6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA-HQ-OAR-2016-0186; FRL-9947-56-OAR]

RIN 2060-AS96

Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to remove the affirmative defense provisions for emergencies found in the regulations for state and federal operating permit programs. These provisions establish an affirmative defense that sources can assert in civil enforcement cases when noncompliance with certain emission limitations in operating permits occurs because of qualifying "emergency" circumstances. These provisions, which have never been required elements of state operating permit programs, are being removed because they are inconsistent with the enforcement structure of the Clean Air Act (CAA) and recent court decisions from the U.S. Court of Appeals for the D.C. Circuit. The removal of these provisions is consistent with other recent EPA actions involving affirmative defenses and would harmonize the enforcement and implementation of emission limitations across different CAA programs. The EPA is also taking comment on various implementation consequences relating to the proposed removal of the emergency affirmative defense provisions.

DATES: *Comments*. Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Public Hearing: If anyone contacts the EPA requesting a public hearing on or before **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the EPA will hold a hearing. Additional information about the hearing, if requested, will be published in a subsequent *Federal Register* document.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2016-0186, at *http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets*.

FOR FURTHER INFORMATION CONTACT: For general information, please contact Mr. Matthew Spangler, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Planning Division (C504-05), Research Triangle Park, NC 27711; telephone number: (919) 541-0327; email address: *spangler.matthew@epa.gov*. To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Planning Division (C504-01), Research Triangle Park, NC 27711;

telephone number (919) 541-0641; fax number (919) 541-5509; email address:

long.pam@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How is this Federal Register notice organized?

The information presented in this preamble is organized as follows:

Populations and Low-Income Populations
VIII. Statutory Authority

B. Does this action apply to me?

Entities potentially affected by this proposed rulemaking include federal, state, local and tribal air pollution control agencies that administer title V operating permit programs[1] and owners and operators of emissions sources in all industry groups who hold or apply for title V operating permits.

C. What should I consider as I prepare my comments for the EPA?

1. Submitting CBI.

Do not submit CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments.

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject

[1] This preamble makes frequent use of the term "state," usually meaning the state air pollution control agency that serves as the permitting authority. The use of the term "state" also applies to local and tribal air pollution control agencies, where applicable.

heading, *Federal Register* date and page number).

- Follow directions. The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

D. How can I find information about a possible public hearing?

If anyone contacts the EPA requesting a public hearing on or before **[INSERT DATE 15 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**, the EPA will hold a hearing. If requested, further details concerning a public hearing for this proposed rule will be published in a subsequent *Federal Register* document. For updates and additional information on a public hearing, please check the EPA's Web page at *https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions.*

E. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this *Federal Register* document will be posted at *https://www.epa.gov/title-v-operating-permits/current-regulations-*

and-regulatory-actions.

II. Overview of Action

The EPA has promulgated permitting regulations for the operation of major and certain other sources of air pollutants under title V of the CAA. These regulations are codified in 40 CFR parts 70 and 71, which contain the requirements for state operating permit programs and the federal operating permit program, respectively. These regulations currently contain identical provisions setting forth an affirmative defense to enforcement actions brought for noncompliance with technology-based emission limitations under specific "emergency" circumstances. *See* 40 CFR 70.6(g) and 71.6(g).

In this action, the EPA is proposing to remove the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the CAA's enforcement structure and recent court decisions from the U.S. Court of Appeals for the D.C. Circuit. These provisions have never been required elements of state operating permit programs. The removal of these provisions is consistent with other recent EPA actions involving affirmative defenses and would help harmonize the enforcement and implementation of emission limitations across different CAA programs.

If the EPA takes final action to remove these provisions from 40 CFR 70.6(g), it may be necessary for any states that have adopted similar affirmative defense provisions into their part 70 operating permit programs to revise their program regulations to remove these provisions. In addition, the EPA expects that these states would coordinate revisions of individual operating permits that contain similar provisions.

III. Background

A. Regulatory History of 40 CFR 70.6(g) and 71.6(g)

In 1990, Congress amended the CAA and established, among other things, title V of the CAA, which contains a national operating permit program for certain stationary sources of air pollution. *See* CAA sections 501–503, Pub. L. 101-549 (1990) (codified at 42 U.S.C. 7661–7661b). Shortly thereafter, and pursuant to CAA section 502(b), the EPA promulgated regulations implementing title V of the CAA. The first set of regulations, finalized in 1992 and codified at 40 CFR part 70 (the part 70 regulations), governs state operating permit programs and provides for states to develop and submit to the EPA programs for issuing operating permits for major and certain other stationary sources of air pollution.[2] Pursuant to CAA section 502(d)(3), the EPA promulgated a second set of regulations in 1996, found at 40 CFR part 71 (the part 71 regulations), which outlines the federal operating permit program.[3] Both sets of regulations contain identical affirmative defense provisions, which are addressed by this action.

Title V of the CAA does not contain any provisions concerning an affirmative defense mechanism for emergencies. When the EPA first proposed its part 70 regulations in 1991, the agency did not include any such provisions.[4] However, the EPA received comments specifically requesting that the part 70 regulations make some provision for "emergencies" or "upsets" caused by the failure of emission control equipment. In promulgating the final part 70 regulations for state operating permit programs, the EPA included § 70.6(g), which contains an

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[2] Operating Permit Program, Final Rule, 57 FR 32250 (July 21, 1992).
[3] Federal Operating Permits Program, Final Rule, 61 FR 34202 (July 1, 1996).
[4] Operating Permit Program, Proposed Rule, 56 FR 21712 (May 10, 1991).

affirmative defense for "emergencies."[5] When the EPA promulgated its part 71 regulations in 1996, it adopted an identical provision in § 71.6(g), in order to maintain consistency between the state and federal operating permit programs.[6] The text of sections 70.6(g) and 71.6(g) has not changed since initially promulgated.

The title V emergency provisions establish an affirmative defense. 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 occurred as the result of an "emergency," as defined in the regulations, and make a number of other demonstrations specified in the regulations. *See* 40 CFR 70.6(g) and 71.6(g). These title V affirmative defense provisions apply in addition to, and independently from, any emergency or upset provisions contained in other applicable CAA requirements.

