County,[13] the finding of failure to attain the PM_{10} NAAQS does not apply to tribal areas, and the rule would not impose a burden on Indian reservation lands or other areas where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction within West Pinal County. Thus, this rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175.

G. Executive Order 13045: Protection of Children From Environmental Health Risks 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 the effect of this action is to trigger additional planning requirements under the CAA. This action does not establish an environmental standard intended to mitigate health or safety risks.

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

This final rule 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 (NTTAA)

This rulemaking does not involve technical standards.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or Indigenous peoples) and low-income populations. There is no information in the record indicating that this action would be inconsistent with the stated goals of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and indigenous peoples.

K. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicability. This rule makes factual determinations for specific entities and does not directly regulate any entities. The determination of a failure to attain by the attainment date and reclassification does not in itself create any new requirements beyond what is mandated by the CAA.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: July 13, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

Part 52, Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart D—Arizona

■ 2. Section 52.126 is amended by adding paragraph (e) to read as follows:

§ 52.126 Control strategy and regulations: Particulate matter.

* * * * *

(e) Effective August 21, 2023, the EPA has determined that the West Pinal Serious PM_{10} nonattainment area failed to attain the 1987 24-hour PM_{10} NAAQS by the applicable attainment date of December 31, 2022. This determination triggers the requirements of CAA sections 179(d) and 189(d) for the State of Arizona to submit a revision to the Arizona SIP for West Pinal to the EPA by December 31, 2023. The SIP revision must, among other elements, demonstrate expeditious attainment of the 1987 PM_{10} NAAQS within the time period provided under CAA section 179(d) and provide for an annual reduction in the emissions of direct PM_{10} or a PM_{10} plan precursor pollutant within the area of not less than five percent until attainment.

[FR Doc. 2023–15339 Filed 7–20–23; 8:45 am]

BILLING CODE 6560–50–P

[13] A map of Federally-Recognized Tribes in the EPA's Pacific Southwest (Region IX) is available at *https://www.epa.gov/tribal-pacific-sw/map-federally-recognized-tribes-epas-pacific-southwest-region-9.*

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA–HQ–OAR–2016–0186; FRL–8961–02–OAR]

RIN 2060–AV39

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is removing the ''emergency'' affirmative defense provisions from the EPA's title V operating permit program regulations. These provisions established an affirmative defense that sources could have asserted in enforcement cases brought for noncompliance with technology-based emission limitations in operating permits, provided that the exceedances occurred due to 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 EPA's interpretation of the enforcement structure of the Clean Air Act (CAA or the Act) in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit. The removal of these provisions is also consistent with other recent EPA actions involving affirmative defenses and would harmonize the EPA's treatment of affirmative defenses across different CAA programs. Through this document, the EPA is also providing guidance on the implementation process resulting from

the removal of the emergency affirmative defense provisions from the EPA's regulations, including the need for some state, local, and tribal permitting authorities to submit program revisions to the EPA to remove similar title V affirmative defense provisions from their EPA-approved title V programs, and to remove similar provisions from individual operating permits.

DATES: This final rule is effective on August 21, 2023.

ADDRESSES: 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 on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Corey Sugerik, Office of Air Quality Planning and Standards, Air Quality Policy Division (C504–05), Environmental Protection Agency, Research Triangle Park, NC; telephone number: (919) 541–3223; email address: *sugerik.corey@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. How is this Federal Register document organized?

The information presented in this preamble is organized as follows:

B. Does this action apply to me?

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

C. 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. Background and Overview of the Final Action

The EPA has promulgated permitting regulations applicable to 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 contained identical provisions establishing an affirmative defense that sources could assert in enforcement actions brought for noncompliance with technology-based emission limitations caused by specific emergency circumstances. These ''emergency'' provisions were located at 40 CFR 70.6(g) and 71.6(g).

In this action, the EPA is removing 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 enforcement structure of the CAA, in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit—primarily the court's 2014 decision in *NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014). The removal of these provisions is also consistent with other recent EPA actions involving affirmative defenses [2] and will harmonize the EPA's treatment of affirmative defenses across different CAA programs. The EPA previously provided background on the title V emergency provisions and articulated its justification for this action in the preamble to the 2016 and 2022 proposed rules preceding this final rule.[3] [4] Section III. of this document responds to significant comments we received on those proposals and provides additional information in support of this final rule.

As a consequence of the EPA's action to remove these provisions from 40 CFR 70.6(g), it will be necessary for any states that have adopted similar affirmative defense provisions in their part 70 operating permit programs to revise their part 70 programs to remove these provisions. In addition, individual operating permits that contain title V affirmative defenses based on 40 CFR 70.6(g) or similar state regulations will eventually need to be revised. The EPA discussed its expectations concerning how states will implement this rule in section V. of the preamble to the 2016 proposed rule and also requested

[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, tribal, and U.S. territorial air pollution control agencies, where applicable.

[2] 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. *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; Final Rule, 81 FR 40956 (June 23, 2016).

[3] *See* Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program, Proposed Rule, 81 FR 38645 (June 14, 2016); Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and the Federal Operating Permit Program, Proposed Rule, 87 FR 19042 (April 1, 2022).

[4] Docket No. EPA–HQ–OAR–2016–0186 comprises all supporting documents and public comments for both the 2016 and 2022 proposals.

comments on some of the aspects discussed. Additional information regarding these implementation considerations and the EPA's response to relevant comments received on these issues are included in section IV. of this document.

EPA expects that program revisions to remove the title V emergency defense provisions from state operating permit programs will include, at minimum: (1) a redline document identifying the state's proposed revision to its part 70 program rules; (2) a brief statement of the legal authority authorizing the revision; and (3) a schedule and description of the state's plans to remove affirmative defense provisions from individual operating permits. The EPA encourages states to consult with their respective EPA regional offices on the specific contents of their revision submittal packages.

