

FACT SHEET

Proposed Rule: Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program

Action

- On June 3, 2016, the Environmental Protection Agency proposed revisions to its operating permit program regulations that implement title V of the Clean Air Act (CAA). The EPA is proposing to remove the “emergency” affirmative defense provisions located at 40 CFR 70.6(g) and 71.6(g).
- The title V emergency provisions currently in the existing regulations establish an affirmative defense. A stationary source of air pollution can use this affirmative defense in an enforcement case to avoid liability for noncompliance with technology-based emission limits contained in the source’s title V permit. In order to use this affirmative defense and avoid liability, the source must demonstrate that any excess emissions occurred as the result of an “emergency,” as defined in the regulations, and the source must make a number of other demonstrations specified in the regulations. These title V affirmative defense provisions apply in addition to, and independently from, any emergency or upset provisions contained in other applicable CAA requirements.

Background

- Title V of the Clean Air Act requires major sources of air pollutants, and certain other sources, to obtain and operate in compliance with an operating permit. Sources with these “title V permits” are required to certify compliance with the applicable requirements of their permits at least annually.
- The EPA first promulgated the emergency affirmative defense provisions when it finalized its title V regulations for state operating permit programs in 1992 and in the regulations for the federal operating permit program in 1996.
- These provisions allow sources to avoid liability in enforcement proceedings by demonstrating that violations of certain emission limitations in a title V permit were caused by an “emergency” situation.
- These emergency affirmative defense provisions have always been discretionary (not required) elements of state operating permit programs. Similarly, the EPA interprets these provisions to be discretionary elements of individual operating permits. Nonetheless, many state, local, and tribal programs have adopted similar provisions and include these affirmative defenses within title V permits.
- In 2014, the U.S. Court of Appeals for the D.C. Circuit issued its *NRDC v. EPA* decision. The court vacated a similar affirmative defense provision included in the EPA’s hazardous air pollutant regulations for the Portland Cement industry.
- The *NRDC v. EPA* case caused the EPA to reevaluate the role of affirmative defense provisions. The EPA determined that affirmative defense provisions are inconsistent with the enforcement structure of the CAA.

- As a result, the EPA has removed affirmative defense provisions from other CAA programs, including State Implementation Plans (in the 2015 “SSM SIP Call”), New Source Performance Standards (NSPS), and National Emission Standards for Hazardous Air Pollutants (NESHAP - also known as MACT standards). This proposal is a follow-up to these recent actions, designed to ensure that the EPA’s title V regulations are consistent with the CAA.

Anticipated Effects on State, Local, and Tribal Permitting Authorities

- The EPA is taking comment on the actions that state, local, and tribal permitting authorities may need to take if this proposal is finalized.
- Program Revisions: If the rule is finalized, the EPA expects it will be necessary for many state permitting authorities to make conforming revisions to their title V programs to remove similar affirmative defense provisions. Alternatively, states may be able to retain affirmative defenses as state-only provisions.
- Permit Revisions: In order to implement the program revisions that may be necessary if the rule is finalized, title V affirmative defense provisions included within individual operating permits will need to be removed. We expect these permit changes will occur in the ordinary course of business as permits are periodically renewed, revised, or reopened for other reasons.

Additional Information

- Interested parties can download today's proposed rule from the EPA’s web site at: <https://www.epa.gov/title-v-operating-permits>.

How to Comment

- The EPA will accept comments for 60 days beginning when this proposal is published in the Federal Register. All comments should be identified by Docket ID No. EPA-HQ-OAR-2016-0186 and submitted to the Federal e-rulemaking portal (<http://www.regulations.gov>). Follow the online instructions for submitting comments.
- For additional information about other ways to submit comments, please visit <http://www.epa.gov/dockets/comments.html>.
- If anyone requests a public hearing within 15 days after this rule is published in the Federal Register, the EPA will hold a hearing. Details about the hearing will be published in the Federal Register.
- For general information about this proposed rule, contact Matthew Spangler at (919) 541-0327 and spangler.matthew@epa.gov, of the EPA’s Office of Air Quality Planning and Standards.