



VIA CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

June 17, 2014

Gina McCarthy
Administrator
Environmental Protection Agency
1101A EPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: Petition to Revise Air Emissions Regulations Containing Affirmative Defense

Dear Administrator McCarthy:

This is a petition under *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), and for rulemaking. The party submitting this petition is Sierra Club, 85 Second St., 2nd Floor, San Francisco, CA 94105, (415) 977-5500. By this petition, Sierra Club requests that EPA revise the regulations it promulgated under sections 111, 112, and 129 of the Clean Air Act to delete the affirmative defense against civil penalties that it included in them. Those regulations are listed below for your convenience.

I. BACKGROUND

Although the Clean Air Act directs district courts, not EPA, to determine the amount of civil penalties, if any, to assess when a stationary source of air pollution violates an emission standard, 42 U.S.C. §7604(a); *see also id.* §7413(e) (providing list of factors district court must consider in determining what penalties to assess), EPA has been inserting into many of its regulations an affirmative defense against civil penalties when plants claim a violation of emission standards resulted from a malfunction and they meet certain EPA-created conditions. EPA first inserted the affirmative defense into the regulations governing emissions of hazardous air pollutants from Portland cement manufacturing plants. *See* 75 Fed. Reg. 54,970 (Sept. 9, 2010); *see also* 78 Fed. Reg. 10,006 (Feb. 12, 2013) (reaffirming and slightly amending affirmative defense). Several environmental organizations, including Sierra Club, challenged EPA's insertion and retention of the affirmative defense in the cement plants rule. *See Natural Res. Def. Council ("NRDC") v. EPA*, No. 10-1371, 2014 WL 1499825 (D.C. Cir. Apr. 18, 2014).

The agency has since inserted the affirmative defense into the following rules promulgated under Clean Air Act §§111, 112, and 129, 42 U.S.C. §§7411, 7412, and 7429, that govern emissions from numerous categories of sources:

New Source Performance Standards (§111 only):

- Subpart Da: Electric Utility Steam Generating Units
 - 40 C.F.R. §60.48Da
 - 77 Fed. Reg. 9304 (Feb. 16, 2012)
- Subpart Ga: Nitric Acid Plants for Which Construction, Reconstruction, or Modification Commenced After October 14, 2011
 - 40 C.F.R. §60.74a
 - 77 Fed. Reg. 48,433 (Aug. 14, 2012)
- Subpart BBa: Kraft Pulp Mill Affected Sources for Which Construction, Reconstruction, or Modification Commenced After May 23, 2013
 - 40 C.F.R. §60.286a
 - 79 Fed. Reg. 18,952 (Apr. 4, 2014)
- Subpart OOOO: Crude Oil and Natural Gas Production, Transmission and Distribution
 - 40 C.F.R. §60.5415
 - 78 Fed. Reg. 58,416 (Sept. 23, 2013); 77 Fed. Reg. 49,490 (Aug. 16, 2012)

Incinerator New Source Performance Standards & Emission Guidelines (§§111, 129):

- Subpart CCCC: Commercial and Industrial Solid Waste Incineration Units (new)
 - 40 C.F.R. §60.2120
 - 78 Fed. Reg. 9112 (Feb. 7, 2013); 76 Fed. Reg. 15,704 (Mar. 21, 2011)
- Subpart DDDD: Commercial and Industrial Solid Waste Incineration Units (existing)
 - 40 C.F.R. §60.2685
 - 78 Fed. Reg. 9112 (Feb. 7, 2013); 76 Fed. Reg. 15,704 (Mar. 21, 2011)
- Subpart LLLL: New Sewage Sludge Incineration Units
 - 40 C.F.R. §60.4861
 - 76 Fed. Reg. 15,372 (Mar. 21, 2011)
- Subpart MMMM: Existing Sewage Sludge Incineration Units
 - 40 C.F.R. §60.5181
 - 76 Fed. Reg. 15,372 (Mar. 21, 2011)

National Emission Standards for Hazardous Air Pollutants (§112):

- Subpart N: Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks
 - 40 C.F.R. §63.342
 - 77 Fed. Reg. 58,220 (Sept. 19, 2012)

