

COLORADO'S MALFUNCTION RULE
Effective March 7, 2007 (state-only)

MALFUNCTION

Any sudden and unavoidable failure of air pollution control equipment or process equipment or unintended failure of a process to operate in a normal or usual manner. Failures that are primarily caused by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions.

II.E. Affirmative Defense Provision for Excess Emissions During Malfunction

II.E.1. An affirmative defense to a claim of violation under these regulations is provided to owners and operators for civil penalty actions for excess emissions during periods of malfunction. To establish the affirmative defense and to be relieved of a civil penalty in any action to enforce an applicable requirement, the owner or operator of the facility must meet the notification requirements of Section II.E.2 in a timely manner and prove by a preponderance of evidence that:

- II.E.1.a The excess emissions were caused by a sudden, unavoidable breakdown of equipment, or a sudden, unavoidable failure of a process to operate in the normal or usual manner, beyond the reasonable control of the owner or operator;
- II.E.1.b The excess emissions did not stem from any activity of event that could have reasonably been foreseen and avoided, or planned for, and could not have been avoided by better operation and maintenance practices;
- II.E.1.c Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded;
- II.E.1.d The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
- II.E.1.e All reasonably possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
- II.E.1.f All emissions monitoring systems were kept in operation (if at all possible);
- II.E.1.g The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs or other relevant evidence;
- II.E.1.h The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

- II.E.1.i At all times, the facility was operated in a manner consistent with good practices for minimizing emissions. This Section II.E.1.i. is intended solely to be a factor in determining whether an affirmative defense is available to an owner or operator, and shall not constitute an additional applicable requirement; and
- II.E.1.j During the period of excess emissions, there were no exceedances of the relevant ambient air quality standards established by the Commission's Regulations that could be attributed to the emitting source.

II.E.2. Notification

The owner or operator of the facility experiencing excess emissions during a malfunction shall notify the division verbally as soon as possible, but no later than noon of the Division's next working day, and shall submit written notification following the initial occurrence of the excess emissions by the end of the source's next reporting period. The notification shall address the criteria set forth in Section II.E.1, above.

EPA's 1999 Memo Regarding SSM Policy has the following definition of "affirmative defense"

"The term affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding."