at all times the affected source is operating. A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. You are required to complete monitoring system repairs in response to monitoring system malfunctions and to return the monitoring system to operation as expeditiously as practicable.

(2) You may not use data recorded during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. You must use all the data collected during all other required data collection periods in assessing the operation of the control device and associated control system. You must report any periods for which the monitoring system failed to collect required data.

(d) A deviation means any of the cases listed in paragraphs (d)(1) through (7) of this section.

(1) Any instance in which an affected source subject to this subpart, or an owner or operator of such a source, fails to meet any requirement or obligation established by this subpart, including, but not limited to, any emission limit, operating limit or work practice standard.

(2) When a performance test indicates that emissions of a pollutant in Table 1 or 2 to this subpart are exceeding the emission standard for the pollutant specified in Table 1 or 2 to this subpart.

(3) When a 3-hour block average from a continuous emissions monitor, as required by §63.11925(c)(1) through (3), exceeds an emission limit in Table 1 or 2 to this subpart.

(4) When the average value of a monitored operating parameter, based on the data averaging period for compliance specified in Table 5 to this subpart, does not meet the operating limit established in §63.11880(b).

(5) When an affected source discharges directly to the atmosphere from any of the sources specified in paragraphs (d)(5)(i) through (iv) of this section.

(i) A pressure relief device, as defined in §63.12005.

(ii) A bypass, as defined in §63.12005.

(iii) A closed vent system in vacuum service.

(iv) A closure device on a pressure vessel.

(6) Any instance in which the affected source subject to this subpart, or an owner or operator of such a source, fails to meet any term or condition specified in paragraph (d)(6)(i) or (ii) of this section.

(i) Any term or condition that is adopted to implement an applicable requirement in this subpart.

(ii) Any term or condition relating to compliance with this subpart that is included in the operating permit for any affected source required to obtain such a permit.

(7) Any failure to collect required data, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments).

§63.11895 How do I assert an affirmative defense for exceedance of emission standard during malfunction?

In response to an action to enforce the standards set forth in §63.11880, 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, 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) Evidence. To establish the affirmative defense in any action to enforce such a standard, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The violation:

(i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring operations at the affected source.

(ii) Was caused by a sudden, infrequent, and unavoidable failure of the monitoring system at the affected source.

(iii) Occurred during a period of malfunction.

(iv) Occurred during a period of required monitoring system quality assurance or control activities.

(b) Notification. You must notify the applicable State or the Administrator in writing of your intent to assert an affirmative defense in accordance with §63.11950(c)(1).

(c) Hearing. If the Administrator determines that you have met the requirements for an affirmative defense, you shall be entitled to a hearing on the merits of your defense.

(d) Penalties. If you establish an affirmative defense, the Administrator may assess appropriate penalties unless the Administrator determines that you have not met the requirements for an affirmative defense.

(e) Finality. If you establish an affirmative defense, the administrative law judge shall determine the finality of the Affirmative Defense Decision in accordance with §63.11960(c).

(f) Appeal. If you assert an affirmative defense and either the Administrator or the administrative law judge determines that you have not met the requirements for an affirmative defense, you shall be entitled to appeal the decision to the court of appeals in accordance with §63.11960(e).

(g) Time Limit. You must assert an affirmative defense in accordance with the time limits specified in §63.11960(a).

(h) Notice. You must notify the applicable State or the Administrator in writing of your intent to assert an affirmative defense in accordance with §63.11950(c)(1).

(i) Hearing. If the Administrator determines that you have met the requirements for an affirmative defense, you shall be entitled to a hearing on the merits of your defense.

(j) Penalties. If you establish an affirmative defense, the Administrator may assess appropriate penalties unless the Administrator determines that you have not met the requirements for an affirmative defense.

(k) Finality. If you establish an affirmative defense, the administrative law judge shall determine the finality of the Affirmative Defense Decision in accordance with §63.11960(c).

(l) Appeal. If you assert an affirmative defense and either the Administrator or the administrative law judge determines that you have not met the requirements for an affirmative defense, you shall be entitled to appeal the decision to the court of appeals in accordance with §63.11960(e).

(m) Time Limit. You must assert an affirmative defense in accordance with the time limits specified in §63.11960(a).

(n) Notice. You must notify the applicable State or the Administrator in writing of your intent to assert an affirmative defense in accordance with §63.11950(c)(1).

(o) Hearing. If the Administrator determines that you have met the requirements for an affirmative defense, you shall be entitled to a hearing on the merits of your defense.

(p) Penalties. If you establish an affirmative defense, the Administrator may assess appropriate penalties unless the Administrator determines that you have not met the requirements for an affirmative defense.

(q) Finality. If you establish an affirmative defense, the administrative law judge shall determine the finality of the Affirmative Defense Decision in accordance with §63.11960(c).

(r) Appeal. If you assert an affirmative defense and either the Administrator or the administrative law judge determines that you have not met the requirements for an affirmative defense, you shall be entitled to appeal the decision to the court of appeals in accordance with §63.11960(e).

(s) Time Limit. You must assert an affirmative defense in accordance with the time limits specified in §63.11960(a).

(t) Notice. You must notify the applicable State or the Administrator in writing of your intent to assert an affirmative defense in accordance with §63.11950(c)(1).

(u) Hearing. If the Administrator determines that you have met the requirements for an affirmative defense, you shall be entitled to a hearing on the merits of your defense.

(v) Penalties. If you establish an affirmative defense, the Administrator may assess appropriate penalties unless the Administrator determines that you have not met the requirements for an affirmative defense.

(w) Finality. If you establish an affirmative defense, the administrative law judge shall determine the finality of the Affirmative Defense Decision in accordance with §63.11960(c).

(x) Appeal. If you assert an affirmative defense and either the Administrator or the administrative law judge determines that you have not met the requirements for an affirmative defense, you shall be entitled to appeal the decision to the court of appeals in accordance with §63.11960(e).

(y) Time Limit. You must assert an affirmative defense in accordance with the time limits specified in §63.11960(a).

(z) Notice. You must notify the applicable State or the Administrator in writing of your intent to assert an affirmative defense in accordance with §63.11950(c)(1).

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§ 63.11896 What am I required to do if I make a process change at my affected source?

If you make a process change to an existing affected source that does not meet the criteria to become a new affected source in § 63.11870(d), you must comply with the requirements in paragraph (a) of this section and the testing and reporting requirements in paragraphs (c) and (d) of this section. If you make a process change to a new affected source, you must comply with the requirements in paragraph (b) of this section and the testing and reporting requirements in paragraphs (c) and (d) of this section. Refer to §63.12005 for the definition of process changes.

(a) You must demonstrate that the changed process unit or component of the affected facility is in compliance with the applicable requirements for an existing affected source. You must demonstrate initial compliance with the emission limits and establish any applicable operating limits in §63.11880 within 180 days of the date of start-up of the changed process unit or component of the affected facility. You must demonstrate compliance with any applicable work practice standards upon startup of the changed process unit or component of the affected facility.

(b) You must demonstrate that all changed emission points are in compliance with the applicable requirements for a new affected source. You must demonstrate initial compliance with the emission limits and establish any applicable operating limits in §63.11880 within 180 days of the date of startup of the changed process unit or component of the affected facility. You must demonstrate compliance with any applicable work practice standards upon startup of the changed process unit or component of the affected facility.

(c) For process changes, you must demonstrate continuous compliance with your emission limits and standards, operating limits, and work practice standards according to the procedures and frequency in §§63.11910 through 63.11980.