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# Environmental Notes

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# EPA Proposes Removing Affirmative Defense Provisions from Eighteen Clean Air Act Emission Standards

BY: TANNER BRANTLEY

In a proposed rule published on June 24, 2024, EPA has proposed to remove eighteen affirmative defense provisions for malfunctions associated with violations of New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) under the Clean Air Act (CAA).

These provisions provide an affirmative defense to civil penalties when the event that causes an exceedance of the emission limit is due to a “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.” See 40 CFR 63.2 and 40 CFR 60.2. Comments on this proposed rule were due to EPA by August 8, 2024.

EPA proposes to remove the affirmative defense definition, as well as revise or remove and reserve regulatory sections that contain affirmative defense provisions from the eighteen source sector rules shown below:

Source Sector	Subpart	NAICS Codes
<b>Clean Air Act section 111 (40 CFR part 60)</b>		
Electric Utility Steam Generating Units (Boilers)	Da	221112, 921150.
Kraft Pulp Mills	BBa	3221.
Nitric Acid Plants	Ga	325311.
<b>Clean Air Act section 112 (40 CFR part 63)</b>		
Chemical Manufacturing Area Sources	VVVVVV (6V)	325.
Chromium Electroplating	N	332813.
Coal- and Oil-Fired Electric Utility Steam Generating Units (MATS)	UUUUU (5U)	221112, 221122, 921150.
Marine Vessel Loading Operations	Y	4883.
Pesticide Active Ingredient Production	MMM	325199, 325320.
Pharmaceuticals Production	GGG	3254.
Polyether Polyols Production	PPP	325199.
Polymers & Resins IV	JJJ	325211.
Primary Lead Processing	TTT	331419.
Printing and Publishing Surface Coating	KK	32311.
Pulp and Paper Industry	S	322.
Secondary Lead Smelters	X	331492.
Shipbuilding and Ship Repair Surface Coating	II	336611.
Steel Pickling	CCC	3311, 3312.
Wood Furniture Surface Coating	JJ	3371, 3372, 3379.

An affirmative defense as defined in each of the subparts in the table above, 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.” As previously stated, the definition of a malfunction in relation to these standards is “a 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.” The affirmative defense provisions provided that a source would not be subject to civil penalties if it could sufficiently demonstrate in a judicial or administrative proceeding that the violation of emission standards was due to malfunctions as defined by the regulations.

EPA has case-by-case enforcement discretion that provides some flexibility, but after a 2008 United States Court of Appeals for the District of Columbia Circuit case, EPA sought to provide a more formalized approach to malfunction related enforcement via affirmative defense provisions. *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). The Court in that matter vacated portions of two provisions governing the emissions of hazardous air pollutants during periods of startup, shutdown, and malfunction in EPA’s CAA section 112 General Provisions regulations. Subsequently in 2014, the court in *NRDC v. EPA*, 749 F.3d 1055 (2014), held that EPA lacked authority to establish an affirmative defense for private civil suits and held that CAA section 304(a) clearly vests the authority over private suits exclusively with the courts, not EPA. Additionally, this court vacated the portion of EPA’s CAA section 112 regulation pertaining to the affirmative defense in the NESHAP for the Portland cement manufacturing industry.

EPA has been removing affirmative defense provisions from CAA section 112 and section 111 rules since *NRDC*. Although *NRDC* pertains only CAA section 112, EPA stated the court’s rationale applies to affirmative defense provisions in CAA section 111 rules as well. EPA has removed affirmative defense provisions from those rules when they were otherwise revised or amended.

In November 2014, EPA granted an administrative petition regarding the removal of affirmative defense provisions in twenty-nine regulations. EPA stated it would continue the process of removing affirmative defenses from the remaining rules included in the petition as expeditiously as practicable. EPA also noted the practice of removing

the affirmative defense provision from individual rules as the rules are opened for periodic review.

