



Facts About ...

Amendments to COMAR 26.11.03 Repeal of Regulation .24 – Part 70 Permit Emergency Provisions

10/25/2023

Purpose

The purpose of this action is to repeal Regulation .24 from COMAR 26.11.03 Permits, Approvals, and Registration — Title V Permits.

Submission to EPA as Revision to Maryland's State Implementation Plan (SIP)

This action will not be submitted to the U.S. Environmental Protection Agency (EPA) for approval as part of Maryland's State Implementation Plan.

Background & Requirements

Title V of the Clean Air Act (CAA) requires major sources of air pollutants, and certain other sources, to obtain and operate in compliance with an operating permit. Sources with these title V permits are required to certify compliance with the applicable requirements of their permits at least annually. The U.S. Environmental Protection Agency (EPA) first promulgated the emergency affirmative defense provisions when it finalized its title V regulations for state operating permit programs in 1992 and in the regulations for the federal operating permit program in 1996. Maryland's Title V program and regulations were effective on August 2, 1996, the date EPA approved Maryland's program.

Under the affirmative defense provisions, a stationary source could use 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. To rely on the 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 the source must make a number of other demonstrations specified in the regulations. No permitted facility has ever utilized the affirmative defense provisions in Maryland.

In 2014, the U.S. Court of Appeals for the D.C. Circuit issued its NRDC v. EPA decision (749 F.3d 1055) vacating the affirmative defense provisions. On June 14, 2016, EPA proposed a rule to remove these affirmative defense provisions from the title V regulations (81 FR 38645), but later withdrew it. On March 28, 2022, EPA re-proposed to remove the emergency affirmative defense provisions from the title V regulations (87 FR 19042). On July 12, 2023, EPA finalized



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the removal of the emergency affirmative defense provisions from the CAA operating permit program (Title V) regulations (88 FR 47029). The finalized rule removes paragraph (g) from 40 CFR 70.6. These provisions are found in EPA's regulations under Title V of the CAA, located at 40 CFR 70.6(g) (applicable to state/local/tribal permitting authorities) and 71.6(g) (applicable when EPA is the permitting authority).

With the removal of the affirmative defense provisions under the CAA, it is necessary for states whose Title V (part 70 programs) contain impermissible affirmative defense provisions to remove such provisions from their EPA-approved part 70 programs.

Maryland's Title V (part 70 program) is contained under COMAR 26.11.03 Permits, Approvals, and Registration — Title V Permits. This action will repeal Regulation .24 to remove the affirmative defense provisions.

Projected Emission Reductions

The proposed action does not impact emissions.

Economic Impact on Affected Sources, the Department, other State Agencies, Local Government, other Industries or Trade Groups, the Public and Small Businesses

The proposed action has minimal or no economic impact.

Comparison to Federal Standards

The state operating permit program (title V) provisions are found in EPA's regulations under title V of the CAA, located at 40 Code of Federal Regulations (CFR) part 70.

Title 26 DEPARTMENT OF THE ENVIRONMENT

Subtitle 11 AIR QUALITY

Chapter 03 Permits, Approvals, and Registration — Title V Permits

Authority: Environment Article, §§1-101, 1-404, 2-101—2-103, 2-301—2-303, 2-401, 2-403, and 2-404, Annotated Code of Maryland

.01 — .23 (text unchanged)

[.24 Part 70 Permit Emergency Provisions.

A. For purposes of a Part 70 permit, an "emergency" means a situation:

(1) Arising from sudden and reasonably unforeseeable events beyond the control of the owner or operator of the source, including acts of God;

(2) Requiring immediate corrective action to restore normal operation; and

(3) That causes the source to exceed a technology-based emission standard under the Part 70 permit because of unavoidable increases in emissions attributable to the emergency.

B. An emergency does not include noncompliance caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

C. An emergency constitutes an affirmative defense to an action brought for noncompliance with a technology-based emission standard in the federally enforceable conditions of a Part 70 permit if the conditions of §D of this regulation are met.

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

(1) An emergency occurred and that the permittee identified the cause of the emergency;

(2) The permitted source was being properly operated when the emergency occurred;

(3) 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 of the federally enforceable conditions of a Part 70 permit and the effects of those levels of emissions; and

(4) The permittee submitted verbal notice of the emergency to the Department immediately and written notice within 2 working days after emission standards were exceeded because of the emergency.

E. The notice under §D(4) of this regulation shall contain a description of the emergency, the steps taken to minimize emissions and their effects, and corrective actions taken. This notice fulfills the requirements of Regulation .06C(7)(a)(iii) of this chapter.

F. In a proceeding to establish noncompliance with the federally enforceable conditions of a Part 70 permit, a permittee has the burden of proof to establish the occurrence of an emergency.

G. This regulation is in addition to an emergency or upset provision contained in an applicable requirement, including the provisions of COMAR 26.11.01.07.]