Sections 70.6(g) and 70.4(b)(16) form the basis for similar affirmative defense provisions contained in state operating permit programs and for similar provisions contained in individual state-issued operating permits. Section 71.6(g) provides the authority to include this emergency provision in operating permits issued by the EPA or by states with delegated authority under part 71.

Such emergency affirmative defense provisions are not required program elements. States have never been obligated to include the § 70.6(g) affirmative defense provision in their part 70

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[5] Operating Permit Program, Final Rule, 57 FR 32279. The EPA explained that the provision was intended to provide operational flexibility, and was modeled on a similar National Pollutant Discharge Elimination System (NPDES) permit provision in 40 CFR 122.41. *Id*.
[6] Federal Operating Permits Program, Final Rule, 61 FR 34219 (July 1, 1996).

operating permit programs; instead, the provision has always been discretionary.[7] Similarly, although the emergency affirmative defense provision is located within the "Permit Content" section of the part 70 and part 71 regulations, the EPA does not consider the provision to be a required permit term.[8] Thus, the EPA considers the emergency provision to be a discretionary element of both state permitting programs as well as individual operating permits.

B. Subsequent Legal and Regulatory History Supporting this Action

The EPA has considered the most appropriate ways to account for excess emissions during different modes of source operation, such as startup and shutdown, and emissions during emergencies, upsets, and malfunctions for more than 40 years. The EPA's policies regarding the emergency affirmative defense provisions in its part 70 and 71 regulations have been shaped by a number of factors, including the structure of the CAA, federal court decisions, experience with similar provisions in other EPA programs, and recommendations from stakeholders. This section

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[7] Operating Permits Program and Federal Operating Permits Program, Proposed Rule [Title V Supplemental Proposal], 60 FR 45530, 45558 (August 31, 1995) ("At the outset, EPA wants to make clear that the part 70 rule does *not* require that States adopt the emergency defense. A State may include such a defense in its part 70 program to the extent it finds appropriate, although it may not adopt an emergency defense less stringent than that set forth at section 70.6(g). . . . [T]he Act in sections 116 and 506(a) authorizes States to establish additional or more stringent air pollution control or permitting requirements. Consistent with that, States may decide to provide an emergency defense that is narrower in scope or more stringent in application than § 70.6(g) or no defense at all.").

[8] *See* State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, Final Action [SSM SIP Call], 80 FR 33839, 33924 (June 12, 2015) ("[A]s part of normal permitting process, the EPA encourages permitting authorities to consider the discretionary nature of the emergency provisions when determining whether to continue to include permit terms modeled on those provisions in operating permits that the permitting authorities are issuing in the first instance or renewing").

summarizes some of the more relevant and recent legal, regulatory, and policy considerations informing the EPA's current policy on affirmative defense provisions, including the D.C. Circuit's opinion in *NRDC v. EPA* and the EPA's recent experience with affirmative defenses for startup, shutdown, and malfunction (SSM) events in State Implementation Plans (SIPs).

1. D.C. Circuit Opinion in NRDC v. EPA

In the 2014 *NRDC v. EPA*[9] case, the United States Court of Appeals for the D.C. Circuit vacated an affirmative defense provision applicable to malfunction events. In 2010, the EPA included an affirmative defense within its National Emission Standards for Hazardous Air Pollutants (NESHAP) for Portland cement facilities, promulgated under CAA section 112.[10] This provision created an affirmative defense that sources could assert in civil enforcement proceedings when violations of emission limitations occurred because of qualifying unavoidable malfunctions. The D.C. Circuit held that this affirmative defense provision exceeded the EPA's statutory authority and that only the courts have the authority to decide whether to assess penalties for violations in civil suits. As the court explained:

> By its terms, Section 304(a) clearly vests authority over private suits in the *courts*, not EPA. As the language of the statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are "appropriate." By contrast, EPA's ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court. . . . [U]nder this statute, deciding whether penalties are "appropriate" in a given private civil suit is a job for the courts, not for EPA."[11]

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[9] 749 F.3d 1055 (D.C. Cir. 2014).
[10] National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 75 FR 54993 (September 9, 2010).
[11] *NRDC v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014).

The D.C. Circuit therefore concluded that the EPA lacked the authority to create an affirmative defense in private civil suits that would purport to alter the jurisdiction of the court to assess civil penalties for violations. Although this case was based on EPA regulations promulgated under CAA section 112, the court's holding was not based on section 112, but rather on sections 304(a) and 113(e)(1). Therefore, and as discussed further in Section IV of this document, the EPA interprets the decision to be relevant to all similar affirmative defense provisions, such as those found in part 70 and part 71, that may interfere with the authority of courts to assess penalties or to impose other remedies authorized in CAA section 113(b) in civil enforcement suits. This proposed rulemaking seeks to ensure that the EPA's part 70 and part 71 regulations are consistent with the enforcement structure of the CAA in accordance with the reasoning of the *NRDC v. EPA* decision.[12]

2. SSM SIP Call

The EPA has also reconsidered affirmative defense provisions similar to those involved in the *NRDC v. EPA* case in other recent regulatory actions. On June 15, 2015, the EPA issued a "SIP Call" (the SSM SIP Call) finding that certain SIP provisions in 36 states are substantially

[12] In 2008, the D.C. Circuit issued a decision in *Sierra Club v. Johnson*, 551 F.3d 1019, vacating the EPA's regulations that exempted sources under certain circumstances from emissions standards during periods of SSM. The EPA maintains that the part 70 and part 71 emergency affirmative defense provisions are just that—affirmative defenses to enforcement actions—not exemptions from otherwise applicable emissions limitations. Such affirmative defense provisions are called into question by *NRDC v. EPA*. However, to the extent that the title V emergency affirmative defense could be considered in some respects to function like an exemption from otherwise applicable emissions limitations, such an exemption would be incompatible with the CAA and *Sierra Club v. Johnson*. This is an alternative basis for proposing to remove the part 70 and part 71 emergency affirmative defense provisions, as discussed further in Section IV.C of this document.

inadequate to meet CAA requirements.[13] Many of the deficient SIP provisions at issue in the SSM SIP call are affirmative defense type provisions, and some of them are analogous to the emergency affirmative defense in part 70 and part 71. Although the agency's SSM policy for SIP provisions is not directly at issue in this proposal, certain aspects of the SSM SIP Call are especially relevant and are discussed in this subsection.

