The EPA Administrator, Lee Zeldin, signed the following notice on 05/28/2026, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (https://www.govinfo.gov/app/collection/fr) and on Regulations.gov (https://www.regulations.gov) in Docket No. EPA-HQ-OAR-2016-0186. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA-HQ-OAR-2016-0186; FRL-8961.1-02-OAR]

RIN 2060-AX05

Withdrawal of Title V Emergency Affirmative Defense Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is withdrawing a 2023 final rule titled "Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program" ("2023 Affirmative Defense Rule"). The 2023 Affirmative Defense Rule removed emergency-related affirmative defense provisions from Federal regulations governing title V operating permit programs. The EPA is taking this final action in response to a September 5, 2025, decision of the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit which reversed the EPA's 2023 Affirmative Defense Rule. This withdrawal is necessary to carry out the court's mandate and reinstates the emergency-related affirmative defense provisions as they existed in the Code of Federal Regulations (CFR) before promulgation of the 2023 Affirmative Defense Rule.

DATES: This action is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: For information about this final rule, contact Sydney Lawrence, Permitting and Program Support Division, Office of State Air Partnerships, Environmental Protection Agency, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711; telephone number: (919) 541-4768; email address: *lawrence.sydney@epa.gov*.

SUPPLEMENTARY INFORMATION:

Docket. The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2016-0186. All documents in the docket are listed in *https://www.regulations.gov*. Although listed, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available as PDF versions that can only be accessed on the EPA computers in the docket office reading room. Certain databases and physical items cannot be downloaded from the docket but may be requested by contacting the docket office at (202) 566-1744. With the exception of such material, publicly available docket materials are available electronically at *https://www.regulations.gov*.

Preamble acronyms and abbreviations. Throughout this preamble, the use of "we," "us," or "our" is intended to refer to the EPA. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

APA	Administrative Procedure Act

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CAA	Clean Air Act
CFR	Code of Federal Regulations
EPA	Environmental Protection Agency
FR	*Federal Register*
OMB	Office of Management and Budget
PBI	Proprietary Business Information
PRA	Paperwork Reduction Act
RFA	Regulatory Flexibility Act
UMRA	Unfunded Mandates Reform Act
U.S.C.	United States Code

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I. General Information

A. Does this action apply to me?

Entities potentially affected by this final rule include Federal, State, local, and Tribal air pollution control agencies that administer title V operating permit programs, and

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owners and operators of emissions sources in all industry groups who hold or apply for title V operating permits.

B. Why is the EPA Issuing this Final Rule?

The EPA is taking this action in response to the decision of the U.S. Court of Appeals for the D.C. Circuit in *SSM Litigation Group v. EPA*, 150 F.4th 593 (D.C. Cir. 2025) ("*SSM Litigation Group*"). In that decision, the D.C. Circuit found that the EPA's 2023 Affirmative Defense Rule,[1] which removed emergency-related affirmative defense provisions from Federal regulations governing title V operating permit programs and required States to remove such provisions from State operating permit programs and State-issued operating permits, was "unreasonable and not in accordance with law."[2] The court issued the mandate in this case on January 12, 2026. The court's decision invalidated the 2023 Affirmative Defense Rule, and the EPA is now taking action to withdraw the rule.

II. Background

On July 21, 2023, the EPA issued the 2023 Affirmative Defense Rule that rescinded the longstanding emergency-related affirmative defense provisions previously codified in the Agency's operating permit program regulations at 40 CFR 70.6(g) and 71.6(g).[3] The previously rescinded affirmative defense provisions that are now being reinstated define an emergency as: "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which

[1] "Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program," 88 FR 47029 (July 21, 2023).
[2] 150 F. 4th at 599-600.
[3] *Id*. Parts 70 and 71 of title 40 of the CFR contain the requirements for State operating permit programs and the Federal operating permit program, respectively.