In general, any impermissible affirmative defense provisions within individual operating permits that are based on a title V authority and that apply to federally-enforceable requirements will need to be removed. As explained in the 2016 proposal, the EPA expects that any necessary permit changes should occur in the ordinary course of business, such as during periodic permit renewals or revisions. At the latest, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

III. Response to Significant Comments

This section contains the EPA's response to significant comments regarding the EPA's proposed action to remove 40 CFR 70.6(g) and 71.6(g) and provides the EPA's justification for this final action. Comments and the EPA's responses are divided into four general topic areas: section III.A. of this document discusses the legal basis for this action in light of the *NRDC* decision; section III.B. discusses issues related to exemptions from emission limitations and the D.C. Circuit's 2008 decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008); section III.C. discusses other legal and policy considerations; and section III.D. discusses various issues involving the consequences of removing the title V emergency affirmative defense provisions from operating permit programs, focusing primarily on the impact on sources.

A. Affirmative Defenses and the NRDC Decision

The following subsections address comments received concerning the *NRDC* decision and the EPA's legal basis for this action. Subsections III.A.1. and III.A.2. of this document address general comments either supporting or opposing the EPA's interpretation of the *NRDC* decision. Subsection III.A.3. addresses specific comments concerning the extent to which the *NRDC* decision should apply beyond the context of citizen-suit enforcement under CAA section 304, and how the decision should inform the EPA's treatment of affirmative defenses in the context of EPA-initiated judicial enforcement and administrative penalty actions under CAA sections 113(b) and (d). Specific comments that discuss the relationship between the *NRDC* decision and prior case law are presented in section III.C.2. of this document.

1. Support for the EPA's Interpretation of the CAA's Enforcement Structure in Light of the NRDC Decision

Comment: Multiple environmental and state commenters supported the EPA's view that, in light of *NRDC,* the title V emergency affirmative defense provisions should be removed because they impermissibly limit the authority of courts to decide appropriate penalties in private civil suits. Some commenters claimed that the EPA lacks the authority to create such provisions. Other state and industry commenters acknowledged that the *NRDC* decision limits the EPA's discretion to retain affirmative defense provisions, either altogether or in certain contexts. Commenters argued that when Congress wanted to limit the authority of courts, to allow an affirmative defense or to permit an extrajudicial entity to modify penalties, it did so expressly, citing CAA sections 113(e)(1), 113(c)(5)(C)–(D), and 113(d)(2)(B).

Some commenters asserted that the *NRDC* decision applies beyond the specific context of CAA section 112 standards because the court's rationale was based on CAA sections 113 and 304, not CAA section 112. Therefore, commenters concluded that the prohibition on affirmative defenses applies to any citizen-enforceable emission standards or limitations under the Act. Commenters claimed that *NRDC* is applicable to the title V emergency affirmative defense provisions because, like the hazardous air pollution standards at issue in *NRDC,* all other emission standards contained in title V operating permits are enforceable under CAA section 304. Some commenters further asserted that the fundamental principles underlying the *NRDC* decision with respect to affirmative defenses were reinforced by the D.C. Circuit's 2016 decision in *U.S. Sugar* v. *EPA*.[5]

Response: The EPA generally agrees with commenters supporting the legal basis for this action to remove the emergency affirmative defense provisions from the EPA's title V regulations. The EPA previously explained its legal rationale for this action in the 2016 and 2022 proposed rules.[6] Here, the EPA reiterates some of the primary legal principles guiding this current action.

The EPA's current interpretation of the CAA with respect to affirmative defenses is informed by the D.C. Circuit's *NRDC* decision. In *NRDC,* the D.C. Circuit vacated affirmative defense provisions contained in the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) for the portland cement industry, promulgated under CAA section 112. The D.C. Circuit concluded that the EPA lacked the authority to create these affirmative defense provisions because they contradicted fundamental requirements of the Act concerning the authority of courts to decide whether to assess civil penalties in CAA enforcement suits. Importantly, the court's decision did not turn upon any specific provisions of CAA section 112, but rather on the provisions of CAA sections 113 and 304. These provisions

[5] *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579 (D.C. Cir. 2016), *amended on rehearing on unrelated grounds, U.S. Sugar Corp* v. *EPA,* 844 F.3d 268 (D.C. Cir. 2016).

[6] *See* 81 FR 38649. As noted in the 2016 and 2022 proposals, the EPA has also previously explained its interpretation of the CAA in light of the *NRDC* decision at great length in multiple other documents, including documents supporting the EPA's 2015 SSM SIP Action. *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, 79 FR 55919, 55929 (September 17, 2014) (SSM SIP Action Supplemental Proposal); State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, Final Action, 80 FR 33839, 33851 (June 12, 2015) (SSM SIP Action); and Memorandum, Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy, 3–4 (September 30, 2021), available at *https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf* (September 2021 SSM SIP Memo).

pertain to enforcement of a wide variety of CAA requirements beyond section 112 standards, including enforcement of emission limits contained in title V permits. Thus, the mere fact that the court addressed the legality of an affirmative defense provision in the context of a section 112 NESHAP does not mean 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.

Notably, in 2016, the D.C. Circuit reaffirmed its *NRDC* opinion concerning affirmative defenses. In *U.S. Sugar,* the D.C. Circuit addressed various challenges to rules promulgated in 2011, including challenges urging that—in the absence of affirmative defenses—the EPA was required to address periods of malfunction in setting the applicable standards. Discussing *NRDC,* the *U.S. Sugar* opinion stated that the affirmative defense provision at issue in the *NRDC* case was ''an impermissible intrusion on the judiciary's role.'' [7] The fact that the title V emergency affirmative defenses arguably apply more broadly (*i.e.,* to potentially numerous technology-based emission limits developed under multiple CAA program areas) than the affirmative defense at issue in *NRDC* potentially makes it even more intrusive on the judiciary's role.