After the EPA initially proposed the SSM SIP Call,[14] the D.C. Circuit issued its opinion in *NRDC v. EPA*. That decision, which concerned the legal basis for an affirmative defense provision in the EPA's own regulations, caused the EPA to reconsider the legal basis for any affirmative defense provisions contained in SIPs.[15] The EPA concluded that the logic of the court in *NRDC v. EPA* extends beyond CAA section 112 to affirmative defense provisions contained in SIPs. Therefore, the EPA clarified and revised its interpretation of CAA requirements with respect to affirmative defense provisions for SSM events. The agency explained that "the enforcement structure of the CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. These provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain or what

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[13] SSM SIP Call, 80 FR 33839 (June 12, 2015).
[14] State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, Proposed Rule, 78 FR 12459 (February 22, 2013).
[15] *See* State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States, Supplemental notice of proposed rulemaking [SSM SIP Call Supplemental Proposal], 79 FR 55919, 55929 (September 17, 2014).

forms of remedy they purport to limit or eliminate."[16] The EPA explained that "[a]ffirmative defense provisions by their nature purport to limit or eliminate the authority of federal courts to determine liability or to impose remedies through factual considerations that differ from, or are contrary to, the explicit grants of authority in section 113(b) and section 113(e)."[17] The EPA's interpretation of the CAA's enforcement structure and the *NRDC v. EPA* decision, as set forth in the final SSM SIP Call, is relevant to the current rulemaking. Section IV of this document further discusses this interpretation in the context of the part 70 and part 71 emergency provisions.

Following this interpretation, the EPA directed states to remove specifically identified provisions containing affirmative defenses from their SIPs. Some of these SSM provisions were similar to the emergency provisions in the EPA's part 70 and part 71 regulations. In the final SSM SIP Call, the EPA indicated that provisions modeled after the §§ 70.6(g) and 71.6(g) emergency affirmative defense provisions—including provisions that were more narrowly defined—were no longer consistent with the EPA's interpretation of the CAA and could not be included in SIPs.[18] For example, the EPA found that an Arkansas SIP provision establishing an affirmative defense for emergencies, which may have been modeled after the EPA's title V regulations, was substantially inadequate to meet CAA requirements.[19] The EPA also discussed the potential conflict between the SSM policy applicable to SIP provisions and the part 70 and part 71 emergency provisions, but noted that it was not taking action to revise the title V

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[16] SSM SIP Call, 80 FR 33851 (June 12, 2015).
[17] *Id*. at 33852.
[18] *Id*. at 33924.
[19] *Id*. at 33967; *see also* SSM SIP Call Supplemental Proposal, 79 FR 55942 and 55943.

regulations in the SSM SIP Call rulemaking.[20] In the final SSM SIP Call, however, the EPA indicated that it was considering whether such changes may be necessary and how best to make such changes.

3. *Related Actions in other CAA Program Areas*

Since 2014, the EPA has removed or omitted affirmative defense provisions in numerous regulations throughout other CAA program areas following the *NRDC v. EPA* case. Specifically, in newly issued and revised New Source Performance Standards (NSPS), emission guidelines for existing sources, and NESHAP regulations, the EPA has either omitted new affirmative defense provisions or removed existing affirmative defense provisions.[21] This proposed rulemaking for the part 70 and part 71 regulations is thus consistent with these related efforts in other CAA program areas and ensures that title V operating permits do not contain additional affirmative defenses that could interfere with the EPA's efforts to remove these impermissible provisions from specific underlying applicable requirements.

[20] SSM SIP Call, 80 FR 33924 (June 12, 2015).

[21] *See, e.g.*, National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants; Final Rule, 80 FR 44771 (July 27, 2015); National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Final Rule, 80 FR 72789 (November 20, 2015); Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units; Proposed Rule, 80 FR 3018, 3025 (January 21, 2015).

IV. Proposed Changes to Part 70 and Part 71 Regulations

A. Purpose of this Proposed Rulemaking

This proposed rulemaking is responsive to a number of concerns and related actions, including those discussed in Section III of this document. The EPA considers this proposed rulemaking important to ensure that the EPA's title V regulations are consistent with the enforcement structure envisioned by Congress in the 1990 CAA amendments. This action is intended to respond to the reasoning of the D.C. Circuit's recent opinion in *NRDC v. EPA*, which the EPA interprets to extend to the affirmative defense provisions in the part 70 and part 71 regulations. This proposed rule also follows from similar regulatory actions in other CAA program areas, including the recent SSM SIP Call and various NSPS and NESHAP regulations. The EPA considers the proposed removal of the emergency affirmative defense provisions from the title V regulations necessary to maintain a consistent interpretation of the CAA throughout different CAA programs, including section 110 SIPs, section 111 NSPS and existing source guidelines, and section 112 NESHAPs.

Finally, this proposed action follows from the EPA's stated intentions to revisit the emergency affirmative defense provisions promulgated in 1992 and seeks to provide clarity in

response to stakeholder concerns.[22] The EPA initially sought to clarify the scope of the emergency provisions over the course of multiple actions in 1995 and 1996. However, the EPA ultimately indicated that it would reevaluate the part 70 and part 71 emergency affirmative defense provisions—including whether these provisions may need to be eliminated—in a subsequent rulemaking.[23] The EPA again discussed the title V emergency provisions in the SSM SIP Call, where the agency acknowledged the potential conflict between the SSM policy applicable to SIP provisions and the part 70 and part 71 emergency provisions, but indicated that

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[22] In addition to comments received on prior regulatory actions, the EPA has received input from stakeholders as recent as 2006. The Clean Air Act Advisory Committee (CAAAC), chartered under the Federal Advisory Committee Act, was established to advise the EPA on issues related to the 1990 CAA Amendments. In 2006, a Task Force formed by the CAAAC issued its Final Report: Title V Implementation Experience. *See* Title V Task Force, *Final Report to the Clean Air Act Advisory Committee: Title V Implementation Experience* (April 2006), *available at http://www.epa.gov/sites/production/files/2014-10/documents/title5_taskforce_finalreport20060405.pdf*. Although the Task Force did not agree on how broadly the title V emergency affirmative defense should be applied, all eighteen members of the Task Force unanimously recommended the following: "Title V permits should be clear as to which limits are subject to the part 70 emergency defense (*e.g.*, under the current rule, technology based limits)." *Id*. at 144. By way of response, the proposed action to remove these provisions would essentially moot these concerns about clarity on the applicability of these provisions.

