

FACT SHEET

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

Action

- On July 12, 2023, the U.S. Environmental Protection Agency (EPA) removed the emergency affirmative defense provisions from Clean Air Act (CAA) operating permit program (title V) 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).
- In 2016, EPA proposed a rule to remove these affirmative defense provisions from the title V regulations (81 FR 38645 (June 14, 2016), but withdrew it. On March 28, 2022, EPA re-proposed to remove the emergency affirmative defense provisions from the title V regulations (87 FR 19042).
- This final rule details expectations for implementation by permitting authorities, including the timing and mechanism of required title V program revisions and individual permit revisions.
- 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.
- In order to implement the program revisions that may be necessary, title V affirmative defense provisions included within individual operating permits will also need to be removed. EPA expects these permit changes will occur in the ordinary course of business as permits are periodically renewed, revised, or reopened for other reasons.

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.

Additional Information

- To download a copy of today's final action from the EPA website, go to "Current Regulations and Regulatory Actions" at the following address: <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>.
- 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.