In light of the *NRDC* decision and the EPA's reevaluation of the CAA, the EPA interprets the enforcement provisions in sections 113 and 304 of the CAA 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. Section 304(a) grants the federal district courts jurisdiction to determine liability and to impose penalties in enforcement suits brought by citizens. Similarly, section 113(b) grants the federal district courts jurisdiction, in enforcement actions brought by the U.S. Department of Justice (DOJ) on behalf of the EPA, to determine liability and to impose remedies of various kinds, including injunctive relief and monetary penalties. These grants of jurisdiction come directly from Congress, and the EPA is not authorized to alter or eliminate this authority. With respect to monetary penalties, CAA section 113(e) lists various factors that courts and the EPA shall consider in the event of judicial or administrative enforcement for violations of CAA requirements, including title V permit conditions. Because Congress has already given federal courts the authority to determine what penalties are appropriate in the event of judicial enforcement for a violation of a title V permit provision, neither the EPA nor states should be able to 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 limit or eliminate the authority of federal courts to determine liability or to impose remedies through considerations that differ from 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. The emergency affirmative defense provisions that the EPA is removing from 40 CFR 70.6(g) and 71.6(g) purported to interfere with the authority of the courts to determine whether and to what extent penalties or other remedies were appropriate in judicial enforcement actions, conflicted with the holding of *NRDC,* and were contrary to the enforcement structure of the CAA. Thus, the EPA has determined that these provisions should be removed from the EPA's regulations.

Section IV.A. of this document contains additional information concerning the need for states to submit program revisions to remove similar title V affirmative defense provisions from EPA-approved state operating permit programs, and to remove similar provisions from individual operating permits.

2. Comments Suggesting That the NRDC Case Is a Narrow Decision That the EPA Is Incorrectly Extending or Misapplying

Comment: Some commenters stated that the D.C. Circuit's decision in *NRDC* v. *EPA* was limited to the particular facts or circumstances of that case and that the EPA's reliance on the decision to support removal of the title V emergency affirmative defense provisions is an incorrect extension or misapplication of the decision. Commenters generally claimed that the EPA should not apply the *NRDC* court's ruling to every corner of the CAA, including to the title V affirmative defense provisions within the EPA's regulations and state operating permit programs. Some commenters stated that the *NRDC* decision only invalidated an affirmative defense associated with a NESHAP issued in accordance with CAA section 112, and that the decision should be limited to those standards (or, even, to the specific standards for portland cement plants subject to that litigation). Commenters alleged that the D.C. Circuit provided no language to broaden its ruling. Some commenters focused on the specific statutory mandates involved in establishing section 112 standards. One commenter alleged that the D.C. Circuit held that once a section 112 standard is promulgated and established for all operating modes, no ''gap'' remains for the EPA to create an affirmative defense.

Other commenters focused on the differences between title V permits and the section 112 standards that the *NRDC* court considered. These commenters explained that title V permits contain numerous different underlying standards applicable to a source (such as standards developed under a State Implementation Plan (SIP) or under New Source Review Programs), as well as additional procedural and monitoring, reporting, and recordkeeping requirements. Thus, one commenter asserted that enforcement of title V permit requirements differs from enforcement of specific section 112 emission limits, and that the D.C. Circuit's logic prohibiting affirmative defenses does not apply to other types of applicable requirements in a title V permit, including substantive standards as well as administrative or procedural requirements.

Some commenters attempted to distinguish the title V emergency affirmative defense, which at least one commenter characterized as a defense to ''liability'' or ''noncompliance,'' from the affirmative defense to ''civil penalties'' at issue in the *NRDC* case. One commenter claimed that the *NRDC* decision was based on the assumption that excess emissions automatically result in a violation of a section 112 standard, and therefore that the D.C. Circuit only addressed how affirmative defense provisions affect a court's authority to determine appropriate remedies *after* an actionable violation has been identified. Multiple commenters asserted that neither CAA section 113 nor the *NRDC* case speak to provisions that define when a violation has occurred. Some commenters also asserted that the *NRDC* decision involved an affirmative defense for malfunctions, not emergencies, and concluded that the EPA should not apply the decision to the title V emergency affirmative defense because malfunctions are not similar in nature to emergencies.

Some commenters also claimed more generally that the title V affirmative defense provisions do not impair a court's ability to decide whether a source has met its burden of

[7] *See U.S. Sugar,* 830 F.3d at 607.

demonstrating that an emergency has occurred and whether civil penalties are appropriate. Other commenters discussed the breadth of the *NRDC* case with respect to SIP provisions. Commenters asserted that the D.C. Circuit did not opine on the authority of the EPA or states to provide relief from noncompliance with technology-based SIP standards that are incorporated into title V operating permits. Commenters also claimed that the D.C. Circuit expressly reserved judgment concerning the validity of such defenses in SIPs,[8] and that states have discretion under the CAA to include affirmative defense provisions in their SIPs. These commenters attempted to distinguish SIPs from the section 112 standards at issue in the *NRDC* case. Multiple commenters also incorporated in their comment submissions various attachments related to the Startup, Shutdown, and Malfunction (SSM) SIP Action,[9] including comments submitted on the initial and supplemental SSM SIP Call proposals [10] as well as briefs filed in the ongoing SSM SIP Action litigation.[11] Portions of these attachments addressed the EPA's interpretation of the *NRDC* case.