[23] *See* Federal Operating Permits Program, Proposed Rule, 60 FR 20804, 20816 (April 27, 1995) ("The EPA is reevaluating the provisions in parts 70 and 71 relating to the emergency defense in light of concerns identified in legal challenges to the part 70 rule. The EPA may propose revisions to the part 70 and part 71 sections providing for the emergency defense before EPA would include such defense in any part 71 permits."); Title V Supplemental Proposal, 60 FR 45560 ("The EPA is reluctant to retain a generally applicable emergency defense without completing further review of the appropriateness of such a defense for the different Federal technology based standards in light of the concerns with such a defense raised in the CWA cases."); Federal Operating Permits Program, Final Rule, 61 FR 34219 ("As a result of concerns identified in legal challenges to part 70, the Agency, in the August 1995 supplemental proposal, solicited comment on the need for, scope and terms of an emergency affirmative defense provision. The Agency is reviewing those comments, but has not yet made a decision on whether or not to modify *or remove* this additional affirmative defense provision from part 70." (emphasis added)).

it would potentially make changes to the title V affirmative defense provisions in a subsequent rulemaking.[24] As contemplated in the prior title V rulemakings and in the more recent SSM SIP Call, the EPA is now considering the appropriate changes to parts 70 and 71 and proposing to remove the title V emergency affirmative defenses provisions.

B. Proposed Action: Removal of 40 CFR 70.6(g) and 71.6(g)

The EPA is proposing to remove the emergency provisions located at 40 CFR 70.6(g) and 71.6(g). The agency has not identified any other viable option for reconciling these affirmative defense provisions with the enforcement structure of the CAA, in accordance with the reasoning of the *NRDC v. EPA* decision. The implications of this proposed removal on the federal operating permit program, state operating permit programs, and on individual sources subject to title V operating permits are discussed in Section V of this document.

C. Legal Justification for Proposed Action

This action is proposed pursuant to CAA sections 502(b) and 502(d)(3), 42 U.S.C. 7661a(b) & (d)(3), which direct the Administrator of the EPA to promulgate regulations establishing state operating permit programs and give the Administrator authority to establish a federal operating permit program.

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[24] *See* SSM SIP Call, 80 FR 33924 ("Those regulations [40 CFR 70.6(g) and 71.6(g)], which are applicable to title V operating permits, may only be changed through appropriate rulemaking to revise parts 70 and 71. Further, any existing permits that contain such emergency provisions may only be changed through established permitting procedures. The EPA is considering whether to make changes to 40 CFR part 70 and 40 CFR part 71, and if so, how best to make those changes. In any such action, EPA would also intend to address the timing of any changes to existing title V operating permits. Until that time, as part of normal permitting process, the EPA encourages permitting authorities to consider the discretionary nature of the emergency provisions when determining whether to continue to include permit terms modeled on those provisions in operating permits that the permitting authorities are issuing in the first instance or renewing.").

The EPA proposes to remove the affirmative defense provisions from the part 70 and 71 regulations in order to ensure that the federal and state title V operating permit programs operate within the bounds established by Congress in the 1990 CAA Amendments. Regarding these boundaries, the D.C. Circuit's opinion in *NRDC v. EPA* is instructive as to the enforcement structure envisioned by Congress, as well as the role of affirmative defense provisions within the EPA's regulations implementing the CAA. As discussed in Section III.B.1 of this document, the court in *NRDC v. EPA* determined that an affirmative defense provision promulgated by the EPA for the Portland cement industry under CAA section 112 exceeded the agency's statutory authority. In doing so, the D.C. Circuit based its holding on CAA sections 304(a) and 113(e)(1).

CAA section 304(a) grants "any person" the right to "commence a civil action . . . against any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of . . . an emission standard or limitation" under the CAA. 42 U.S.C. 7604(a). Section 304(a) also provides that "[t]he [federal] district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation . . . and to apply any appropriate civil penalties." *Id*. CAA section 113(e)(1) establishes a number of factors that courts must consider when determining the amount of any penalties assessed in civil actions under section 304(a). *See* 42 U.S.C. 7413(e)(1).

The D.C. Circuit indicated that these statutory provisions precluded the EPA from promulgating affirmative defense provisions that a source could use in civil enforcement suits. The court did not remand the regulation to the EPA for better explanation of the legal basis for an affirmative defense; the court instead vacated the affirmative defense and indicated that there could be no valid legal basis for such a provision because it contradicted fundamental

requirements of the CAA concerning the authority of courts in judicial enforcement of CAA requirements. As the court explained:

> By its terms, Section 304(a) clearly vests authority over private suits in the *courts*, not EPA. As the language of the statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are "appropriate." By contrast, EPA's ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court. . . . [U]nder this statute, deciding whether penalties are "appropriate" in a given private civil suit is a job for the courts, not for EPA."[25]

The court also noted that "EPA cannot rely on its gap-filling authority to supplement the Clean Air Act's provisions when Congress has not left the agency a gap to fill."[26]

The D.C. Circuit's holding in *NRDC v. EPA* is especially pertinent here.[27] Like the Portland cement NESHAP at issue in the *NRDC v. EPA* case, the provisions at issue in this proposal are also regulations promulgated by the EPA to implement programs under the CAA. The affirmative defense for malfunctions in the Portland cement NESHAP and the affirmative defense for emergencies in the EPA's part 70 and part 71 regulations are functionally similar provisions that operate in essentially identical ways to establish affirmative defenses in civil enforcement actions. Moreover, the EPA believes that the reasoning of the court's decision in *NRDC v. EPA* applies more broadly than to the specific facts of the case for several reasons. The EPA notes that the court's decision did not turn upon the specific provisions of CAA section

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[25] *NRDC v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014).
[26] *Id.* at 1064.
[27] The EPA's interpretation of the *NRDC v. EPA* case as it affects the affirmative defense provisions in parts 70 and 71 is similar to the interpretation of the case as articulated in the SSM SIP Call. More information on the EPA's interpretation of the *NRDC v. EPA* ruling can be found in the Final SSM SIP Call and the August 2014 Supplemental Proposal. *See* SSM SIP Call, 80 FR 33851; SSM SIP Call Supplemental Proposal, 79 FR 55929.

