

Coming To a MACT Near You

**Changes to the MACT Startup,
Shutdown, Malfunction Requirements**

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Introduction

- ▶ In the beginning, EPA created Startup, Shutdown, and Malfunction provisions for MACT regulations
 - ▶ Then came the court cases requiring these provisions to be removed
 - ▶ Not a straight forward task and “one-size does not fit all MACT’s”
 - ▶ Most MACT’s are in a state of flux
 - ▶ Depends on when the rule was published or last amended
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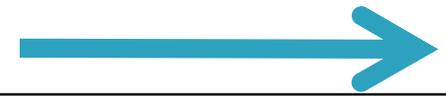
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December
2008



April
2014



The Good MACT has SSMP	The Bad MACT has Affirmative Defense	The Ugly MACT has only Limits
<ul style="list-style-type: none">• Comply at all times except during SSM• Maintain SSM Plan• SSM Not a violation	<ul style="list-style-type: none">• Comply at all times per General Duty• Document affirmative defense to civil penalties• Make two day notification• Not subject to enforcement	<ul style="list-style-type: none">• Comply at all times• Enforcement discretion• Citizen suits

Original MACT General Provisions

- ▶ Emission standards apply at all times except during periods of startup, shutdown, and malfunction
 - ▶ Requires an SSM Plan be in place, followed, and documented
 - ▶ Defines “Malfunction” in a manner that supports an affirmative defense
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SSM Plan Purpose

- ▶ Ensure that facilities operate and maintain air pollution control and monitoring equipment in a manner which satisfies the general duty to minimize emissions
 - ▶ Ensure that facilities are prepared to correct malfunctions as soon as practicable after SSM occurrence in order to minimize excess emissions of hazardous air pollutants
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Breakdown of Malfunction Definition

- ▶ Sudden, infrequent, and not reasonably preventable
 - ▶ Failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner
 - ▶ Causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded
 - ▶ Poor maintenance or careless operation are not malfunctions
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SSM Plan Requirements

- ▶ Develop a written plan for operating and maintaining the source during periods of SSM
 - ▶ Develop a program of corrective action for malfunctioning process, air pollution control, and monitoring equipment used to comply with the relevant standard
 - ▶ Mandate specific Recordkeeping, Reporting and Notifications
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SSM Records and Reporting

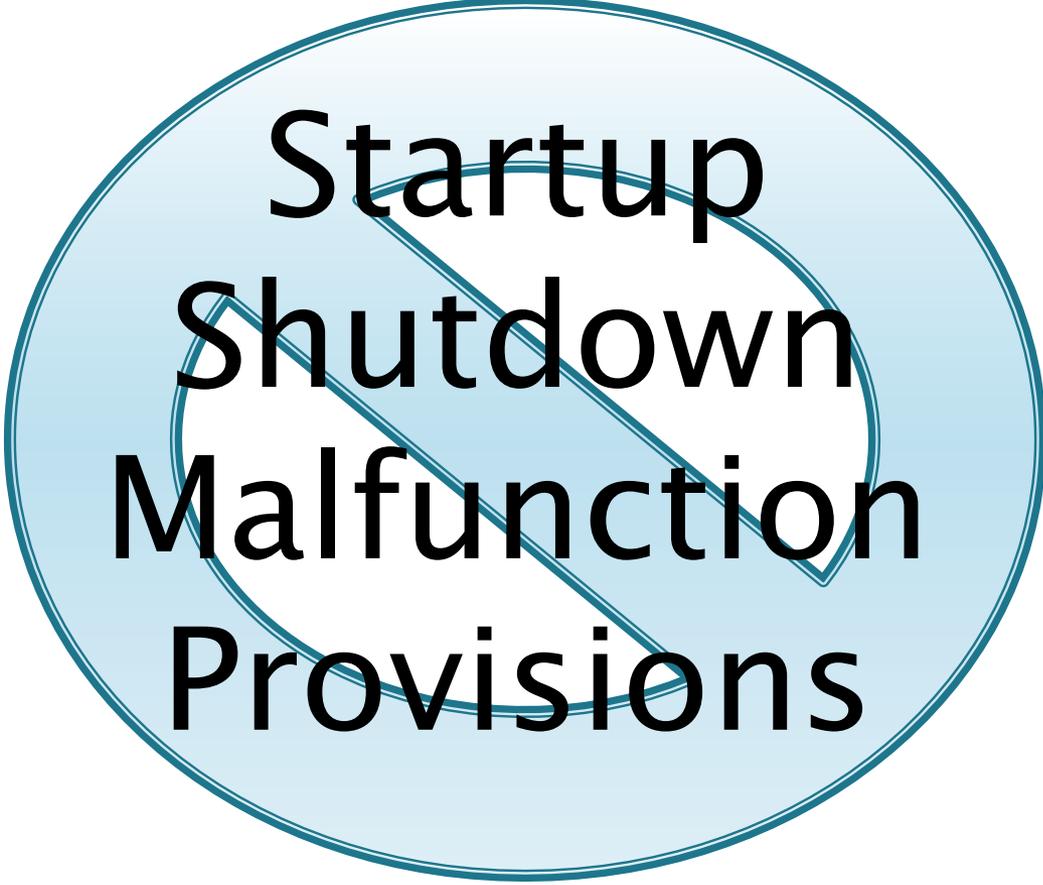
- ▶ Records of each SU/SD where excess emissions occur
 - ▶ Records of each malfunction regardless of emissions
 - ▶ Describe whether the plan was followed
 - ▶ Report **semi-annually** each event that followed the plan
 - ▶ Report **immediately** if actions taken are not consistent with the plan (2 day verbal; 7 day written)
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The “Good” Bottom Line

