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EPA Plans To Scrap 'Affirmative Defense' Emissions Waiver In Air Permits

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EPA is re-proposing an Obama-era plan to eliminate "affirmative defense" regulatory waivers from state and federal air quality permits, in line with its revived position that such exemptions for excess emissions during periods of facility startup, shutdown or malfunction (SSM) are unlawful and must be removed from state air plans.

In **a notice** scheduled for publication in the *Federal Register* April 1, EPA moves to scrap its own regulations allowing states and federal air regulators to include affirmative defense provisions for "emergency" malfunctions in Clean Air Act Title V facility operating permits.

The Obama EPA in 2016 proposed to do this, but the Trump administration never finalized the rule.

EPA will take comment on the new proposal for 45 days following its publication in the *Register*, until May 15, and will also consider comments made on the original 2016 proposal as well.

"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 and court decisions, EPA says.

Affirmative defenses shield industry permit holders from civil liability in the event of a malfunction or other emergency that releases air pollution exceeding regulatory limits, provided that regulators view the breakdown as unavoidable with reasonable maintenance of facilities.

Environmentalists say such exemptions allow damaging amounts of excess pollution.

While the agency had long allowed such provisions, the Obama administration viewed such defenses as unlawful under legal precedent, and in a 2015 "SIP Call" rule required 36 states to remove them from their state implementation plans (SIPs) for attaining federal air quality standards.

Trump EPA officials disagreed with this position, declining to enforce the SIP Call and allowing three states -- Texas, North Carolina and Iowa -- to retain SSM waivers. But the Trump administration never revoked the SIP Call regulation itself.

The SIP Call and these state-specific exemptions are now being litigated, but the Biden EPA has already reversed Trump-era guidance that contradicted the SIP Call, and the agency is now moving to implement the rule after years of delay. EPA is also conducting a voluntary remand of its approval of the three states' SIPs that is likely to result in a requirement for those states to remove their SSM exemptions, which include affirmative defenses and other SSM waiver provisions.

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit heard **oral arguments** on the SIP Call March 25, appearing split on many issues but possibly in agreement with

EPA that the court's 2014 precedent in *Natural Resources Defense Council (NRDC) v. EPA* does not allow for affirmative defenses, either in federal regulations or in SIPs.

The *NRDC* ruling applied directly to air toxics regulations, but EPA interprets the ruling as providing a broader prohibition on affirmative defenses.

Industry groups and some states disagree, saying that *NRDC* and a similar 2008 D.C. Circuit ruling in *Sierra Club v. EPA* apply only to air toxics regulations, not SIPs or other provisions.

"The EPA believes that the reasoning and logic of that decision" in *NRDC* "extend to regulations concerning operating permit programs under title V. This view aligns the EPA's position on affirmative defenses in title V with positions taken in other [air law] program areas, including EPA policy relating to the treatment" of SSM periods in SIPs, the proposal says.

'Inconsistent With' EPA Interpretation

EPA's permit regulations "currently contain provisions describing an affirmative defense that sources may be able to assert in enforcement actions brought for noncompliance with technology-based emission limitations caused by specific emergency circumstances," EPA says in the new proposal.

"These provisions are inconsistent with the EPA's interpretation" of the Clean Air Act enforcement structure "and court decisions from the U.S. Court of Appeals for the D.C. Circuit -- primarily the 2014 *NRDC v. EPA* decision," EPA adds.

EPA interprets the air law 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. The title V affirmative defense provisions the EPA proposes to remove . . . set forth just such limitations."

There will be no immediate impact on SIPs from EPA's proposed rule, but once finalized it would require states to examine their SIPs and air permits and if necessary revise them, EPA says.

"The nature and focus of the proposed action are to remove the affirmative defense provisions from the EPA's regulations. . . . The EPA is not proposing any specific finding with respect to individual state programs or state-issued title V permits that may contain similar provisions."

However, if the EPA finalizes the rule as proposed, "the Agency expects that some state, local, and tribal permitting authorities will need to remove similar provisions from their approved part 70 program regulations" in SIPs "and submit program revisions to the EPA. The EPA also expects that these permitting authorities will need to remove such provisions from individual title V permits." -- *Stuart Parker* (**sparker@iwpnews.com**)

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