EPA highlighted a few ways a source may have a path for recourse once the affirmative defense provisions are removed. EPA made clear that it will continue to evaluate violations on a case-by-case basis and use discretion when determining whether an enforcement action is appropriate. Moreover, EPA pointed out a source can raise any and all defenses in response to enforcement actions brought under CAA section 113(d)(2)(B) for a violation of an emission standard, and the federal district court will determine what, if any, relief is appropriate. Additionally, EPA emphasized that the presiding officer in an administrative proceeding can consider any defense raised and determine whether administrative penalties are appropriate. Lastly, EPA reiterated the *NRDC* court’s holding that in a citizen enforcement action brought under CAA section 304(a), the reviewing court has the discretion to consider any defense raised when determining whether penalties are appropriate.

Owners and operators of facilities regulated by the aforementioned eighteen emission standards should weigh whether the potential removal of the affirmative defense provisions warrants revamping current operations, maintenance, and training procedures to proactively decrease the chance of malfunctions that could cause costly emission standard violations. As previously mentioned, comments on this proposed rule must have been received by EPA by August 8, 2024.

[89 Fed. Reg. 52425 \(June 24, 2024\)](#)

## As Easy as 1, 2, 3? EPA’s New Herbicide Strategy to Protect Endangered Species Under FIFRA Gets Mathematical

BY: SUSIE BRANCACCIO

EPA primarily regulates the sale, distribution and use of pesticides pursuant to its authority under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under FIFRA, EPA is involved with the registration of new pesticides (*i.e.*, pesticides with new active ingredients or new uses) as well as the periodic re-evaluation of existing pesticides. Moreover, EPA has enforcement authority over users of registered pesticides, such as when an herbicide—which is regulated and registered under

FIFRA—is used in a manner inconsistent with its labeling.

When EPA conducts registration actions, it is required under the Endangered Species Act (ESA) to ensure that its actions are not likely to jeopardize the continued existence of threatened or endangered (“listed”) species, or result in the adverse modification of their critical habitats. Under this obligation, EPA is also required to consult with agencies such as the Fish and Wildlife Service (FWS).

According to EPA, in the past decades EPA has “struggled” to meet this obligation under the ESA for the “thousands” of actions it completes annually under FIFRA—noting that the consultation process with FWS can take “years for a single pesticide” to be completed. As it currently stands, there are over 1,700 listed species EPA must assess in order to meet its ESA responsibilities while evaluating pesticides under FIFRA. To that end, EPA has been weighing more efficient approaches to integrating the consideration of endangered and threatened species into its activities under FIFRA, to keep pace with its ESA obligations, and generate efficiencies at the front-end of the pesticide registration process.

As a result, on August 20, 2024, EPA announced its new Herbicide Strategy, which is intended to create a “consistent, reasonable, transparent, and understandable” approach for assessing potential impacts and identifying mitigations for listed species affected by the use of agricultural herbicides. EPA believes its Herbicide Strategy promotes two dual goals: the *protection of endangered species* and their habitats from herbicides *earlier* in the regulatory process, while also creating *greater regulatory certainty* and reducing litigation risk (*i.e.*, the legal vulnerability of EPA’s pesticide decisions), which is both beneficial to producers and users of these products. EPA also believes that implementing this Herbicide Strategy into the front end of its FIFRA evaluations will increase the efficiency of consultations with FWS on the back end as well. For instance, EPA believes that when mitigation is implemented early, impacts to species can thereby be reduced, leaving only a limited number of remaining

impacts to focus upon during consultation with FWS. In turn, labels could then be altered if additional mitigation is later determined to be required based on any remaining impacts.

## The Herbicide Strategy’s Framework

EPA’s new Herbicide Strategy involves a three-step framework for EPA to use when evaluating new or existing herbicides under FIFRA. Notably, this framework only applies to herbicides used in the contiguous United States for agricultural purposes—including orchards, vineyards, Christmas trees, row crops, specialty crops,



and flooded crops. It is important to note that EPA’s Herbicide Strategy was issued as non-rulemaking and is considered by the agency to be “self-implementing.” To that end, EPA will likely use this framework when registering or re-registering herbicides and determining their labeling requirements. Thus, enforcement of this policy will likely be carried out when an herbicide user

does not follow the new instructions set forth on the label—described in more detail below.

### Step One:

At step one, EPA will evaluate the potential for population-level impacts to the listed species, based on long standing FIFRA risk assessment approaches. The key takeaway from this step is that EPA intends to run models and analyze various factors and data points in order to compare exposure and toxicity estimates—to then ultimately determine whether grouped listed species face a **not likely, low, medium, or high** potential for population-level impacts from the herbicide.