Response: The EPA disagrees with commenters' assertions that the logic of the *NRDC* case was restricted to the context of section 112 standards, or to a single NESHAP standard. Most of these comments do not address the fundamental legal principles upon which the D.C. Circuit based its decision, or the EPA's explanation of these principles. Contrary to what some commenters suggest, the *NRDC* decision was not based on any statutory mandates specific to promulgating CAA section 112 standards. Instead, the decision was based on CAA sections 113 and 304, which apply broadly to the enforcement of a wide range of CAA requirements, including SIP requirements. Thus, any differences between section 112 standards and other standards contained in title V permits (or, for example, the difference between malfunctions and emergencies) are irrelevant to the legal principles upon which the *NRDC* decision was based, and which apply equally well to the EPA's title V regulations in 40 CFR 70.6(g) and 71.6(g), as discussed in the preceding subsection.

The EPA also disagrees that *NRDC* is distinguishable from the current action due to any functional differences between the affirmative defense at issue in *NRDC,* which some commenters characterized as a defense to a claim for civil penalties for violations, and the title V emergency affirmative defense, which commenters characterized as a defense to an action brought for noncompliance. Both the title V affirmative defense and the portland cement NESHAP malfunction affirmative defense (originally located at 40 CFR 63.1344) established an affirmative defense that a source could assert in actions brought under CAA sections 113 and 304, after an enforcement action had been initiated for an alleged violation.[12] Both affirmative defense provisions functioned in the same manner. The fact that the portland cement defense was confined to enforcement actions for penalties, whereas the title V provisions do not on their face contain such an explicit restriction and could potentially be read more broadly, is irrelevant to the fact that both provisions purported to interfere with the authority of courts to determine whether and to what extent relief is appropriate in a given case, including relief from penalties. Moreover, CAA section 304(a), upon which the D.C. Circuit relied, is not restricted to monetary penalties. The EPA has previously explained its position that affirmative defenses are inappropriate regardless of what type of event they apply to, what criteria they contain, or what forms of remedy they purport to limit or eliminate. The EPA also notes that the title V emergency affirmative defense provisions were explicitly restricted to noncompliance with technology-based emission limits (such as emission limits derived from a NESHAP similar to the ones the D.C. Circuit invalidated) and were never available as a defense in an enforcement case for violations of other types of title V permit requirements, contrary to some commenters' assertions.

Finally, the EPA disagrees with commenters' claims that the title V affirmative defense provisions would not impair a court's ability to decide whether civil penalties are appropriate because a source attempting to invoke the title V emergency affirmative defense would have the burden to prove that an emergency occurred and other demonstration requirements had been met. The affirmative defense provision formerly in the portland cement NESHAP was similarly structured, and the D.C. Circuit nonetheless found that those provisions impermissibly intruded into the judiciary's role to determine whether penalties are appropriate. Any comments challenging the holding of the D.C. Circuit in *NRDC* are beyond the scope of this rulemaking. To the extent that commenters suggested that a title V affirmative defense provision could be appropriate with respect to certain technology-based SIP requirements contained in a title V permit, the EPA disagrees. For the reasons previously discussed, affirmative defense provisions in title V permits are not appropriate with respect to any federally-enforceable requirements. To the extent that commenters discussed the relationship between the *NRDC* and *Sierra Club* cases and affirmative defense provisions contained within SIPs, and to the extent that commenters incorporated comments or briefs relevant to the SSM SIP Action but did not specifically explain how those comments were pertinent to the EPA's proposal to eliminate the title V emergency affirmative defense provisions, such comments are beyond the scope of this current rulemaking. Moreover, the EPA has previously responded to those comments and legal briefs in the appropriate venues.[13] To the extent that comments addressed issues relevant to this action, the EPA is responding to these comments in this document.

3. The NRDC Case As It Applies Beyond Citizen-Suit Enforcement Under CAA Section 304(a)

Comment: Many commenters argued that the *NRDC* decision only invalidated affirmative defenses that could be asserted in citizen suits brought under CAA section 304 in federal court. These commenters asserted that the *NRDC* case does not require the EPA to remove affirmative defenses with respect to either: (1) EPA-initiated civil judicial enforcement actions under section 113(b); or (2) administrative penalty actions brought under section 113(d). Many of these commenters recommended that instead of entirely

[8] Commenters cited *NRDC,* 749 F.3d at 1064 n.2.

[9] SSM SIP Action, 80 FR 33840.

[10] 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 12460 (February 22, 2013); SSM SIP Action Supplemental Proposal, 79 FR 55919.

[11] *Environmental Committee of the Florida Electric Power Coordinating Group, Inc.* v. *EPA,* No. 15–1239 (D.C. Cir.) (SSM SIP Action litigation).

[12] To the extent that commenters argue that the title V affirmative defenses function to define when a violation has occurred, these comments are addressed further in section III.B.1. of this document.

[13] *See* SSM SIP Action, 80 FR 33840, 33852 (noting that ''[s]tates have great discretion in how to devise SIP provisions, but they do not have discretion to create provisions that contradict fundamental legal requirements of the CAA'' and that ''[t]he jurisdiction of federal courts to determine liability and to impose statutory remedies for violations of SIP emission limitations is one such fundamental requirement''); Initial Brief of Respondent EPA, SSM SIP Action Litigation (filed July 26, 2016).

removing the title V emergency affirmative defense provisions, the EPA should amend the provisions to clarify that they do not apply to any enforcement actions based on section 304, but only to actions based on sections 113(b) and (d).

First, regarding EPA-initiated enforcement under section 113(b), some commenters acknowledged the EPA's position (as explained in the 2016 proposed rule) that, because both sections 304 and 113(b) vest federal district courts with the ability to determine liability and assess penalties, the EPA's hands are tied with respect to its own civil enforcement. One commenter noted that the *NRDC* case did not directly speak to enforcement actions brought by the EPA under section 113(b). Other commenters claimed that section 113(b) does nothing to impede the EPA's ability to define the circumstances under which it is ''appropriate'' to initiate an enforcement action, and that this would not interfere with the authority of a court to determine liability and assess penalties in an eventual enforcement action. Some commenters suggested that the EPA could use the affirmative defense to define by rule when it would be appropriate to commence an enforcement action, and others noted that the practical effect of the defense is to define when the EPA will exercise its enforcement discretion to initiate an enforcement action in the courts.

