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Removal of Title V Emergency Affirmative Defense Provisions/State Operating Permit Programs: U.S. Environmental Protection Agency Proposed Rule

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The United States Environmental Protection Agency (“EPA”) issued a proposed rule in the April 1st Federal Register that would remove the emergency affirmative defense provisions found in the regulations for state and federal Title V Operating Permit programs under the Clean Air Act. See 87 Fed. Reg. 19042.

These provisions are found in EPA’s regulations under Title V of the Clean Air Act which include:

- 40 CFR 70.6(g) (applicable to state/local/tribal permitting authorities)
- 40 CFR 71.6(g) (applicable when EPA is the permitting authority)

Congress in 1990 added Title V to the Clean Air Act to assure stationary sources were subject to a comprehensive air permit. The Title V operating permit program generally does not impose new substantive air quality control requirements.

Title V of the Clean Air Act requires certain stationary sources of air pollutants to obtain operating permits. The Clean Air Act provides that states administer Title V through adopted implementation plans. The intent of a Title V permit is to organize in a single document all the requirements that apply to the permit holder.

States are provided the opportunity to develop their own Title V programs. They are required to submit them to the EPA for approval. For example, Arkansas’s Title V operating program was approved by EPA many years ago.

EPA states in the April 1st Federal Register notice that it is re-proposing a document which was originally proposed in 2016. The purpose of the emergency affirmative defense provisions had been to establish an affirmative defense that Title V sources could assert in civil enforcement cases when noncompliance of certain emission limitations in Title V operating permits occurs because of qualifying “emergency” circumstances. In other words, these provisions are described by EPA as allowing sources to avoid liability and enforcement proceedings by demonstrating that violations of certain emission limitations were caused by an emergency situation.

EPA has taken the position in putting forth the proposed rule that these affirmative defense provisions are inconsistent with the enforcement structure of the Clean Air Act. Cited in support of this position is the D.C. Circuit Court of Appeals decision in 2014 of *National Resources Defense Council v. EPA*.

EPA in 2016 had proposed a rule to remove such affirmative defense provisions from the Title V regulations. See 81 Fed. Reg. 38645 (June 14, 2016).

In the event this proposed rule is finalized, it will be necessary for various Title V delegated states to make accompanying changes to their programs to remove the affirmative defense provisions. In addition, EPA assumes that certain Title V affirmative defense provisions included within individual operating permits will have to be removed. Such permit changes would presumably occur when they are periodically renewed, revised or reopened.

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