### Step Two:

At step two, EPA will essentially assign levels of mitigation based on the population-level impacts determined in step one. The mitigation levels are essentially intended to reduce exposure pathways such that population-level impacts are reduced to “not likely” when the herbicide is used. Generally speaking, these levels of mitigation correlate with population-

level impacts: low population impacts = low mitigation required, high population impacts = high mitigation required, etc. EPA notes, however, that in determining the mitigation level, it may take into account any existing or proposed mitigations that the registrant already intends to include on the product label or commits to writing.

The mitigation levels apply under two circumstances (1) spray drift, and (2) runoff and erosion.

### Spray Drift

For spray drift, EPA requires a buffer distance for each mitigation level. Thus, for aerial, ground, and air blast sprays of herbicides, the distance associated with that buffer increases with the level of mitigation (low, medium, and high) required. For example:

Potential for Population-Level Impacts from Step 1	Distance from Edge of Treated Area (ft)		
	Aerial Spray	Ground Spray	Airblast
Low	50	10	25
High	320	230	160

\* Medium impact is excluded from this table as EPA intends to use modeling to determine the requisite buffer and has therefore not set numerical values for buffer distance.

EPA's Herbicide Policy, nevertheless, identifies various mitigation measures a user can rely on, such as using a windbreak or hedgerow on the downside of application, that can then be "credited" or applied to the required buffer distance. Consequently, if the user of the herbicide combines various mitigation methods, they may mathematically reduce the buffer distance required by the mitigation level all the way down to zero.

To illustrate, let's assume an herbicide requires a high mitigation level (due to a high potential population-level impact), and the site it is being used at is using the herbicide as an aerial spray. The required buffer for spray drift would start out at **320 feet**. Now assume this site has a basic windbreak or hedgerow, the spray has a very coarse droplet size distribution, and the relative humidity is 60% or more at time of application. EPA has determined that those mitigation measures reduce the buffer required by 50%, 40% and 10%, respectively. Consequently, the new buffer required would be **0 feet**, so long as all three mitigation measures are used or are in existence at the time of application.

	320 FT	Starting Buffer Required
Basic windbreak or hedgerow – 50% reduction	160 FT	Reduction in buffer
Very coarse droplet size distribution – 40% reduction	128 FT	Reduction in buffer
Relative humidity is 60% or more at time of application – 10% reduction	32 FT	Reduction in buffer
New total after subtraction	<b>0 FT</b>	<b>Final Buffer Required</b>

In practice, an applicator would select mitigation measures to determine how much the buffer distance on the pesticide product label can be reduced prior to application. In addition to these mitigation measures, EPA also will permit downwind managed areas to count toward the reduced buffer distance. For more information on potential mitigation measures for spray drift and their corresponding percentage reductions, see Tables 7-9 of the Herbicide Strategy. For more information on downwind managed areas see Table 10 and section 3.2.1.4 of the Herbicide Strategy.

### Runoff and Erosion

EPA intends to use a similar "mathematical" approach to address the mitigation levels assigned for runoff and erosion concerns. Where EPA identifies that population-level impacts of an herbicide are associated with runoff or erosion, EPA will likewise assign a corresponding mitigation level, and each mitigation level corresponds with a number of "points," as illustrated below.

Potential for Population-Level Impacts from Step 1	Mitigation Level	Mitigation Points Required to Achieve for Use - Runoff	Mitigation Points Required to Achieve for Use - Erosion
Low	Low	3	2
Medium	Medium	6	4
High	High	9	6

Similar to spray drift, EPA has developed a wide variety of mitigation measures with varying point values that can be used to achieve the required mitigation points. These mitigation measures are generally categorized as: application parameters, field characteristics, in-field mitigation measures, adjacent to the field mitigation measures, systems that capture runoff and discharge, and other measures. Mitigation measures generally range



from 1 to 4 points, and those measures deemed to have a higher efficacy for preventing runoff and erosion provide more points toward mitigation.

