hold that the EPA did not act arbitrarily or capriciously in its partial approval of the SIP revision. The above-mentioned reasons and policy choices provided by the EPA for approving the affirmative defense for unplanned SSM activity "conform to minimal standards of rationality"; therefore, they are reasonable and will be upheld by this court. *Tex. Oil & Gas Ass'n*, 161 F.3d at 934.

   "Unplanned SSM activity" would include emergencies. This is directly on point for the provisions in paragraphs 70.6(g) and 71.6(g) where the *NRDC* ruling is pointed more toward the application of an affirmative defense to private or citizen suits. Thus we believe that the Agency is not required to remove these two paragraphs and encourage them to leave them in.

4. Planned Startup and Shutdown Events.

   The Agency should not limit the exemption to only "unplanned" or "emergency" events as decades of data exist to support the rationale that the exceedance of operating parameter limits are near certainties during such abnormal operating conditions. Penalizing facilities for failing to meet limits that are designed around normal operations, when they operate in extreme conditions, is both unfair and contrary to the sound policy upon which the exemption was based.

Finally, we would like to note that there is another lawsuit currently being considered in the U.S. Court of Appeals for the District of Columbia Circuit on the use of affirmative defenses as a part of state implementation plans. We suggest that, at the very least, the Agency wait until the court rules on these challenges before finalizing this rule.

For all of the reasons stated above, CRWI encourages the Agency to retain the affirmative defense language in paragraphs 70.6(g)(2) and 71.6(g)(2) with one small modification that will make it compliant with the *NRDC* ruling. The suggested change (underlined) is as follows:

> "An emergency constitutes an affirmative defense to an action under section 113(d) and (e) of the Act brought…"