Second, regarding the EPA's authority to assess administrative penalties under section 113(d), commenters cited language from the *NRDC* decision, wherein the D.C. Circuit noted that, although the EPA did not have discretion to determine whether civil penalties should be imposed by a court, the agency had discretion to determine whether to assess administrative penalties under section 113(d).[14] Various commenters similarly alleged that because CAA section 113(d) explicitly gives the EPA the authority to modify penalties, it therefore allows the EPA to establish an affirmative defense in the context of administrative enforcement. Some commenters claimed that retaining the title V affirmative defense for administrative enforcement is especially important because most penalties related to emission exceedances are imposed through administrative penalties sought by the agency, not as a result of citizen suits in federal court. Finally, some commenters suggested that the EPA could define when it would be appropriate to assess administrative penalties.

Commenters also made similar arguments with respect to the ability of states to determine when it would be appropriate to pursue enforcement action, whether through the courts or with respect to administrative penalties.

Response: The EPA disagrees with the claim that it would be appropriate to retain the title V affirmative defense provisions for use in EPA-initiated judicial enforcement or administrative penalty actions. First, as explained previously and as acknowledged by commenters, the logic of the *NRDC* case applies not only to citizen-suit actions under section 304(a), but also to judicial enforcement actions initiated by DOJ on behalf of the EPA pursuant to section 113(b). Like section 304(a), section 113(b) involves enforcement actions that are ultimately brought before federal courts. Therefore, any affirmative defense that could be asserted in an enforcement proceeding brought under section 113(b) would similarly infringe on the authority of courts to determine appropriate penalties. Regarding suggestions that the EPA could treat the affirmative defense as establishing criteria defining whether the EPA considers it ''appropriate'' to commence an enforcement action under section 113(b), the EPA finds that this is not necessary or appropriate. For the reasons provided in section III.D.2. of this document, the EPA has decided not to explicitly codify such an ''enforcement discretion'' type provision.

Second, the EPA acknowledges that *NRDC* does not address the EPA's authority to establish an affirmative defense to CAA section 113(d) administrative actions. However, such an affirmative defense is not necessary. As discussed further in section III.D.2., if a source believes it is unable to comply with emissions standards as a result of an emergency, the EPA may use its case-by-case enforcement discretion to determine whether to initiate enforcement, as appropriate. Further, as the D.C. Circuit recognized, in an EPA or citizen enforcement action, the court has the discretion to consider any defense raised and determine whether penalties are appropriate.[15] The same is true for EPA administrative actions. Moreover, assessment of penalties for violations in administrative proceedings and judicial proceedings should generally be consistent. *Cf.* CAA section 113(e), 42 U.S.C. 7413(e) (requiring both the Administrator of the EPA and the court to take specified criteria into account when assessing penalties). The EPA has previously explained this approach in various rules developed under CAA sections 111, 112, and 129.[16]

Section IV.A.3. of this document discusses similar issues regarding how states may be able to implement this rule by retaining or developing similar provisions that apply in the limited context of state-initiated administrative enforcement actions or judicial enforcement in state courts.

B. Exemptions and the Sierra Club Decision

In the 2016 proposed rule, the EPA noted that the D.C. Circuit in *Sierra Club* vacated an EPA rule that exempted sources from otherwise applicable emissions standards during periods of SSM because the SSM exemption violated the CAA requirement that such standards apply continuously. The EPA stated that, although the title V emergency affirmative defenses were not exemptions, if they were to be construed or treated as exemptions, they would run afoul of *Sierra Club* and also should be removed for that reason. The EPA received various comments relating to these issues.

1. Comments Suggesting That the Title V Emergency Provisions Create an Exemption to Emission Limits or Define Whether a Violation Has Occurred

Comment: Commenters presented differing perspectives on how the title V emergency affirmative defense provisions function. The majority of commenters addressing this topic supported the EPA's position that the title V affirmative defense provisions, by their terms, clearly function as an affirmative defense, rather than as exemptions or provisions that define when a violation occurs. Commenters supporting this perspective explained that applicable emission limits would still apply during an emergency, and exceedances would still constitute a

[14] *See NRDC,* 749 F.3d at 1063.

[15] *See NRDC,* 749 F.3d at 1064; *see also U.S. Sugar,* 830 F.3d at 609. (''[Sources] can argue that penalties should not be assessed because of an unavoidable malfunction'' and courts ''should not hesitate to exercise their judicial authority to craft appropriate civil remedies in the case of emissions exceedances caused by unavoidable malfunctions.'').

[16] *See, e.g.,* National Emission Standards for Hazardous Air Pollutants Residual Risk and Technology Review for Flexible Polyurethane Foam Production; Final Rule, 79 FR 48073, 48082 n.3 (August 15, 2014); Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards; Final Rule, 79 FR 79017, 79024 n.3 (December 31, 2014); National Emission Standards for Hazardous Air Pollutants: Polyvinyl Chloride and Copolymers Production Reconsideration; Proposed Rule, 85 FR 71490 n.16 (November 9, 2020).

violation, but sources could later assert the affirmative defense in an effort to demonstrate to either the agency or a judge that, despite a violation of the applicable requirement, there are valid reasons to excuse the source from some or all penalties associated with the violation. Another commenter noted the very strict conditions that a source attempting to claim the affirmative defense for an emergency would have to comply with and document in order to be eligible for the affirmative defense. Similarly, commenters acknowledged that asserting this defense would not automatically mean it was granted.