- Subpart S: Pulp and Paper Industry
 - 40 C.F.R. §63.456
 - 77 Fed. Reg. 55,698 (Sept. 11, 2012)
- Subpart U: Group I Polymers and Resins
 - 40 C.F.R. §63.480
 - 76 Fed. Reg. 22,566 (Apr. 21, 2011)
- Subpart X: Secondary Lead Smelting
 - 40 C.F.R. §63.552
 - 77 Fed. Reg. 556 (Jan. 5, 2012)
- Subpart Y: Marine Tank Vessel Tank Loading Operations
 - 40 C.F.R. §63.562
 - 76 Fed. Reg. 22,566 (Apr. 21, 2011)
- Subpart HH: Oil and Natural Gas Production Facilities
 - 40 C.F.R. §63.762
 - 77 Fed. Reg. 49,490 (Aug. 16, 2012)
- Subpart II: Shipbuilding and Ship Repair (Surface Coating)
 - 40 C.F.R. §63.781
 - 76 Fed. Reg. 72,050 (Nov. 21, 2011)
- Subpart JJ: Wood Furniture Manufacturing Operations
 - 40 C.F.R. §63.800
 - 76 Fed. Reg. 72,050 (Nov. 21, 2011)
- Subpart KK: Printing and Publishing Industry
 - 40 C.F.R. §63.820
 - 76 Fed. Reg. 22,566 (Apr. 21, 2011)
- Subpart CCC: Steel Pickling—HCl Process Facilities and Hydrochloric Acid Regeneration Plants
 - 40 C.F.R. §63.1155
 - 77 Fed. Reg. 58,220 (Sept. 19, 2012)
- Subpart GGG: Pharmaceuticals Production
 - 40 C.F.R. §63.1250
 - 76 Fed. Reg. 22,566 (Apr. 21, 2011)
- Subpart HHH: Natural Gas Transmission and Storage Facilities
 - 40 C.F.R. §63.1272
 - 77 Fed. Reg. 49,490 (Aug. 16, 2012)
- Subpart JJJ: Group IV Polymers and Resins
 - 40 C.F.R. §63.1310
 - 79 Fed. Reg. 17,340 (Mar. 27, 2014)
- Subpart MMM: Pesticide Active Ingredient Production
 - 40 C.F.R. §63.1360
 - 79 Fed. Reg. 17,340 (Mar. 27, 2014)
- Subpart PPP: Polyether Polyols Production
 - 40 C.F.R. §63.1420
 - 79 Fed. Reg. 17,340 (Mar. 27, 2014)

- Subpart TTT: Primary Lead Smelting
 - 40 C.F.R. §63.1551
 - 76 Fed. Reg. 70,834 (Nov. 15, 2011)
- Subpart DDDDD: Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters
 - 40 C.F.R. §63.7501
 - 78 Fed. Reg. 7138 (Jan. 31, 2013); 76 Fed. Reg. 15,608 (Mar 21, 2011)
- Subpart UUUUU: Coal- and Oil-Fired Electric Utility Steam Generating Units
 - 40 C.F.R. §63.10001
 - 77 Fed. Reg. 9304 (Feb. 16, 2012)
- Subpart JJJJJ: Industrial, Commercial, and Institutional Boilers Area Sources
 - 40 C.F.R. §63.11226
 - 78 Fed. Reg. 7488 (Feb. 1, 2013); 76 Fed. Reg. 15,554 (Mar. 21, 2011)
- Subpart VVVVV: Chemical Manufacturing Area Sources
 - 40 C.F.R. §63.11501
 - 77 Fed. Reg. 75,740 (Dec. 21, 2012)
- Subpart HHHHHH: Polyvinyl Chloride and Copolymers Production
 - 40 C.F.R. §63.11895
 - 77 Fed. Reg. 22,848 (Apr. 17, 2012)

II. GROUNDS FOR PETITION

On April 18, 2014, the D.C. Circuit ruled that EPA lacked authority to promulgate the affirmative defense in the cement rule and vacated it. *NRDC v. EPA*, No. 10-1371, 2014 WL 1499825, at *7-9 (D.C. Cir. Apr. 18, 2014). The affirmative defense in that rule is indistinguishable from the affirmative defense in the rules listed above. Thus, EPA's insertion of the affirmative defense into the rules for the source categories listed above contravenes the D.C. Circuit's binding caselaw, which was decided after those rules were promulgated.