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situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency.[4] The regulations also provide that an emergency constitutes "an affirmative defense to an action brought for noncompliance with such technology-based emission limitations" if certain conditions are met.[5]

The 2023 Affirmative Defense Rule rescinded these longstanding provisions based on the EPA's conclusion that they were legally impermissible under the Clean Air Act (CAA).[6] As a result, the preamble to the 2023 Affirmative Defense Rule explained that removal of these provisions from the EPA's regulations meant that States were likewise required to remove from their operating permit program regulations and from existing operating permits any State affirmative defense provisions that were based on the rescinded Federal provisions.[7]

SSM Litigation Group filed a petition for review of the 2023 Affirmative Defense Rule in the D.C. Circuit, challenging the EPA's basis for rescinding the title V affirmative defense provisions. On September 5, 2025, the court issued a decision finding that the 2023 Affirmative Defense Rule rested entirely on erroneous legal justifications.[8] On January 12, 2026, the court issued its mandate in the case.[9]

III. Basis for the Final Rule

[4] 40 CFR 70.6(g)(1) (as effective 2022).
[5] 40 CFR 70.6(g)(2) (as effective 2022).
[6] 88 FR at 47030, 47039.
[7] *Id*. at 47030-31.
[8] *SSM Litigation Group*, 150 F.4th at 600.
[9] *SSM Litigation Group v. EPA*, Case No. 23-1267, Document 2152683 (order denying petition for rehearing, filed Jan. 2, 2026) and Document 2153880 (mandate, filed Jan. 12, 2026).

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Because the D.C. Circuit in *SSM Litigation Group* reversed the 2023 Affirmative Defense Rule, the rule is now invalid. Accordingly, the EPA must withdraw the 2023 Affirmative Defense Rule and restore the longstanding regulatory text that existed prior to that rule.

IV. Final Rule

The EPA is withdrawing the 2023 Affirmative Defense Rule, consistent with the D.C. Circuit's decision in *SSM Litigation Group*. The effect of this action is to restore the text of 40 CFR 70.6(g) and 71.6(g) as these provisions existed before the EPA promulgated the 2023 Affirmative Defense Rule (*i.e.*, to reinstate the emergency-related affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) that the 2023 Affirmative Defense Rule rescinded). As a result of this final action, State, local, and Tribal permitting authorities are no longer required to submit revisions to their title V operating permit programs or to revise existing operating permits to implement the requirements of the 2023 Affirmative Defense Rule.

The EPA is taking this action as a final rule without providing an opportunity for public comment or a public hearing because the Agency finds that the Administrative Procedure Act (APA) "good cause" exemption applies. In general, the APA requires that general notice of proposed rulemaking be published in the *Federal Register*, and that such notice must provide an opportunity for public participation in the rulemaking process. However, the APA authorizes an agency to directly issue a final rulemaking in certain specific instances. This may occur when an agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rule issued) that notice and public participation are "impracticable, unnecessary, or contrary to the public

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interest.”[10] Because the D.C. Circuit in *SSM Litigation Group* reversed the 2023 Affirmative Defense Rule, the rule is no longer valid and the EPA must withdraw it. The EPA has determined that it is unnecessary to provide a public hearing or an opportunity for public comment on this action because the withdrawal of the 2023 Affirmative Defense Rule is a ministerial act necessary to carry out the D.C. Circuit’s mandate in *SSM Litigation Group*. Because this action involves no exercise of Agency discretion and instead merely implements the binding decision of the court, it would serve no useful purpose to provide an opportunity for public comment or a public hearing on this action. For these reasons, the EPA finds good cause under 5 U.S.C. 553(b)(B) to issue a final rule without undergoing public notice and comment. For the same reasons, the EPA finds that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders*.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 14192: Unleashing Prosperity Through Deregulation

[10] 5 U.S.C. 553(b)(B).

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This action is considered an Executive Order 14192 deregulatory action. This final rule provides burden reduction because State, local, and Tribal permitting authorities are no longer required to submit revisions to their title V operating permit programs, or to revise existing operating permits.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA. This final action does not establish any new information collection requirement apart from what is already required by law. In this action, the EPA is reinstating certain provisions in the Agency's regulations. This action does not involve any requests for information, recordkeeping or reporting requirements, or other requirements that would constitute an information collection under the PRA

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Entities potentially affected directly by this proposal include state, local, and tribal governments, and none of these governments would qualify as a small entity. Other types of small entities, including stationary sources of air pollution, are not directly subject to the requirements of this action.

E. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain an unfunded mandates as described in the UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any State, local, or Tribal governments or the private sector.