However, other commenters suggested that the affirmative defense provisions functionally serve as exemptions to applicable emission limits or define when a violation of an emission limit has occurred. For example, one commenter claimed that the title V affirmative defense provisions operate as an exemption, whereby no restriction or emission limit would exist in specific emergency circumstances. One commenter suggested that the affirmative defenses found in 40 CFR 70.6(g) are an affirmative defense to liability rather than an affirmative defense for the reduction of penalties, which the commenter claims was considered in *NRDC.* Other commenters claimed that the title V affirmative defense essentially provides criteria for the EPA, the state, or a court to consider when deciding whether excess emissions trigger a violation in the first instance, and these commenters attempted to distinguish the title V affirmative defense from the section 112 affirmative defense at issue in the *NRDC* decision. Environmental commenters stated that the emergency provisions could be interpreted to mean that, when their terms are met, a source did not violate the relevant emission limitation, thereby effectively providing an exemption. Environmental commenters also argued that this type of functional exemption would be illegal.

Finally, one commenter suggested that the EPA convert the emergency affirmative defense provisions into a narrowly tailored exemption from technology-based standards. The commenter asserted that this approach would be within the EPA's authority, and that an exemption would provide more consistency than the use of enforcement discretion alone.

Response: The EPA agrees with the majority of commenters that acknowledged that the title V emergency affirmative defense provisions did not create exemptions or otherwise define whether a violation has occurred, as stated in the proposal.[17] The provisions being removed through this action, found at 40 CFR 70.6(g)(2) and 71.6(g)(3) state, in part, ''An emergency constitutes an affirmative defense to an action brought for noncompliance with . . . technology-based emission limitations.'' By their terms, these provisions explicitly purported to establish an affirmative defense to an enforcement action, not an exemption. Moreover, these provisions purported to establish an affirmative defense to an action brought for noncompliance with certain emission limits. So, before the defense would apply, alleged noncompliance with an emissions limitation would have already occurred, and an enforcement action (administrative or judicial) would have been brought because of such noncompliance. The title V affirmative defenses, like the affirmative defense provisions at issue in the *NRDC* case, were thus based on the establishment of an alleged violation of permitted emission limits in the first instance. Moreover, it would not have been the burden of the party bringing an action for noncompliance to negate any claimed emergency ''exemption'' to an otherwise applicable emission limit. Rather, it would clearly have been the source's burden in defending against such an action to properly assert and prove all the elements of the emergency affirmative defense.[18] The result of a successfully pled affirmative defense would be to provide the decision maker in an enforcement case with reasons why, despite violations of an emission limit, the source should not be held liable and assessed penalties (or potentially other forms of relief) for such noncompliance. Therefore, the EPA believes that the title V emergency affirmative defense provisions were not intended and should not be interpreted to function as an exemption or to otherwise define when a violation has occurred.

To the extent that the affirmative defense provisions could have been interpreted to provide an exemption or define whether a violation has occurred, the EPA reiterates that such an exemption would be impermissible under the EPA's interpretation of the CAA and in light of *Sierra Club.* Some commenters suggested that the EPA should interpret the affirmative defense to function as an affirmative defense to liability or to define whether the emission limitation applies and thus whether there is a ''violation.'' But, if there is no ''violation'' when certain criteria or conditions for an affirmative defense are met, then there is, in effect, no emission limitation that applies when the criteria or conditions are met, and the affirmative defense would operate to create an exemption from the emission limitation. As discussed in the following subsection, and based on the EPA's interpretation of the *Sierra Club* decision, this would violate the basic CAA principle that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise. For the same reasons, it is not appropriate to convert the title V emergency affirmative defense provisions into an exemption, as suggested by a commenter.

2. Comments Interpreting the Sierra Club Case With Respect to Exemptions From Emission Limitations

Comment: Commenters presented differing views on the EPA's interpretation of *Sierra Club.* Environmental commenters supported the EPA's conclusion that exemptions from emission limitations are unlawful, and that, to the extent that the title V emergency affirmative defense provisions could be interpreted as providing for an exemption, those provisions would be unlawful. Commenters noted that in the *Sierra Club* case, the D.C. Circuit held that sections 112 and 302(k), read together, require that there must be continuous section 112-compliant standards. Commenters claimed that the statutory terms ''emission standard'' and ''emission limitation'' mean the same thing, citing CAA section 302(k). Therefore, commenters asserted the court's holding in *Sierra Club* also applies to the emission limitations affected by the title V affirmative defenses. Environmental commenters further asserted that the fundamental principles underlying the *Sierra Club* decision with respect to exemptions were reinforced by the D.C. Circuit's *U.S. Sugar* decision.

However, a number of industry commenters challenged the EPA's interpretation of the *Sierra Club* case, arguing generally that the case has limited applicability beyond the context of section 112 standards. Some commenters asserted that *Sierra Club* is not relevant to the current rulemaking because the case was anchored to the unique language of CAA section 112 and only addressed exemptions under CAA section 112, rather than regulations in operating permit programs, SIP requirements, or New Source Performance Standards (NSPS) regulations. One commenter argued that because the *Sierra Club* decision was

[17] *See* 81 FR 38645, 38651.

[18] *See* 40 CFR 70.6(g)(4) (the ''permittee . . . has the burden of proof'').

limited to section 112 standards, the decision could at most be read to prohibit title V provisions excusing noncompliance with an underlying NESHAP provision.

Other commenters asserted that requirements that limit emissions on a continuous basis do not have to impose the same limitation at all times, and that the form of the limitation does not always have to be the same. For example, commenters noted that CAA section 302(k) includes design, equipment, work practice, and operational standards, which could apply during periods of operation not covered by a numerical emissions limitation. These commenters claim that the *Sierra Club* case did not approach the question of whether these different types of standards would be acceptable. One commenter also asserted that the emergency affirmative defense is not an exemption from continuously applicable emission limits.

