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# Reinstatement of Title V Emergency Affirmative Defense Provisions/State Operating Permit Programs: US Environmental Protection Agency Final Rule

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The United States Environmental Protection Agency (“EPA”) issued a final rule that is withdrawing a 2023 final rule titled:

“Removal of Title 5 Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Programs” (“2023 Affirmative Defense Rule”)

The 2023 Affirmative Defense Rule eliminated emergency affirmative defense provisions found in the regulations for State and Federal Title 5 Operating Permit Programs under the Clean Air Act.

EPA is reinstating it. See 91 Fed. Reg. 32357 (June 1, 2026)

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’ Title V Operating Program was approved by EPA many years ago.

The purpose of the emergency affirmative defense provisions had been the establishment of an affirmative defense that Title V sources could assert in civil enforcement cases when non-compliance of certain emission limitations in Title V Operating Permits occur 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 in withdrawing the 2023 Affirmative Defense Rule states that it is taking the action in response to a September 5, 2025 decision of the United States Court of Appeals for the District of Columbia which

reversed this rule. The withdrawal is stated to be necessary to carry out the Court's mandate and reinstates the emergency-related affirmative defenses as they existed in the Code of Federal Regulations before promulgation of the 2023 Affirmative Defense Rule.

EPA states that it is taking this action as a final Rule without providing an opportunity for public comment because it finds that the Administrative Procedure Act "good cause" exemption applies. Because the D.C. Circuit Court of Appeals reversed the 2023 Affirmative Defense Rule, it is no longer valid and EPA states it must withdraw it. Therefore, the federal agency is determined that it is unnecessary to provide a public hearing or public comment because the withdrawal is a ministerial act necessary to carry out the Court's mandate.

A copy is [attached](#).