

However, when we made that change, we inadvertently adopted some language which could be construed as contrary to the policies regarding the relationship between the general duty to minimize emissions and SSM plans which we stated in the proposal preamble for the preceding amendments. The SSM plans must be drafted in a manner which satisfies the general duty to minimize emissions (40 CFR 63.6(e)(3)(i)(A)). Thus, compliance with a properly drafted SSM plan during a period of startup, shutdown, or malfunction will necessarily also constitute compliance with the duty to minimize emissions, even though compliance with the MACT standard itself during a period of SSM may not be practicable. When we proposed the preceding amendments, we stated explicitly that “* * * compliance with an inadequate or improperly developed SSM plan is no defense for failing to minimize emissions.” (66 FR 16327, March 23, 2001).

The Sierra Club subsequently pointed out to us that the actual language of the section as promulgated could be construed to indicate that a facility that complies with its SSM plan—regardless of whether the plan is inadequate or improperly developed—thereby satisfies its general duty to minimize emissions. We did not intend this result. Such a construction could encourage abuse because SSM plans do not have to be reviewed or approved by the permitting authority before they take effect, and because such plans may also be revised by the owner or operator of the source without prior notice to the permitting authority. The revisions to 40 CFR 63.6(e)(1)(i) which we proposed in this rulemaking were intended to assure that this section would not be construed in this manner.

We received numerous comments from industry opposing the proposed revised language. In general, the commenters did not disagree with the general principles concerning the relationship between the general duty to minimize emissions and the compliance of a source with its SSM plan which we articulated in the proposal preamble. Rather, the commenters expressed concerns about the interpretation of the proposed language.

We believe that much of the concern expressed by the commenters is based on one alternative construction of the phrase “to the levels required by the relevant standards,” which replaced the phrase “at least to the levels required by the relevant standards” in several sections of the April 5, 2002 final rule. While we intended this phrase to mean that emissions must be minimized to the

greatest extent which is practicable, unless and until the levels required by the applicable MACT standard are achieved, some commenters were concerned that this phrase would be construed to require that the standard be met at all times. While we believe that such a construction would be unreasonable in the context of the remainder of the rule, we do understand how the literal language could be construed in this manner. The parenthetical phrase which followed this language in one section of the April 5, 2002 final rule helped to mitigate the potential that readers might adopt this alternative construction. However, as we have explained, it also created the significant problem identified by the Sierra Club.

Many commenters suggested that we modify the language of the rule itself to more clearly establish those general principles which we stated in the proposal preamble. We agree with these commenters. Accordingly, we have adopted new language for § 63.6(e)(1)(i), which establishes the general duty to minimize emissions. This new language makes it clear that during a period of SSM, the general duty to minimize emissions requires the owner or operator to reduce emissions to the greatest extent consistent with safety and good air pollution control practices. However, during an SSM event, the general duty to minimize emissions does not require an owner or operator to achieve the levels required by the applicable MACT standard at other times, or to make further efforts to reduce emissions if such levels have been successfully achieved.

Rather than restating these principles in other sections of the rule, we have instead cross-referenced the revised language of § 63.6(e)(1)(i) in § 63.6(e)(3)(i)(A) and § 63.6(e)(vii)(B). This assures that the same principles concerning the duty to minimize emissions will also be applied in the drafting of an SSM plan and in determining whether a particular SSM plan requires revision. We believe that this combination of amendments is responsive to the concerns expressed by the industry commenters. However, it also achieves our original purpose by assuring that a source will not be considered to have satisfied the duty to minimize emissions merely because it has complied with the provisions of an inadequate SSM plan.

We note that the Sierra Club argued in its comments that the whole concept that a MACT standard does not apply during periods of SSM has a questionable legal basis, and that any exemption for such activities should be

strictly limited to those instances where violation of emission limitations is “unavoidable.” We believe that we have discretion to make reasonable distinctions concerning those particular activities to which the emission limitations in a MACT standard apply, and we, therefore, disagree with the legal position taken by the Sierra Club. However, we note that the general duty to minimize emissions is intended to be a legally enforceable duty which applies when the emission limitations in a MACT standard do not apply, thereby limiting exceedances of generally applicable emission limitations to those instances where they cannot be reasonably avoided.

The general duty to minimize emissions requires that owners or operators review their SSM plans on an ongoing basis and make appropriate improvements to assure that excess emissions are avoided. Our experience in another regulatory context illustrates how sources and regulatory authorities can work together to improve procedures for SSM events. We have been working with the petroleum refining industry to reduce the number and significance of refinery acid gas flaring episodes, and a refinery flaring reduction protocol has now been implemented at about 35 refinery facilities nationwide. The protocol helps sources to determine the root cause of certain flaring events, determine the corrective action(s) for such problems, and then to implement the corrections.

Use of this protocol has resulted in a dramatic drop in the number of SSM events. For example, one company reduced the percentage of time in flare at its refineries (including all startup, shutdown, maintenance, upset activities) from 29.0% in 1998 to 1.6% in 2002. The EPA intends to develop guidance this year that will highlight the best practices that have been implemented by various refineries around the country to improve their response to SSM events. We believe that the experience we have gained in this process may also be beneficial to other facilities as they work to improve the quality and comprehensiveness of their SSM plans.

2. Public Access to SSM Plans

We also proposed some changes to 40 CFR 63.6(e)(3)(v), the section that governs submission of SSM plans to the EPA Administrator, and to the State or local permitting authorities which operate as the Administrator's designated representatives. That section provides that the current SSM plan must be made available upon request to the Administrator for “inspection and