Response: As discussed in the preceding subsection, the title V emergency affirmative defense provisions should not be interpreted to provide an exemption to emission limits or otherwise define when a violation of an emission limitation has occurred. However, as noted in the proposal, to the extent that the title V provisions could be interpreted as providing such an exemption, this would run afoul of the CAA requirement that emission limitations be continuous. *See* CAA section 302(k), 42 U.S.C. 7602(k). The EPA disagrees with commenters' assertions that the *Sierra Club* court's reasoning does not apply beyond section 112 standards. As the EPA has explained in depth in other documents, the same logic prohibiting exemptions from NESHAP emission limits applies to other emission limitations subject to the definition of ''emission limitation'' within section 302(k), including emission limits contained within a source's title V permit.[19] Finally, comments on whether it is appropriate to impose different types of emission limitations during different modes of operation may be relevant to standard-setting or other proceedings where such limitations are established, but these comments are not material to this rulemaking to remove the title V emergency affirmative defense provisions.

C. Other Legal and Policy Considerations

This section addresses comments involving other legal and policy considerations related to the EPA's removal of the title V emergency affirmative defense provisions.

1. Ongoing SSM SIP Action Litigation

Comment: Some state and industry commenters urged the EPA to delay finalizing this action until the ongoing SSM SIP Action litigation concludes. These commenters claimed that the EPA's rationale underlying this title V action depends on the same core legal issues involving the EPA's interpretation of the *NRDC* and *Sierra Club* cases, which the commenters claimed is currently under judicial review in the SSM SIP Action litigation. One commenter further asserted that an adverse ruling in the SSM SIP Action litigation would be dispositive of the issues involved here.

Response: The EPA disagrees with the commenters' suggestion to delay this final action. The EPA has no reason to delay moving forward with the removal of affirmative defense provisions from various CAA program areas, including title V, solely because litigants have challenged the SSM SIP Action. The EPA is confident of the strong legal and policy bases for this current action, as well as prior actions in the SSM SIP Action and numerous regulations promulgated under CAA sections 111, 112, and 129 that also address affirmative defense provisions. In fact, the EPA's interpretation of the CAA and its application of relevant court decisions was upheld by the D.C. Circuit.[20] The EPA also disagrees with commenters' assertions that an adverse decision with respect to the SSM SIP Action would necessarily undermine the legal justification for this rule, because the SSM SIP Action litigation could be decided on procedural or substantive grounds that would not be determinative for this action. For example, the ongoing SSM SIP Action litigation involves many issues that are unrelated to this current rulemaking.[21]

2. Consideration of Prior Case Law

Comment: Multiple state and industry commenters discussed court decisions involving SSM issues and affirmative defenses predating the *NRDC* cases. These commenters generally asserted that the EPA relied too heavily on the *NRDC* case in justifying the current action, and that the EPA failed to address the importance of prior case law and the relationship between these prior cases and the *NRDC* case.

Many of these commenters cited to the Fifth Circuit's *Luminant*[22] decision, where commenters asserted the court determined that affirmative defense provisions do not interfere with a court's jurisdiction to assess civil penalties or enforce the CAA, contrary to the D.C. Circuit's decision in *NRDC.* One commenter, acknowledging the differing outcomes of the *Luminant* and *NRDC* cases, asked the EPA to discuss this dissonance and claimed that the EPA should have sought *en banc* review of the *NRDC* decision before the full D.C. Circuit, or alternatively sought review by the Supreme Court. Another commenter suggested that the EPA should delay finalizing this rule because of the confusion in the courts resulting from the differing *NRDC* and *Luminant* decisions. Some commenters claimed that the *Luminant* case is more directly relevant to the current action than the *NRDC* case. One commenter asserted that the *Luminant* case would be controlling over the *NRDC* case in states within the Fifth Circuit's jurisdiction, including Texas. Some commenters noted that the *NRDC* case explicitly distinguished its holding from that of *Luminant* and avoided confronting the SIP issues discussed in *Luminant.* Similarly, some commenters cited the Eleventh Circuit's *Georgia Power*[23] case, which also involved affirmative defense provisions contained within a SIP. Some commenters also cited two cases where circuit courts upheld the EPA's ability to use affirmative defense provisions in Federal Implementation Plans (FIPs), including the Ninth Circuit's *Montana Sulphur*[24] decision and the Tenth Circuit's *Arizona Public*

[19] *See, e.g.,* SSM SIP Action, 80 FR 33892 (''Since the 2008 D.C. Circuit decision in *Sierra Club* v. *Johnson,* however, it has been clear that NSPS and NESHAP standards themselves cannot contain such exemptions. The reasoning of the court was that exemptions for SSM events are impermissible because they contradict the requirement that emission limitations be 'continuous' in accordance with the definition of that term in section 302(k). Although the court evaluated this issue in the context of EPA regulations under section 112, the EPA believes that this same logic extends to SIP provisions under section 110, which similarly must contain emission limitations as defined in the CAA. Section 110(a)(2)(A) requires states to have emission limitations in their SIPs to meet other CAA requirements, and any such emission limitations would similarly be subject to the definition of that term in section 302(k).''); *see also id.* at 33862.

[20] Specifically, the EPA's approach to addressing malfunction emissions in section 112 rules for major boilers and area boilers and section 111 and 129 rules for commercial and industrial solid waste incinerators was upheld by the D.C. Circuit in *U.S. Sugar.*

[21] For example, briefs filed in the SSM SIP Action litigation allege, among other things, that the EPA failed to make the showing required to issue a SIP call, which is a procedure specific to CAA section 110. *See* Brief of Industry Petitioners, SSM SIP Action Litigation (filed March 16, 2016).

[22] *Luminant Generation Co.* v. *EPA,* 714 F.3d 841 (5th Cir. 2013).

[23] *Sierra Club* v. *Georgia Power,* 443 F.3d 1346, 1357 (11th Cir. 2006).

[24] *Montana Sulphur & Chemical Co.* v. *EPA,* 666 F.3d 1174 (9th Cir. 2012).