Accordingly, EPA must remove the affirmative defense from those rules. EPA has already acknowledged that the affirmative defense has no place in air regulations like these because of the *NRDC* decision. For example, in the recent pre-publication version of its proposal for the rule governing air toxics emissions from refineries, EPA declined to include the affirmative defense "[i]n light of *NRDC*." EPA, *Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards* 333 (signed by Administrator on May 15, 2014), epa.gov/ttn/atw/petrefine/20140515fr.pdf. Just as EPA is removing the affirmative defense from rules that are under development, it should also remove it from the rules listed above, where rule development has already concluded. It is identically illegal in all of them, and should not be shielded by happenstance from removal in some of them.

III. PROMPT RESPONSE REQUESTED

As indicated above, this petition raises a purely legal issue. Further, there is no dispute that the affirmative defense is unlawful: EPA has already publicly recognized as much by declining to insert it in the refineries rule proposal.

Moreover, removing the affirmative defense from the rules listed above can be done easily. The affirmative defense is entirely distinct from the emission standards it purports to apply to for each source category. *See NRDC*, 2014 WL 1499825, at *9 (vacating parts of rule relating to affirmative defense but upholding remainder of rule); *see also* Final Brief of Respondents 52, *NRDC*, No. 10-1371 (D.C. Cir. Aug. 23, 2013) (affirmative defense is “an ancillary provision related to implementation” of emission standards, not part of emission standards as Clean Air Act defines them) (attached as Ex.A). Thus, the impact of the *NRDC* decision on the rules at issue is clear without any need for further examination: the affirmative defense in each of these rules is unlawful, is severable from the remaining provisions of each rule, and must be removed. EPA’s course on the standards for refineries demonstrates the simplicity of the issue: within four weeks of receiving the *NRDC* decision, EPA simply chose not to insert the affirmative defense. Thus, EPA’s own action suggests that the affirmative defense sits on top of emission standards without affecting how they were calculated, and that it can be removed with a minimum of time or difficulty.

Because EPA need not review or evaluate any new technical information, but only must affirm the legal reality it has already acknowledged, EPA can rule on this petition swiftly.

Accordingly, Sierra Club requests that EPA rule within 30 days and promptly begin taking the necessary steps to remove the unlawful affirmative defense from the rules containing it.¹

If you have any questions, please do not hesitate to contact me at (202) 667-4500.

Sincerely,



Seth L. Johnson
Attorney for Sierra Club

¹ Some of the regulations listed above are the subject of currently pending litigation. *See, e.g., Am. Chemistry Council v. EPA*, No. 14-1083 (D.C. Cir. filed May 27, 2014) (challenging NESHAP Subpart JJJ: Group IV Polymers and Resins, Subpart MMM: Pesticide Active Ingredient Production, and Subpart PPP: Polyether Polyols Production); *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir. filed Apr. 3, 2013) (challenging NSPS Subpart OOOO: Crude Oil and Natural Gas Production, Transmission and Distribution); *Nat'l Ass'n for Surface Finishing*, No. 12-1459 (D.C. Cir. filed Nov. 19, 2012) (challenging NESHAP Subpart N: Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks); *Am. Petroleum Inst. v. EPA*, No. 12-1405 (D.C. Cir. filed Oct. 16, 2012) (challenging NESHAP Subpart HH: Oil and Natural Gas Production Facilities and Subpart HHH: Natural Gas Transmission and Storage Facilities); *Ass'n of Battery Recyclers v. EPA*, No. 12-1373 (D.C. Cir. filed Sept. 17, 2012) (challenging NESHAP Subpart X: Secondary Lead Smelting); *Mexichem Specialty Resins v. EPA*, No. 12-1260 (D.C. Cir. filed June 14, 2012) (challenging NESHAP Subpart HHHHHHH: Polyvinyl Chloride and Copolymers Production); *Am. Chemistry Council v. EPA*, No. 11-1141 (D.C. Cir. filed May 17, 2011) (challenging NESHAP Subpart JJJJJJ: Industrial, Commercial, and Institutional Boilers Area Sources); *Am. Forest & Paper Ass'n v. EPA*, No. 11-1125 (D.C. Cir. filed Apr. 29, 2011) (challenging incinerator NSPS Subpart CCCC: Commercial and Industrial Solid Waste Incineration Units (new) and Subpart DDDD: Commercial and Industrial Solid Waste Incineration Units (existing)); *U.S. Sugar Corp. v. EPA*, No. 11-1108 (D.C. Cir. filed Apr. 14, 2011) (challenging NESHAP Subpart DDDDD: Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters). Voluntary vacatur of the affirmative defense in these rules would be appropriate, in the interest of efficiency.