

# TITLE 326 AIR POLLUTION CONTROL DIVISION

## Rule Information Sheet

Emergency Affirmative Defense Provisions  
LSA Document #24-318

### Overview

On July 24, 2023, the United States Environmental Protection Agency (U.S. EPA) removed the emergency affirmative defense provisions in 40 CFR 70.6(g) and 40 CFR 71.6(g) as a result of decisions from the U.S. Court of Appeals for the D.C. Circuit, primarily *NRDC vs. U.S. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). These provisions established an affirmative defense for sources to assert in enforcement cases brought for noncompliance with technology-based emission limitations in operating permits if the exceedances occurred due to qualifying emergency circumstances. These provisions have never been required elements of state operating permit programs and were removed from federal regulations because they are inconsistent with the Clean Air Act and U.S. EPA's interpretation of the Act's enforcement structure (88 FR 47029).

Consequently, U.S. EPA requires each state with a part 70 program to submit a program revision, or request a submission extension, by August 21, 2024, to remove similar affirmative defense provisions from EPA-approved Title V programs. IDEM timely submitted a request for an extension to submit its program revision, which is now due on August 21, 2025. Although states may not retain Title V provisions establishing an affirmative defense to noncompliance with federal requirements, U.S. EPA is allowing states to choose whether to retain certain aspects of their existing program regulations, such as the definition of emergency, associated reporting and recordkeeping requirements, and prompt reporting to support functions unrelated to an affirmative defense.

This rulemaking proposes to revise rule language at 326 IAC 2-7 and 326 IAC 2-8 to remove the emergency affirmative defense provisions consistent with U.S. EPA's removal of these provisions in 40 CFR 70.6(g) and 40 CFR 71.6(g). The proposed amendments will remove the emergency affirmative defense from Indiana's EPA-approved Title V program as well as its Federally Enforceable State Operating Permit (FESOP) program, which is also federally approved and part of Indiana's State Implementation Plan. To ensure regulatory continuity with the reporting and recordkeeping requirements being removed by the repeal of the emergency provisions, this rule also amends the malfunction rule at 326 IAC 1-6-1. The proposed amendments revert to the applicability and notification requirements that were in place prior to the promulgation of the Title V and FESOP emergency provisions. This rulemaking brings Title V and FESOP sources back under 326 IAC 1-6, which imposes reporting and recordkeeping requirements that are functionally equivalent to those found in the emergency provisions being repealed by this rulemaking.

### **Affected Persons**

Sources in the state of Indiana with a Title V operating permit or a FESOP that the emergency affirmative defense provisions might be applicable to.

### **Reasons for the Rule**

On July 24, 2023, U.S. EPA removed the emergency affirmative defense provisions in 40 CFR 70.6(g) and 40 CFR 71.6(g) as a result of decisions from the U.S. Court of Appeals for the D.C. Circuit, primarily *NRDC vs. U.S. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). U.S. EPA consequently requires each state with a part 70 program to submit a program revision, or request a submission extension, by August 21, 2024, to remove similar affirmative defense provisions from EPA-approved Title V programs. IDEM timely submitted a request for an extension to submit its program revision, which is now due on August 21, 2025.

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To ensure regulatory continuity with the reporting and recordkeeping requirements being removed by the repeal of the emergency provisions, this rule also amends the malfunction rule at 326 IAC 1-6-1. The proposed amendments revert to the applicability and notification requirements that were in place prior to the promulgation of the Title V and FESOP emergency provisions. These changes ensure that state rules are consistent with federal regulations.

### **Economic Impact of the Rule**

There is no estimated economic impact of this rule, as it only removes the emergency affirmative defense provisions from state rules to ensure consistency with federal regulations.

### **Scheduled Board Action and Hearings**

First Public Hearing: October 9, 2024, at 1:30 p.m., at the Indiana Government Center South, 10 North Senate Avenue, Conference Center Room A, Indianapolis, IN 46204.

### **IDEM Contact**

Additional information regarding this rulemaking action can be obtained from Keelyn Walsh, Rules Development Branch, Office of Legal Counsel, at [kwalsh@idem.in.gov](mailto:kwalsh@idem.in.gov), (317) 232-8229, (800) 451-6027 (in Indiana), or [kwalsh@idem.in.gov](mailto:kwalsh@idem.in.gov).