

## FACT SHEET

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

#### **Action**

- On March 28, 2022, the U.S. Environmental Protection Agency (EPA) proposed to remove the emergency affirmative defense provisions from Clean Air Act (CAA) operating permit program regulations. These provisions are found in EPA’s regulations under title V of the CAA, located at 40 CFR 70.6(g) (applicable to state/local/tribal permitting authorities) and 71.6(g) (applicable when EPA is the permitting authority).
- Emergency affirmative defense provisions allow sources to avoid liability in enforcement proceedings by demonstrating that violations of certain emission limitations were caused by an “emergency” situation.
- All such affirmative defense provisions are inconsistent with the enforcement structure of the CAA, following the reasoning of the D.C. Circuit’s 2014 *NRDC v. EPA* decision. This proposal is a follow-up to prior actions in which EPA eliminated similar affirmative defense provisions from other Clean Air Act program areas.
- In 2016, the EPA proposed a rule to remove these affirmative defense provisions from the title V regulations. 81 FR 38645 (June 14, 2016) (the 2016 Proposal). To assure clarity in the regulatory process, this action is a re-proposal of the 2016 Proposal under the same title. The previous proposal was withdrawn in the Spring 2018 Unified Agenda of Federal Regulatory and Deregulatory Actions due to “other pending priorities.”
- In 2016 and in this re-proposal, EPA’s interpretation is that the enforcement structure of the CAA, embodied in sections 113 and 304, precludes affirmative defense provisions that would operate to limit a court’s authority or discretion to determine the appropriate remedy in an enforcement action.

#### **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.
- 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.
- A stationary source 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. To rely on the 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 emergency affirmative defense provisions have never been required elements of state operating permit programs or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in title V permits.
- In 2014, the U.S. Court of Appeals for the D.C. Circuit issued its *NRDC v. EPA* decision (749 F.3d 1055). The court vacated a similar affirmative defense provision included in EPA’s hazardous air pollutant regulations for the Portland Cement industry. The *NRDC v. EPA* case led EPA to reevaluate affirmative defense provisions in CAA programs.

### **Anticipated Effects on State, Local, and Tribal Permitting Authorities**

- Program Revisions: If the rule is finalized, EPA expects it will be necessary for some state permitting authorities to make changes to their title V programs to remove the affirmative defense 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 also 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 EPA’s web site at: <https://www.epa.gov/title-v-operating-permits>.
- For general information about this final rule, contact Corey Sugerik of EPA’s Office of Air Quality Planning and Standards at (919) 541-3223 or [sugerik.corey@epa.gov](mailto:sugerik.corey@epa.gov).

### **How to Comment**

- EPA will consider all comments received on the 2016 Proposed Rule as the Agency moves forward with the current rulemaking, and *commenters may but are not required to submit duplicate comments on the current proposal*. EPA will accept comments for 45 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.
- You may also send comments via these alternative methods:
  - E-mail: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov). Include Docket ID No. EPA-HQ-OAR-2016-0186 in the subject line of the message.
  - Fax: (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2016-0186.

- If anyone requests a public hearing within 5 days after this rule is published in the Federal Register, EPA will hold a virtual public hearing. Details about the hearing will be published in the Federal Register.