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U.S. Environmental Protection Agency  
EPA Docket Center, Mail Code 28221T  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Submitted online via [www.regulations.gov](http://www.regulations.gov) and via e-mail to [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov)

**In Re: Comments of the National Association of Clean Water Agencies on the U.S. Environmental Protection Agency's Proposed Amendments to the National Emission Standards for Hazardous Air Pollutants for the Secondary Lead Smelting Source Category, Docket ID No. EPA-HQ-OAR-2025- 0078**

To Whom It May Concern:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) proposed amendments to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Secondary Lead Smelting source category (Secondary Lead Smelting NESHAP) under Clean Air Act (CAA) section 112.

NACWA represents the interests of over 360 publicly owned wastewater and stormwater agencies of all sizes nationwide. NACWA's members are anchor institutions in their communities that provide the essential services of treating billions of gallons of our nation's wastewater and managing the millions of tons of biosolids generated as a byproduct of the wastewater treatment process in a manner that ensures the continued protection of public health and the environment.

Many NACWA members operate sewage sludge incinerators (SSIs) pursuant to CAA permits as part of their biosolids management process. At times, NACWA's members operating SSIs encounter emergency malfunction situations that cause temporary exceedances of emission limits. NACWA writes to encourage EPA to adopt affirmative defense provisions in its NESHAPs and New Source Performance Standards (NSPS) that are consistent with recent judicial precedent, starting with the Secondary Lead Smelting NESHAP.

**EPA Should Remove the Existing Affirmative Defense Provisions From the Secondary Lead Smelting NESHAP**

EPA has asked for public comment on its proposal to remove the current Secondary Lead Smelting NESHAP affirmative defense provisions found at 40 CFR 63.552. Those provisions provide an "affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions." 77 Fed. Reg. 556 (January 5, 2012). Specifically, under the provisions,

penalties may only be assessed if a party asserting an affirmative defense fails to meet the burden of proving all requirements of the defense.

NACWA supports EPA's position that these existing Secondary Lead Smelting NESHAP affirmative defense provisions are inconsistent with the ruling by the U.S. Court of Appeals for the District of Columbia Circuit in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (Kavanaugh, J.). In that decision, the court held that affirmative defense provisions cannot limit a court's discretion to determine and apply appropriate civil penalties for violations of emission limits. Because the existing affirmative defense provisions at 40 CFR 63.552 are structured so as to limit the authority of a court to assess penalties for emissions violations under certain circumstances, they likely run afoul of the 2014 *NRDC* decision and should be removed.

### **EPA Should Adopt New Affirmative Defense Provisions In NESHAPs and NSPS**

While the existing Secondary Lead Smelting NESHAP affirmative defense provisions are likely unlawful under *NRDC*, however, the D.C. Circuit's more recent 2025 ruling in *SSM Litigation Group v. EPA* made clear that affirmative defense provisions not purporting to limit judicial remedies available for permit violations, but instead providing a total defense against liability, may be permissible under the CAA. EPA should consider adopting such provisions for all of its NESHAPs and NSPS, beginning with the current revisions to the Secondary Lead Smelting NESHAP.

EPA has long recognized that unavoidable malfunctions are expected at major stationary sources, like secondary lead smelters and SSIs. *See, e.g., United States Sugar Corp. v. EPA*, 830 F.3d 579, 606 (D.C. Cir.), *on reh'g en banc*, 671 F. App'x 822 (D.C. Cir. 2016), and *on reh'g en banc in part*, 671 F. App'x 824 (D.C. Cir. 2016) ("Both sides agree that malfunctions are inevitable in the operation of area and major boilers."). This is true even in the case of well-designed facilities that are being safely and diligently operated.

In acknowledgement of that fact, and to encourage facilities to take appropriate and timely response measures, EPA should adopt permissible affirmative defense provisions in the NESHAPs and NSPS. Those provisions could mirror prior EPA model language, which provided that, "in the event of a malfunction, a source may assert an affirmative defense for exceedances of emission limits if the source demonstrates that the malfunction was unavoidable, that the source took all reasonable steps to minimize emissions, and that the source properly operated and maintained the affected equipment." To ensure consistency with the *NRDC* ruling, the Agency may wish to clarify that this would provide a total defense against liability, not a limitation on judicial review.

Adoption of such total affirmative defense provisions in the NESHAPs and NSPS is lawful and will encourage the safe operation of stationary sources without penalizing operators for unavoidable emergency situations. For operators such as NACWA's public utility members,

such provisions being applied to SSIs would help ensure that limited public dollars are spent on projects that improve human health and the environment in communities nationwide, not on fines and protracted litigation over situations that are impossible for utilities to avoid. NACWA therefore encourages EPA to consider their adoption across all NESHAPs and NSPS, beginning with the current revisions to the Secondary Lead Smelter NESHAP.

NACWA appreciates EPA's consideration of these comments. Please contact me at [AAspatore@nacwa.org](mailto:AAspatore@nacwa.org) with any questions, or if any additional information is needed.

Sincerely,

A handwritten signature in blue ink that reads "Amanda E. Aspatore". The signature is written in a cursive, flowing style.

Amanda E. Aspatore  
Chief Legal Officer