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

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The United States Environmental Protection Agency ("EPA") issued a final rule in the July 21st Federal Register that removes the emergency affirmative defense provisions found in the regulations for state and federal Title V Operating Permit programs under the Clean Air Act. See 88 Fed. Reg. 47029.

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 EPA for approval. For example, Arkansas's Title V operating program was approved by EPA many years ago. It is found in Arkansas Pollution Control & Ecology Commission Rule 26.

The previously cited EPA Title V regulations establish an affirmative defense that sources can assert in enforcement actions brought for noncompliance with technology-based emission limitations caused by specific emergency circumstances.

EPA states it is removing the emergency affirmative defense provisions because of its view they are inconsistent with its current interpretation of the enforcement structure of the Clean Air Act. Cited are prior court decisions from the U.S. Court of Appeals for the D.C. Circuit such as NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. 2014).

The federal agency argues as an additional rationale its view that the provision is inconsistent with other actions it has taken involving affirmative defenses. Cited are:

- New Source Performance Standards
- Emission Guidelines for Existing Sources
- National Emission Standards for Hazardous Air Pollutant regulations

Therefore, the agency takes the position that this final rule will harmonize its treatment of affirmative defenses across different Clean Air Act programs.

EPA further states that this final rule will require any states that have adopted similar affirmative defense provisions in their Title V Operating Permit programs to revise such regulations so as to remove these provisions. Facility Operating Permits in such states that contain such a Title V affirmative defense based on 40 CFR 70.6(g) or a similar state regulation will eventually need to be revised.

A copy of the final rule can be downloaded here.