

7049.0490 UPSET AFFIRMATIVE DEFENSE FOR VIOLATIONS OF CATEGORICAL STANDARDS.

Subpart 1. **Defense.** This part provides an affirmative defense to actions brought for noncompliance with categorical pretreatment standards.

Subp. 2. **Definition.** For the purposes of this part, "upset" means an exceptional incident in which there is unintentional and temporary noncompliance with categorical pretreatment standards because of factors beyond the reasonable control of the industrial user. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

Subp. 3. **Effect of upset.** An upset constitutes an affirmative defense to an action brought for noncompliance with categorical pretreatment standards if the requirements of subpart 4 are met.

Subp. 4. **Conditions necessary for demonstration of upset.** An industrial user that asserts the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

A. an upset occurred and the industrial user can identify the cause of the upset;
and

B. the industrial user's facility was at the time being operated in a prudent and professional manner and in compliance with applicable operation and maintenance procedures.

Subp. 5. **Establishing defense.** To establish the affirmative defense of upset, the industrial user shall submit the information in items A to C to the control authority within 24 hours of becoming aware of the upset. If the information is provided orally, a written submission must be provided within five days that includes the following:

A. a description of the indirect discharge and cause of noncompliance;

B. the period of noncompliance, including exact dates and times or, if not corrected, the anticipated time the noncompliance is expected to continue; and

C. steps being taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

Subp. 6. **Burden of proof.** In any enforcement proceeding, the industrial user seeking to establish the occurrence of an upset has the burden of proof.

Subp. 7. **Reviewability of agency consideration of claims of upset.** In the usual exercise of prosecutorial discretion, agency enforcement personnel may review any claims that noncompliance was caused by an upset. No determinations made in the course of the

review constitute final agency action subject to judicial review. Industrial users shall have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with categorical pretreatment standards.

Subp. 8. **Industrial user responsibility in case of upset.** The industrial user shall control production or all discharges to the extent necessary to maintain compliance with categorical pretreatment standards upon reduction, loss, or failure of its treatment facility until the facility is restored or an alternative method of treatment is provided. This requirement applies when, among other things, the primary source of power of the treatment facility is reduced, lost, or fails.

Statutory Authority: *MS s 115.03*

History: *33 SR 696*

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