Essentially, a user is required to implement mitigation measures to reduce the starting point value of the herbicide down to zero prior to application. For example, assume an herbicide user needs to achieve 6 mitigation points. The user could combine the following mitigation measures (with varying levels of efficacy) to achieve a total of 6 mitigation points: soil incorporation (watering-in before runoff producing rain event) (low efficacy - 1 point); reservoir tillage (reservoir tillage, furrow tillage or basin tillage) (high efficacy - 3 points), and the field has a slope of  $\leq 3\%$  (naturally low slope or flat) (medium efficacy - 2 points). Added together, these 6 mitigation points reduce the starting balance of points (6) down to zero.

As EPA plans to implement this program at the FIFRA stage, users will likely see the number of mitigation points required on the label of the herbicide. Users will then be directed from the label to view a “mitigation menu” online, in order to decide for themselves how they intend to achieve the required mitigation points. EPA believes this approach will provide greater flexibility to applicators or growers as users can choose which measures, field characteristics, or parameters make sense for their circumstances; moreover, EPA can continuously add to the menu of options or revise mitigation measures as their efficacy evolves—which will ultimately improve and expand upon the menu of options.

In addition to the menu of mitigation measures, EPA also intends to credit points for growers or applicators that work with a runoff or erosion technical expert or those who participate in a conservation program meeting certain minimum specifications. For more information on how these points will be credited, see sections 3.2.2.6.1 and 3.2.2.6.2 of the Herbicide Strategy.

### Step Three:

At the final step of the Herbicide Strategy, EPA will identify where in the U.S. the mitigation levels identified in step two will apply. In some cases, EPA expects the mitigation levels to apply across the “full spatial extent of a use pattern (e.g., specific crops),” whereas other mitigation levels may only be necessary in geographically-specific areas—referred to as a pesticide use limitation areas or PULAs. Users of the herbicides would be responsible for reviewing these specific areas on an EPA website to determine whether they

are required to comply with any geographically specific mitigation levels.

### Conclusion:

Under the ESA, EPA is required to consider impacts to listed species when undertaking evaluations of new or existing herbicides under FIFRA. EPA has developed a new Herbicide Strategy, which includes a three-step framework, in an effort to confidently identify potential impacts to endangered species and assign flexible mitigation measures for spray drift, runoff, and erosion. Those mitigation measures can then be implemented in a variety of ways depending on a user's crops, existing field conditions, or geographic area. EPA believes this integrated approach will be beneficial to both endangered species as well as the regulated community, such as herbicide producers and their users.

EPA's intended approach, which includes identifying mitigation measures and then calculating reduced buffer distances or adding up mitigation points, may create a lot of new and confusing burdens for users of herbicides—which are important to consider in light of EPA's civil and criminal enforcement authority under FIFRA for pesticide misuse and/or noncompliance with a requirement set forth in a label. EPA recognizes that this mathematical approach to mitigation may be “complicated,”—that it is not as easy as 1, 2, 3—so it's important for applicators, growers, and agricultural stakeholders alike to be aware of this new strategy and “check their work” as new herbicides come to market or existing herbicides are re-evaluated under FIFRA.

The Herbicide Strategy is available to download [here](#).

## The Supreme Court's Decision in *SEC v. Jarkesy* and Its Implications for EPA's Administrative Enforcement

BY: CARRICK BROOKE-DAVIDSON

### Introduction

The Supreme Court's recent decision in *SEC v. Jarkesy*, 144 S. Ct. 2117, 219 L. Ed. 2d 650 (2024) marks a significant shift in the landscape of administrative enforcement, particularly concerning the power of federal agencies like EPA. The case centered around

the SEC's authority to impose civil penalties through its administrative proceedings without a jury trial. The Court's ruling that such actions violate the Seventh Amendment's right to a jury trial has profound implications not only for the SEC but also for other federal agencies, including the EPA, which rely heavily on administrative enforcement mechanisms.

## Background of the Case

The *Jarkesy* case arose from an SEC enforcement action against George Jarkesy and his firm, Patriot28, LLC, for alleged securities fraud. The SEC opted to adjudicate the matter in-house, using its administrative law judges (ALJs) to impose a civil penalty of \$300,000. Jarkesy challenged the SEC's decision, arguing that the administrative proceeding deprived him of his Seventh Amendment right to a jury trial. The Fifth Circuit agreed with Jarkesy, and the Supreme Court affirmed, holding that when the SEC seeks civil penalties the Constitution guarantees the right to a jury trial.