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F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have Tribal implications as specified in Executive Order 13175. This action withdraws a previous final rulemaking requiring the removal of emergency affirmative defense provisions from part 70 and part 71 operating permit programs. No Tribal government is subject to a requirement to revise their operating permit programs as a result of this action. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks that the Agency has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2-202 of the Executive Order.

Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA's Policy on Children's Health also does not apply.

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I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This final action does not involve technical standards.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

VI. Statutory Authority

The statutory authority for this action is provided in CAA sections 502(b) and 502(d)(3), 42 U.S.C. 7661a(b) and (d)(3), which direct the Administrator of the EPA to promulgate regulations establishing State operating permit programs and give the Administrator the authority to establish a Federal operating permit program. Additional authority for this action is provided in 5 U.S.C. 553(b)(B) and (d)(3), which authorize the EPA to find that good cause exists to forego notice and public procedure and to issue a final rule that is effective immediately upon publication in the *Federal Register*.

VII. Judicial Review

CAA section 307(b)(1) governs judicial review of final actions by the EPA. This section generally provides that petitions for review of final actions that are nationally applicable must be filed in the U.S. Court of Appeals for the D.C. Circuit, and petitions for judicial review of actions that are locally or regionally applicable must be filed in the

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appropriate regional circuit.[11] However, petitions for judicial review of a final action that is locally or regionally applicable must be filed in the D.C. Circuit when "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."[12]

As the Supreme Court recently articulated in *EPA v. Calumet*, 605 U.S. 627 (2025), the first step in determining the appropriate venue for judicial review of an EPA final action is to ascertain whether the action at issue is "nationally applicable" or "locally or regionally applicable."[13] To determine whether an action is "nationally applicable" or "locally or regionally applicable," courts ask "whether the action '[o]n its face' applies throughout the entire country, or only to particular localities or regions." *Calumet*, 605 U.S. at 638. If the action is nationally applicable, venue lies in the D.C. Circuit. If the action is locally or regionally applicable, the second step is to determine whether the EPA has appropriately invoked the "nationwide scope or effect" exception to "override the default rule" that judicial review of a locally or regionally applicable action belongs in the appropriate regional circuit.[14]

This final action is "nationally applicable" within the meaning of CAA section 307(b)(1). This final action withdraws a previous final action that had revised both the regulatory requirements in 40 CFR part 70 that govern State, local, Tribal, and U.S. territorial operating permit programs nationwide and the regulatory requirements in 40 CFR part 71 that govern Federal operating permits nationwide. Because this action

[11] 42 U.S.C. 7607(b)(1).
[12] *Id*.
[13] *Calumet*, 605 U.S. at 636-39.
[14] *Id*. at 642.

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withdraws a nationally applicable action, thereby reinstating nationally applicable title V regulations that had been rescinded in that action, this final action is also nationally applicable.

Per CAA section 307(b)(1), petitions for judicial review of this action must be filed in the U.S. Court of Appeals for the D.C. Circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of the action for the purposes of judicial review or extend the time within which a petition for judicial review must be filed and shall not postpone the effectiveness of such rule or action.

List of Subjects

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Lee Zeldin,
Administrator.

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For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 70–STATE OPERATING PERMIT PROGRAMS

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq*.

2. In § 70.6, add paragraph (g) to read as follows:

§ 70.6 Permit content.

* * * * *

(g) *Emergency provision*.

(1) *Definition*. An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) *Effect of an emergency*. An emergency constitutes an affirmative defense to an action bought my noncompliance with such technology-based emission limitations if the conditions of paragraph (g)(3) of this section are met.

(3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

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(ii) the permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of paragraph (a)(3)(iii)(B) of this section. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(5) This provision is in addition to any emergency or upset provision contained in any applicable requirement.

PART 71−FEDERAL OPERATING PERMIT PROGRAMS

3. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq*.

4. In § 71.6, add paragraph (g) to read as follows:

§ 71.6 Permit content.

* * * * *

(g) *Emergency provision*.

(1) *Definition*. An “emergency” means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes

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the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) *Effect of an emergency.* An emergency constitutes an affirmative defense to an action bought my noncompliance with such technology-based emission limitations if the conditions of paragraph (g)(3) of this section are met.

(3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) the permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of paragraph (a)(3)(iii)(B) of this section. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(5) This provision is in addition to any emergency or upset provision contained in any

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