§ 63.10001  Affirmative defense for exceedence of emission limit during malfunction.

In response to an action to enforce the standards set forth in §63.9991 you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner, and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(4) If the excess emissions resulted from a bypass of control equipment or
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a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) Notification. The owner or operator of the affected source experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction or, if it is not possible to determine within two business days whether the malfunction caused or contributed to an exceedance, no later than two business days after the owner or operator knew or should have known that the malfunction caused or contributed to an exceedance, but, in no event later than two business days after the end of the averaging period, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance.

TESTING AND INITIAL COMPLIANCE REQUIREMENTS

§ 63.10005 What are my initial compliance requirements and by what date must I conduct them?

(a) General requirements. For each of your affected EGUs, you must demonstrate initial compliance with each applicable emissions limit in Table 1 or 2 of this subpart through performance testing. Where two emissions limits are specified for a particular pollutant (e.g., a heat input-based limit in lb/MMBtu and an electrical output-based limit in lb/MWh), you may demonstrate compliance with either emission limit. For a particular compliance demonstration, you may be required to conduct one or more of the following activities in conjunction with performance testing: collection of hourly electrical load data (megawatts); establishment of operating limits according to § 63.10011 and Tables 4 and 7 to this subpart; and CMS performance evaluations. In all cases, you must demonstrate initial compliance no later than the applicable date in paragraph (f) of this section for tune-up work practices for existing EGUs, in §63.9984 for other requirements for existing EGUs, and in paragraph (g) of this section for all requirements for new EGUs.

(1) To demonstrate initial compliance with an applicable emissions limit in Table 1 or 2 to this subpart using stack testing, the initial performance test generally consists of three runs at specified process operating conditions using approved methods. If you are required to establish operating limits (see paragraph (d) of this section and Table 4 to this subpart), you must collect all applicable parametric data during the performance test period. Also,