## Supreme Court's Reasoning

The Supreme Court's majority opinion, delivered by Chief Justice Roberts, based its reasoning on a thorough examination of the Seventh Amendment and the nature of the SEC's enforcement actions. The Court employed a two-part test derived from *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) and *Tull v. United States*, 481 U.S. 412 (1987) to determine whether the Seventh Amendment's right to a jury trial applies.

1. **Legal Nature of the Claim:** The Court first analyzed whether the SEC's action resembled a traditional common law claim that would historically have been tried by a jury. The Court found that the SEC's anti-fraud provisions closely mirrored common law fraud claims, which are traditionally within the purview of the judiciary and subject to jury trials.
2. **Public Rights Exception:** The Court then considered whether the public rights doctrine, which allows certain disputes involving government-created rights to be resolved by administrative agencies without a jury, applied in this case. The Court concluded that the public rights exception did not apply because the SEC's action did not involve a "public right" in the constitutional sense but rather a private right to be adjudicated in an Article III court with a jury.

## Implications for EPA Enforcement



The ruling in *Jarkesy* has far-reaching implications for the administrative enforcement practices of the EPA. Like the SEC, the EPA primarily relies on administrative proceedings to enforce environmental laws and regulations. These proceedings, which can impose significant penalties, have traditionally been overseen by ALJs within the agency. The *Jarkesy* decision raises questions about the constitutionality of these practices, particularly when the EPA seeks to impose civil penalties.

1. **Potential Challenges to EPA Enforcement:** Following the *Jarkesy* decision, entities subject to EPA enforcement actions may now challenge the agency's authority to adjudicate cases involving civil penalties without a jury trial. This could lead to a significant increase in litigation, as parties subject to EPA enforcement may seek to have their cases heard in federal court rather than in an administrative setting.
2. **Impact on Administrative Efficiency:** The requirement for jury trials in cases involving civil penalties could undermine the efficiency of the EPA's enforcement mechanisms. The administrative process is typically faster and more flexible than the federal court system. If the EPA is forced to shift a substantial number of its enforcement actions to the courts, it could face delays and increased costs, potentially weakening its ability to effectively enforce environmental laws.
3. **Reevaluation of Administrative Law Judges' Role:** The decision also prompts a reevaluation of the role of ALJs in federal agencies. If civil penalty cases must be tried in federal court, the scope of ALJs' authority may be significantly curtailed, limiting their role to cases that do not involve the imposition of penalties or other legal remedies traditionally handled by courts.

4. Legislative and Regulatory Responses: In response to the *Jarkesy* decision, Congress may consider legislative changes to clarify the scope of the public rights doctrine or to provide alternative mechanisms for administrative enforcement that comply with the Seventh Amendment. Additionally, the EPA and other agencies may need to revise their regulations and enforcement procedures to align with the new legal landscape.

It is unlikely, however, that significant changes in EPA's administrative enforcement practices will occur until there is a definitive Supreme Court ruling that extends *Jarkesy* to EPA enforcement. It is also unclear, especially given the legal reasoning underpinning the decision, whether it will be extended. In particular, the public rights exception which *Jarkesy* acknowledges would appear to have applicability in the EPA context. It would be very surprising if a case raising that issue does not find its way to the Supreme Court in the near future.

## Conclusion

The Supreme Court's decision in *Jarkesy* represents a critical juncture in the evolution of administrative law and the enforcement powers of federal agencies. For EPA, an extension of this ruling could significantly alter the way it conducts enforcement actions, particularly those involving civil penalties. As agencies and courts navigate the implications of this decision, the balance between administrative efficiency and constitutional rights will likely remain a central issue in the ongoing debate over the role of federal agencies in the American legal system. The *Jarkesy* decision may well serve as a catalyst for broader reforms in administrative law, reshaping the enforcement landscape for years to come.

[\*SEC v. Jarkesy\*, 144 S. Ct. 2117, 219 L. Ed. 2d 650 \(2024\)](#)

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