112. Although the court only evaluated the legal validity of an affirmative defense provision created by the EPA in conjunction with specific standards applicable to manufacturers of Portland cement, the court based its decision upon the provisions of sections 113 and 304 that pertain to enforcement of CAA requirements more broadly, including to emission limits in title V permits. Sections 113 and 304 pertain to administrative and judicial enforcement generally and are in no way limited to enforcement of emission limitations promulgated by the EPA under section 112. Thus, the EPA does not think that the mere fact that the court only addressed the legality of an affirmative defense provision in this particular context means that the court's interpretation of sections 113 and 304 does not also apply more broadly. To the contrary, the EPA sees no reason why the logic of the court concerning sections 113 and 304 would not apply to the title V emergency affirmative defense provisions, as well.

In light of the court's decision, the EPA now interprets the enforcement structure of the CAA, embodied in section 113 and section 304, to preclude affirmative defense provisions that would operate to limit a court's authority or discretion to determine the appropriate remedy in an enforcement action. CAA section 304(a) grants the federal district courts the jurisdiction to determine liability and to impose penalties in enforcement suits brought by citizens. Similarly, section 113(b) provides courts with explicit jurisdiction to determine liability and to impose remedies of various kinds, including injunctive relief, compliance orders, and monetary penalties, in judicial enforcement proceedings. These grants of jurisdiction come directly from Congress, and the EPA is not authorized to alter or eliminate this authority under the CAA or any other law. With respect to monetary penalties, CAA section 113(e) explicitly includes the factors that courts and the EPA are required to consider in the event of judicial or administrative enforcement for violations of CAA requirements, including title V permit provisions. Because

Congress has already given federal courts the authority to determine what monetary penalties are appropriate in the event of judicial enforcement for a violation of a title V permit provision, neither the EPA nor states can alter or eliminate that authority by superimposing restrictions on the authority and discretion granted by Congress to the courts. Affirmative defense provisions by their nature purport to limit or eliminate the authority of federal courts to determine liability or to impose remedies through factual considerations that differ from, or are contrary to, the explicit grants of authority in section 113(b) and section 113(e). Therefore, these provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain, or what forms of remedy they purport to limit or eliminate. This is true for regulations promulgated under CAA sections 111 and 112, SIP provisions approved by the EPA, and regulations promulgated under title V of the CAA. Thus, just as the EPA revisited affirmative defenses in SIP provisions in light of the *NRDC v. EPA* opinion, the EPA is reevaluating its interpretation of the CAA relative to the emergency affirmative defense provisions contained in its part 70 and part 71 regulations, and is proposing to remove those provisions because they are not consistent with the CAA's enforcement structure.

Since the 2014 *NRDC v. EPA* decision, and in order to ensure consistency with the CAA's enforcement structure, the EPA has been omitting new affirmative defense provisions and removing existing affirmative defense provisions throughout many CAA program areas that establish emission limitations contained in title V permits. However, the title V emergency affirmative defense provisions apply regardless of whether there is an affirmative defense also found in the underlying applicable requirements. *See* 40 CFR 70.6(g)(5) and 71.6(g)(5). As a result, sources could seek to assert this affirmative defense in title V enforcement cases for noncompliance with emission limitations derived from applicable requirements that do *not*

otherwise contain such an affirmative defense for emergencies. The continued existence of the title V emergency affirmative defense provisions thus contradicts and compromises the EPA's on-going efforts to ensure that underlying regulations are applied consistently with the CAA.

The EPA maintains that the part 70 and part 71 emergency affirmative defense provisions are affirmative defenses to enforcement actions and are not "exemptions" from otherwise applicable emissions limitations. However, as an alternative but additional justification, to the extent that the emergency affirmative defense provisions in part 70 and part 71 could be interpreted to establish an exemption or exclusion from emission limits (rather than merely an affirmative defense to penalties in the event of a violation), these provisions would still run contrary to the CAA's requirements and require removal. As previously noted,[28] under *Sierra Club v. Johnson,*[29] the CAA requires that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise. Therefore, even if characterized as an exemption or exclusion from otherwise applicable limits, the emergency affirmative defense provisions would, nonetheless, run afoul of the CAA and *Sierra Club v. Johnson*, and should, on that alternative basis, be removed.

V. Implementation

A. Implementing these Changes in Part 70 State Operating Permit Programs

This section discusses the actions that the EPA anticipates state, local, and tribal permitting authorities[30] would need to take (if this proposed rule is finalized in substantially the

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[28] *See* footnote 12.
[29] 551 F.3d 1019 (D.C. Cir. 2008).
[30] As noted in footnote 1, the term "state" as used throughout this preamble refers to all state,

same form) in order to ensure that their operating permit programs are consistent with the proposed revisions to the EPA's part 70 regulations and the CAA's enforcement structure. The EPA welcomes comments on how best to address the implementation consequences of the proposed removal of 40 CFR 70.6(g).

1. Programs that do not Contain Emergency Affirmative Defense Provisions

As discussed in Section III.A of this document, the section 70.6(g) emergency provision has never been a required element of part 70 operating permit programs. For states that have not adopted the section 70.6(g) emergency provision, or any similar affirmative defense provision, into their part 70 operating permit programs, no further action would be required to comply with this rule as proposed. However, we expect that as a result of this rulemaking, it may be necessary for states that have adopted an affirmative defense in their part 70 programs to take the actions described in the following subsections.