If a MACT Standard is exceeded and the event meets the definition of a “malfunction” AND the SSM Plan is followed, an affirmative defense is established and the event is NOT a violation

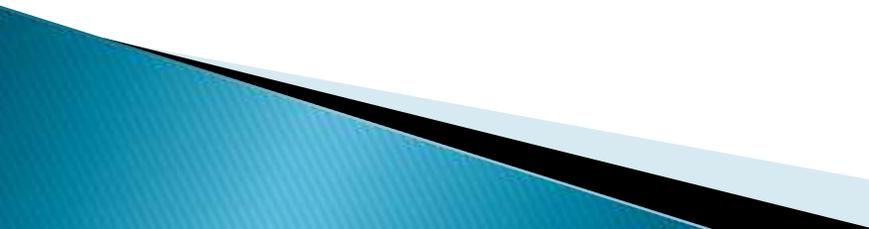
Facilities essentially established a proactive approach to respond to potential malfunctions



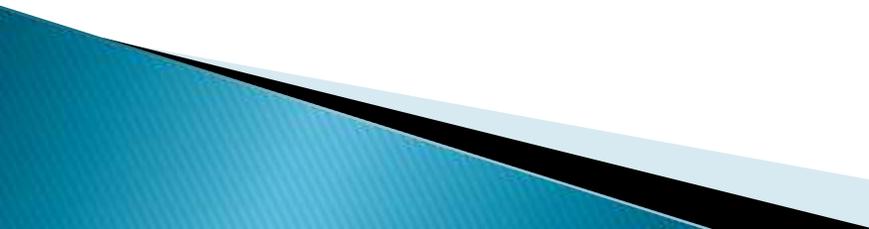


**Startup
Shutdown
Malfunction
Provisions**

Sierra Club v. EPA F.3d 1019 (D.C. Cir. 2008)

- ▶ Vacated General Provisions which exempted sources from complying with standards during SSM events
 - ▶ Sources must now comply with standards at all times
 - ▶ Immediate effect on MACT regulation that incorporated SSM requirements from the General Provisions
 - ▶ Temporary Stay – most MACT regulations have included specific language that exempts compliance during SSM events
 - ▶ See the “Kushner Letter” – July 22, 2009
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Removing the Specific Exemptions

- ▶ EPA is revising MACT language that exempts compliance during SSM events
 - ▶ Typically done as part of the required Residual Risk and Technology Review (every 8 years)
 - ▶ Removing any specific language and cross-references to General Provisions
 - ▶ Adding General Duty requirement to comply at all times
 - ▶ Initially provided a mechanism for asserting “Affirmative Defense”
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Affirmative Defense

In an affirmative defense, the defendant may concede that he committed the alleged acts, but he proves other facts which, under the law, either justify or excuse his otherwise wrongful actions, or otherwise overcome the plaintiff's claim.

