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Title V/Clean Air Act: U.S. Environmental Agency Proposed Rule Removing Affirmative Defense Provisions from State/Federal Operating Permit Programs

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The United States Environmental Protection Agency ("EPA") in a June 14th Federal Register Notice proposed the removal of the affirmative defense provisions for emergencies found in the regulations for state and federal Title V/Operating Permit Program. See 81 Fed. Reg. 38645.

In 1990 the Clean Air Act was amended to add a national operating permit program for certain stationary sources of air pollution.

EPA subsequently promulgated permitting regulations for such stationary sources. The regulations were codified in 40 C.F.R. parts 70 and 71. They contain requirements for state operating permit programs and the federal operating permit program.

Title V emergency provisions establish an affirmative defense. EPA states that a stationary source of air pollution can:

... assert 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 incurred as the result of an "emergency", as defined in the regulations, and 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 any other applicable CAA requirements.

EPA's proposal would remove the emergency affirmative defense provisions in 40 C.F.R. 70.6 (g) and 71.6 (g). The agency states that they are inconsistent with its current interpretation of the Clean Air Act's enforcement structure and "recent court decisions from the U.S. Court of Appeals for the D.C. Circuit". It further opines that the provisions have "never been required elements of state operating permit programs" noting:

...the removal of these provisions is consistent with other recent EPA actions involving affirmative defenses have helped harmonize the enforcement and implementation of emission limitations across different CAA programs.

EPA states that finalization of this proposal may make it necessary for any states that have adopted similar affirmative defenses into their part 70 operating permit programs to revise their program regulations to remove these provisions.

A recent blog post referenced a presentation by William Montgomery of the Arkansas Department of Environmental Quality Office of Air that discussed a related action involving EPA's "SIP call" addressing start-up and malfunction exemptions in state implementation plans. A number of states (including Arkansas) have challenged this EPA action. [A link to the blog can be found here.](#)

[A copy of the Federal Register Notice can be downloaded here.](#)