2. Programs that Contain Emergency Affirmative Defense Provisions

The EPA's existing part 70 regulations provide for state program revisions if part 70 is revised and the EPA determines that such conforming changes are necessary. *See* 40 CFR 70.4(a) and 70.4(i). Therefore, as a result of this proposed regulatory action to remove 40 CFR 70.6(g) and 71.6(g), state operating permit programs that contain an emergency affirmative defense may have to take appropriate actions to remain consistent with the CAA and the EPA's part 70 regulations. As discussed in more detail in the following subsections, the EPA is requesting comment on whether revisions to certain approved state programs may be necessary if

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local and tribal permitting authorities that administer approved part 70 programs.

the EPA removes 40 CFR 70.6(g) and 71.6(g).

a. Scope of Program Revisions that May be Necessary if the Rule is Finalized as Proposed

Affirmative defense provisions included within a state's part 70 (title V) program regulations—including provisions that are narrower in scope or more stringent than 40 CFR 70.6(g)—will generally implicate the same concerns that prompted the EPA to propose removing 70.6(g) and 71.6(g) from the agency's regulations. The EPA expects that state programs containing provisions that mirror the exact language of 70.6(g) would need to be revised if this proposed rule is finalized, as would state programs that have provisions that do not exactly mirror the language of 40 CFR 70.6(g), but nonetheless provide for title V affirmative defenses.[31] In any case, the EPA invites comment on whether it may be necessary for states to revise programs containing any provisions that (1) purport to establish an affirmative defense to enforcement actions[32] and (2) are included within the state's part 70 (title V) program regulations. Anytime the phrases "affirmative defense" or "emergency affirmative defense" are used within this section, these phrases are intended to refer to all such provisions meeting these criteria. These criteria are intended to encompass provisions that initially would have been approved by the EPA as consistent with 40 CFR 70.6(g) and 70.4(b)(16). This action would not

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[31] For example, affirmative defense provisions that refer to "upsets" or "malfunctions" rather than "emergencies" would still implicate the same concerns.

[32] Additionally, any state program provisions based off of 70.6(g) that purport to establish an "exemption" or "exclusion" to emission limitations (rather than, or in addition to, an affirmative defense for noncompliance) during emergencies, upsets, or malfunctions would also likely need to be removed. To the extent that an emergency defense is characterized as an exemption, this would run afoul of the CAA requirement that emission limitations must apply continuously and cannot contain exemptions. *See Sierra Club v. Johnson*, 551 F.3d 1019 (D.C. Cir. 2008); SSM SIP Call, 80 FR 33852.

directly affect any affirmative defense provisions arising under other CAA applicable requirements, or state-only provisions outside of each state's approved part 70 operating permit programs.

The EPA has begun to compile a tentative list of affirmative defense provisions within state programs that may eventually need to be removed. The EPA is including this list in the docket for this proposed rulemaking (EPA-HQ-OAR-2016-0186) for informational purposes only; this list is not an official determination as to the adequacy or inadequacy of any program provisions. The EPA seeks comment on whether there are additional title V affirmative defense provisions in state regulations or statutes that we have not yet identified, and whether any such provisions would or would not remain appropriate as part of a state's approved title V program if this proposed rule is finalized.

b. Form of Program Revisions

Because the EPA believes that a large number of part 70 programs contain provisions resembling those that the agency proposes to eliminate, the EPA anticipates that it will be necessary for states to initiate conforming revisions to remove any affirmative defense provisions from their approved title V operating permit programs if the EPA removes 40 CFR 70.6(g). The EPA seeks comment on this approach and on other possible approaches to ensure that state programs are consistent with the CAA and the EPA's part 70 regulations. However, the EPA does not anticipate that it would be appropriate for states to retain affirmative defense provisions within their approved part 70 programs. For example, if a state decided, in lieu of a program revision, to exercise its discretion to omit or remove affirmative defense provisions from all future title V operating permits, the state's approved part 70 program would still contain regulations inconsistent with the EPA's part 70 regulations and the CAA. Further, if an

emergency provision remained in a state's approved program, a source could potentially attempt to invoke the provision as an affirmative defense during an enforcement proceeding, notwithstanding its absence from the source's individual title V permit. This result could undermine the enforcement of certain permit limitations and would be inconsistent with the enforcement structure of the CAA.

Although the EPA expects that most states would elect to remove the emergency affirmative defense provisions from their part 70 program regulations, states could nonetheless choose to retain such affirmative defense provisions within their permitting regulations as state-only requirements in certain circumstances. In that case, states would have to ensure and make clear to the EPA that any remaining affirmative defense provisions are only available for alleged noncompliance with permit requirements arising solely from state law. Ideally, this would involve an amendment to state regulations to explicitly clarify the limited applicability of any remaining affirmative defense provisions; such a clarifying amendment could also effectively serve as an appropriate revision to the state's part 70 program. The EPA solicits comment on whether and to what extent it would be appropriate for states to retain state-only affirmative defense provisions if this proposed rule is finalized.

Finally, states may also choose to remove any other provisions that reference 40 CFR 70.6(g) or similar state affirmative defense provisions in order to ensure clarity. These could include, but are not limited to, state regulations that incorporate by reference 40 CFR 70.6(g), as well as any associated definitions, recordkeeping, or reporting requirements relating to the affirmative defense provisions affected by this rulemaking. States may also wish to retain a portion of the emergency provisions, such as the definition of "emergency" or certain reporting requirements, for purposes of supporting other regulations that do not involve an affirmative

defense. This could be appropriate as long as any remaining provisions could not be interpreted to provide an affirmative defense to federally applicable requirements.

c. Procedure, Timing and Content of Program Revisions

If this proposed rule is finalized, the EPA expects that it would be necessary for any states with approved part 70 operating permit programs that contain emergency affirmative defense provisions to remove any such provisions and submit program revisions to the EPA within 12 months after the final rule's effective date. For many programs, the EPA does not anticipate that additional state legislative authority will be required to enact these revisions. Therefore, the EPA believes that 12 months will be ample time for many states to make such a straightforward and narrow program revision. However, the EPA is considering whether it may be appropriate to provide individual states up to 24 months to submit program revisions if a state demonstrates that additional legislative authority is necessary to enact the program revisions.

If this proposed rule is finalized, the EPA expects that state program revisions submitted to the agency should include a redline version of the specific changes made to the state's part 70 regulations to remove any emergency affirmative defense provisions. States may, but need *not*, include as part of their program revision submittals any other unrelated revisions to state program regulations.[33] Each state should also include a brief statement of the legal authority that authorized this removal, which could take various forms depending on the specific circumstances of each state. Finally, to address how the program revisions would be implemented with respect

[33] The EPA intends that any narrow program revisions that may be necessary if this rule is finalized could be expeditiously processed, whether submitted alone or with other program revisions.

to individual permits, each state should also include a schedule for the planned removal of these provisions from individual title V operating permits, as well as a description of the mechanism(s) that the state plans to use to remove these existing provisions. Further discussion of how these program revisions should be implemented in individual permits is presented in Section V.A.3 of this document.