Asserting Affirmative Defense

Must provide **detailed information** in periodic report that:

(i) The violation

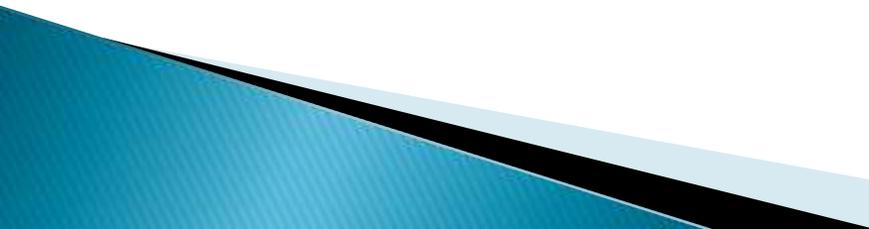
(A) Was caused by a **sudden, infrequent, and unavoidable** failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and

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

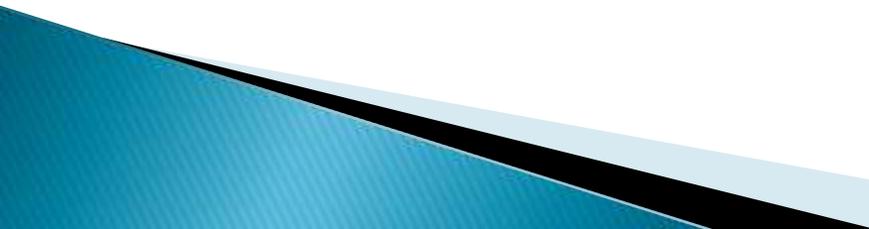
(C) Did **not** stem from any activity or event that could have been **foreseen and avoided**, or planned for; and

(D) Was **not** part of a **recurring pattern** indicative of inadequate design, operation, or maintenance; and

Asserting Affirmative Defense

- (ii) **Repairs** were made as **expeditiously** as possible when a violation occurred; and
 - (iii) The frequency, amount, and duration of the violation (including any bypass) were **minimized to the maximum extent practicable**; and
 - (iv) *If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and*
 - (v) All possible steps were taken to **minimize the impact** of the violation on ambient air quality, the environment, and human health; and
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Asserting Affirmative Defense

- (vi) All emissions monitoring and control systems were **kept in operation** if at all possible, consistent with safety and good air pollution control practices; and
 - (vii) All of the actions in response to the violation were **documented** by properly signed, contemporaneous operating logs; and
 - (viii) At all times, the affected source was operated in a manner consistent with good practices for **minimizing emissions**; and
 - (ix) **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 violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.
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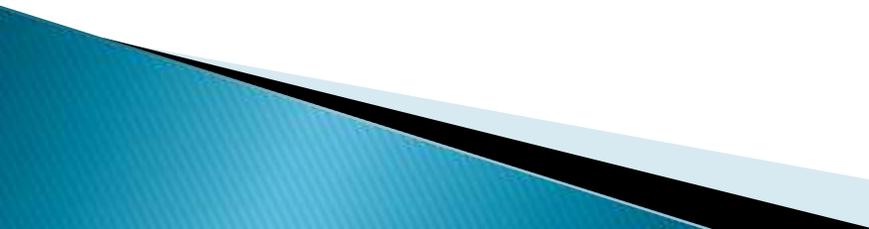
From “the Good” to “the Bad”

- ▶ Became a reactive approach with SSM provisions vacated
 - ▶ Facilities expected to react in a way to minimize impact, assess cause, and implement preventive measures
 - ▶ Must also make the claim of an affirmative defense within two days (per Part 70)
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**Affirmative
Defense**

From “the Bad” to “the Ugly”

- ▶ April 2014 – D.C. Circuit vacates affirmative defense from the Portland Cement MACT as it would prevent courts from assessing monetary penalties in civil suits
 - ▶ July 2014 – EPA considers removing SSM provisions from NSPS for grain elevators
 - ▶ July 2014 – proposing to remove the affirmative defense provisions in the 2012 NSPS subpart OOOO
 - ▶ September 2014 – EPA issues proposal that could lead to the removal of all SSM affirmative defenses from State air regulations via SIP Call
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What Do We Know?

- ▶ Effective immediately upon promulgation
 - ▶ Usage of a SSM backup control device may now be a violation
 - ▶ SSM events that are not violations will no longer be reportable
 - ▶ Precedence for expansion into other rules and environmental media
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What to do, what to do?

- ▶ Determine status of your MACT
 - ▶ Clearly identify the standards and what constitutes a “violation” (24-hour averages, etc.)
 - ▶ Only report SSM events that violate the standard as opposed to every “malfunction”
 - ▶ Maintain and follow SSMP, thoroughly document affirmative defense
 - ▶ Confer with legal and corporate
 - ▶ Evaluate Startups and Shutdowns that do not meet the standard
 - ▶ Modify operations to comply
 - ▶ Meet with EPA
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Questions?