The EPA is specifically requesting comment on these program revision time frames and procedures from permitting authorities whose approved part 70 programs contain affirmative defense provisions. The EPA solicits additional comments from states with title V program provisions that may also be contained within SIPs as to any additional revisions that may be necessary if this rule is finalized.

3. Effect of this Rule on Current and Future State-Issued Operating Permits

The eventual finalization of this rule would not have an automatic impact on sources currently operating under a title V permit, and any minimal resource burden to revise permits would likely be spread over many years. After a state makes any necessary revisions to its title V program, the EPA expects that revisions to operating permits to remove emergency affirmative defense provisions would generally occur in the ordinary course of business as the state issues new permits or reviews and revises existing permits. The options presented in the following subsections would afford states with the maximum flexibility to implement these changes while ensuring predictability for sources operating under title V permits.

a. Form of Permit Changes

In order to implement program revisions that may be necessary if this rule is finalized as

proposed, it may be necessary for states to remove title V emergency affirmative defense provisions that are currently included in any state-issued permits.[34] Alternatively, states may choose to allow sources to retain affirmative defense provisions in their permits as state-only provisions. Any such remaining affirmative defense provisions must be clearly labeled within each permit as not applicable for federal law purposes to ensure that they are not available in enforcement actions for noncompliance with any federally-enforceable emission limitations, as required by 40 CFR 70.6(b)(2).

b. Mechanisms and Timing of Permit Changes

The EPA anticipates that states would have the flexibility to remove emergency provisions from title V permits through a number of different existing mechanisms, either through changes to individual permits or perhaps to multiple permits through more streamlined processes. As previously noted, if the proposed action is finalized, any necessary program revision submittals should reflect the planned schedule and mechanism for these permit changes. The EPA expects that states will follow the guidelines discussed in this preamble, but will consider other plans for revising title V permits that would not cause undue delay.

First, states could require that permit applications address the removal of emergency provisions during the next periodic permit renewal, permit modification, or permit reopening, including those that occur as the result of other rulemakings. States using these mechanisms

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[34] It is possible that individual operating permits may contain other provisions establishing affirmative defenses that are derived from other applicable requirements. As previously noted, this proposed rulemaking will not have any effect on affirmative defense provisions promulgated under any CAA requirements other than 40 CFR 70.6(g) and 71.6(g). However, the source of such affirmative defense provisions should be clearly stated in each individual operating permit, to avoid confusion about the scope of such provisions.

should ensure that these changes occur at the first possible occasion; in other words, the first situation in which the permitting authority must act on an individual permit after state program revisions are approved by the EPA. Moreover, because states have never been required by federal law to include these provisions in state-issued title V permits, the EPA also encourages states to exercise their discretion to cease including emergency affirmative defense provisions as early as practicable. In many cases, there will be no reason for states to wait for the EPA to take final action on this proposal to begin implementing this suggestion.[35]

Additionally, sources may apply for a permit modification from their permitting authority at any time. The EPA anticipates that the removal of an emergency affirmative defense would not trigger the significant modification procedures under 40 CFR 70.7(e)(4), and—depending on the regulations in each state's approved title V program—could be implemented using minor modification procedures. Finally, depending on the unique structure of each state's operating permit program, some states may also be able to remove these provisions from multiple existing permits in a single action, via mechanisms such as general permits or permits-by-rule. The EPA is requesting comment on how states could use existing permitting options to remove emergency affirmative defense provisions from title V permits in a more streamlined and expeditious manner.

Overall, the EPA believes that addressing the omission or removal of emergency affirmative defense provisions from permits according to the existing state program mechanisms

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[35] Of course, if currently-approved state program regulations require that this provision be included within individual title V operating permits, a state may not be able to exercise this discretion until program revisions are completed.

described in this subsection affords states sufficient flexibility to implement these changes and provides certainty to facilities operating under title V permits. Under the approaches currently being considered, the EPA anticipates that the removal of affirmative defense provisions from permits should generally occur in the ordinary course of business and should require essentially no additional burden on states or sources. The timing for these changes may coincide with similar changes to operating permits based on revised SIP provisions following the SSM SIP Call or changes to other applicable requirements, and it may be convenient and efficient for states to make all necessary changes to title V permits at the same time.

B. Implementing these Changes in the Part 71 Federal Operating Permit Program

Although the title V operating permit program is typically implemented by state and local permitting authorities through EPA-approved part 70 programs, in certain circumstances the EPA has assumed direct permitting authority over sources through its part 71 program. The EPA administers the part 71 federal program in most areas of Indian country (however, one tribe—the Southern Ute Tribe—has an approved part 70 program, and another—the Navajo Nation—has been delegated part 71 implementation authority[36]), on the Outer Continental Shelf (where there is no state permitting authority), as well as for specific sources where the EPA has determined that a state has not adequately implemented its part 70 program or satisfied an EPA objection to a permit.

[36] The EPA has delegated a portion of its part 71 permitting authority to the Navajo Nation EPA (NNEPA) through a delegation agreement, such that NNEPA assumes the responsibility for specific aspects of program administration under the part 71 regulations, including the authority to issue part 71 operating permits to sources.

In some cases where the EPA administers its part 71 program, the EPA has included in its federally-issued operating permits the emergency affirmative defense provision found in 40 CFR 71.6(g). If 40 CFR 71.6(g) is removed, the federal (including delegated) program rules would no longer include regulatory authority for incorporating this emergency affirmative defense in permits. Therefore, in order to ensure that part 71 programs are implemented consistent with the proposed revisions to the part 71 regulations, the EPA or delegated permitting authority should remove emergency affirmative defense provisions that are currently included in title V permits at the next permit action following the effective date of the final rule. Because the EPA has always considered the emergency provisions to be discretionary permit terms, the EPA has omitted emergency affirmative defense provisions from part 71 permits that it has issued since the D.C. Circuit's 2014 *NRDC v. EPA* decision. The EPA plans to continue to exercise its discretion to not include emergency affirmative defense provisions in future EPA-issued operating permits.

C. Effect on Sources Potentially Subject to Enforcement Proceedings

The legal rights and obligations of individual sources potentially subject to enforcement proceedings would not be adversely affected by the removal of emergency affirmative defense provisions from their title V permits.[37] The absence of an affirmative defense provision in a source's title V permit does not mean that all exceedances of emission limitations in a title V permit will automatically be subject to enforcement or automatically be subject to imposition of particular remedies. Pursuant to the CAA, all parties with authority to bring an enforcement

[37] The removal of these provisions from individual operating permits has similar implications to sources as the removal of the SSM provisions subject to the SSM SIP Call. *See* SSM SIP Call, 80 FR 33852.

action to enforce title V permit provisions (*i.e.*, the state, the EPA, or any parties who qualify under the citizen suit provision of CAA section 304) have enforcement discretion that they may exercise as they deem appropriate in any given circumstances. For example, if the excess emissions caused by an emergency occurred despite proper operation of the facility, and despite the permittee taking all reasonable steps to minimize excess emissions, then these parties may decide that no enforcement action is warranted. In the event that any party decides that an enforcement action is warranted, then it has enforcement discretion with respect to what remedies to seek from the court for the violation (*e.g.*, injunctive relief, compliance order, monetary penalties, or all of the above), as well as the type of injunctive relief and/or amount of monetary penalties sought.[38]

Further, courts have the discretion under section 113 to decline to impose penalties or injunctive relief in appropriate cases. In the event of an enforcement action for an exceedance of an emission limit in a title V permit, a source can elect to assert any common law or statutory defenses that it determines are supported, based upon the facts and circumstances surrounding the alleged violation. Under sections 304(a) and 113(b), courts have authority to impose injunctive relief, issue compliance orders, assess monetary penalties or fees and award any other appropriate relief. Under section 113(e), courts are required to consider the enumerated factors when assessing monetary penalties, including the source's compliance history, good faith efforts to comply the duration of the violation, and "such other factors as justice may require." If the

[38] The EPA notes that only the state and the EPA have authority to seek criminal penalties for knowing and intentional violation of CAA requirements. The EPA has this explicit authority under section 113(c).

exceedance of the emission limitation occurs due to an emergency, the source retains the ability to defend itself in an enforcement action and to oppose the imposition of particular remedies or to seek the reduction or elimination of monetary penalties, based on the specific facts and circumstances of the emergency event. Thus, elimination of an emergency affirmative defense provision that purported to take away the statutory jurisdiction of the court to exercise its authority to impose remedies does not disarm sources in potential enforcement actions. Sources would retain all of the equitable arguments they previously could have made; they must simply make such arguments to the reviewing court as envisioned by Congress in section 113(b) and section 113(e). Congress vested the courts with the authority to judge how best to weigh the evidence in an enforcement action and determine appropriate remedies.

The eventual removal of such impermissible emergency affirmative defense provisions from state operating permit programs and individual title V permits will likely be necessary to preserve the enforcement structure of the CAA, to preserve the authority of courts to adjudicate questions of liability and remedies in judicial enforcement actions, and to preserve the potential for enforcement by states, the EPA, and other parties under the citizen suit provision as an effective deterrent to violations. In turn, this deterrent encourages sources to be properly designed, maintained, and operated and, in the event of violation of permitted emission limitations, to take appropriate action to mitigate the impacts of the violation. In this way, as intended by the existing enforcement structure of the CAA, sources can mitigate the potential for enforcement actions against them and the remedies that courts may impose upon them in such enforcement actions, based upon the facts and circumstances of the event.

VI. Environmental Justice Considerations

The EPA believes the human health or environmental risk addressed by this proposed

action would not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it would not adversely affect the level of protection provided to human health or the environment. This action simply proposes to remove emergency affirmative defense provisions from the EPA's operating permit program regulations. If the proposed rule is finalized, it may also be necessary for state, local and tribal permitting authorities to remove similar affirmative defense provisions from program regulations and from individual title V operating permits. None of these changes would alter the obligations of sources to comply with the emission limits and other standards contained within title V operating permits. However, this proposed rulemaking could encourage sources to comply with the terms of their operating permits at all times to the maximum extent practicable. This could potentially result in improved air quality for communities living near sources of air pollution as well as the broader population. Thus, this proposed rulemaking will not adversely affect the level of protection to human health or the environment for any populations.

VII. Statutory and Executive Order Reviews

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. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060-0243 (for part 70 state operating permit programs) and 2060-0336 (for part 71 federal operating permit program). In this action,

the EPA is proposing to remove certain provisions from the EPA's regulations, which if finalized could result in the removal of similar provisions from state, local, and tribal operating permit programs and individual permits. Consequently, states could eventually be required to submit program revisions to the EPA outlining any necessary changes to their regulations and their plans to remove provisions from individual permits. However, this proposed action will not involve any requests for information, recordkeeping or reporting requirements, or other requirements that would constitute an information collection under the PRA.

C. 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 proposed 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.

D. Unfunded Mandates Reform Act (URMA)

This action does not contain an unfunded mandate of $100 million or more as described in 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.

E. 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.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. One tribal government (the Southern Ute Indian Tribe) currently administers an approved part 70 operating permit program, and one tribal government (the Navajo Nation) currently administers a part 71 operating permit program pursuant to a delegation agreement with the EPA. These tribal governments may be required to take actions if this proposed rule is finalized, including program revisions (for part 70 programs) and eventual permit revisions, but these actions will not require substantial compliance costs. The EPA solicits comment from affected tribal governments on the implications of this proposed rulemaking.

G. 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 environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations 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.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it does not affect the level of protection provided to human health or the environment. The results of this evaluation are contained in Section VI of this document titled, "Environmental Justice Considerations."

VIII. Statutory Authority

The statutory authority for this proposed action is provided in CAA sections 502(b) and 502(d)(3), 42 U.S.C. 7661a(b) & (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. Additionally, the Administrator determines that this action is subject to the provisions of CAA section 307(d), which establish procedural requirements specific to rulemaking under the CAA. CAA section 307(d)(1)(V) provides that the provisions of CAA section 307(d) apply to "such other actions as the Administrator may determine." 42 U.S.C. 7607(d)(1)(V).

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.

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Dated: June 3, 2016.

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Gina McCarthy,
Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be 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.*

§ 70.6 [Amended]

2. In § 70.6, remove paragraph (g).

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.*

§ 71.6 [Amended]

4. In §71.6, remove paragraph (g).

[FR Doc. 2016-14104 Filed: 6/13/2016 8:45 am; Publication Date: 6/14/2016]