Service [25] case. Other commenters cited to prior cases decided in the context of Clean Water Act regulations, including *Marathon Oil* [26] and *Essex Chemical,*[27] and claimed that these cases support the creation of mechanisms like affirmative defenses to account for the unforeseeable and uncontrollable failure of even the best technology.

Some commenters also addressed the D.C. Circuit's *U.S. Sugar* decision. One commenter claimed generally that the case did not undercut the EPA's basis for providing the title V emergency affirmative defense. Other commenters, however, claimed that *U.S. Sugar* reinforced the EPA's view that affirmative defense provisions that constrain or interfere with a court's authority under CAA sections 113 and 304 are inimical to the Act.

Response: The EPA acknowledges that various circuit court cases preceding the D.C. Circuit's *NRDC* decision, including the Fifth Circuit's *Luminant* decision, upheld the agency's prior interpretation of affirmative defense provisions in various contexts, including the authority of the EPA to approve affirmative defense provisions contained in SIPs and the authority of the EPA to create affirmative defense provisions in FIPs. In these decisions, the courts deferred to the EPA's prior interpretation of the CAA with respect to affirmative defense provisions.[28] While some courts found the EPA's former interpretation permissible, those courts did *not* determine that the EPA's former interpretation was the only or even the best permissible interpretation. As previously noted, it is well within the EPA's legal authority to now revise its interpretation to a different interpretation of the CAA.[29] Those prior decisions were based upon an interpretation of the CAA that the agency no longer holds, and therefore those prior decisions do not speak to the validity of the EPA's current policy with respect to affirmative defenses. The EPA further notes that the affirmative defense provisions at issue in the other court decisions cited by the commenters, including affirmative defenses in SIPs and FIPs, are not affected by this action.

In *NRDC,* however, the D.C. Circuit conclusively determined that the EPA's former interpretation of the CAA concerning affirmative defenses was not permissible with respect to section 112 standards promulgated by the EPA. The *NRDC* court vacated the affirmative defense provisions in that case, finding them without legal basis because they contradicted fundamental requirements of the Act concerning the authority of courts to decide whether to assess civil penalties in CAA enforcement suits. Because the *NRDC* decision interprets CAA sections 113 and 304 and addresses the legal basis for affirmative defense provisions, the EPA has reevaluated its interpretation of the CAA with respect to affirmative defense provisions in title V programs as well. Based on this reevaluation and the reasoning of the *NRDC* decision, the EPA has determined that it is appropriate to remove the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g), and to require removal of similar affirmative defense provisions from state operating permit programs and individual operating permits, because these provisions are not authorized by the CAA.

Finally, the EPA notes that the D.C. Circuit's *U.S. Sugar* decision further reinforced the principles underlying the *NRDC* decision. In *U.S. Sugar,* the D.C. Circuit, acknowledging that the EPA could not create an exemption or affirmative defense provision, deferred to the EPA's decision to rely on case-by-case enforcement discretion as the mechanism to handle excess emissions during malfunctions.[30] Arguments suggesting that prior cases, including *Marathon Oil* and *Essex Chemical,* require the EPA to provide affirmative defenses in such situations are contrary to the *U.S. Sugar* decision.

3. EPA's Historical Policies Concerning Affirmative Defense Provisions

Comment: A number of commenters addressed the EPA's historical policies concerning affirmative defenses,[31] including the title V emergency provisions and the policy considerations underlying this type of mechanism to address emissions in unusual situations. Many commenters discussed the EPA's initial decision to create the title V affirmative defense in the 1992 part 70 rule and 1996 part 71 rule. One commenter claimed that the EPA initially included the title V provisions to do what was right, even if the EPA did not concede that it was required. Commenters focused on the initial purpose of the emergency provisions, asserting that the affirmative defense provisions were a very limited, appropriate recognition that even properly designed and maintained technology is not infallible and can fail due to emergencies beyond the control of a source. Other commenters noted the EPA's prior approach that acknowledged that enforcement and the imposition of penalties might not be appropriate in certain situations beyond the control of the source. Commenters asserted that the *NRDC* decision does not undermine the policy reasons that initially informed the promulgation of affirmative defense provisions, and that these same policy reasons support the title V emergency affirmative defense provisions.

Commenters also claimed that the title V emergency provisions are consistent with decades of EPA policy, citing various rulemakings and guidance documents. Commenters also stated that these types of affirmative defense provisions were recognized by states long before the 1990 CAA Amendments and the title V operating permits program, and that the title V affirmative defense provisions have existed for over 25 years. Commenters also pointed to other EPA actions justifying affirmative defenses, including FIPs for Montana and New Mexico, EPA's briefs prepared for litigation in the *Luminant* case, and EPA's withdrawal of Texas' SIP Call. Commenters also noted that affirmative defense provisions are still contained in other regulations promulgated by the EPA, including NSPS and NESHAP standards.

Some commenters addressed the EPA's legal authority to change its policy on affirmative defenses. Commenters asserted that agencies are only permitted to change their existing interpretations when they offer a reasoned explanation for the change, citing various Supreme Court cases including *Encino Motorcars, LLC* v. *Navarro* [32] and *FCC* v. *Fox Television Stations.*[33] These commenters alleged that the EPA's action is arbitrary and capricious because the EPA has failed to provide an adequate justification for the agency's revised policy with respect to the title V affirmative defenses. However, other commenters acknowledged that the EPA may change its interpretation so long as the agency provides a reasoned explanation, and

[25] *Arizona Public Service* v. *EPA,* 562 F.3d 1116 (10th Cir. 2009).

[26] *Marathon Oil Co.* v. *EPA,* 564 F.2d 1253 (9th Cir. 1977).

[27] *Essex Chemical Corp.* v. *Ruckelshaus,* 486 F.2d 427 (D.C. Cir. 1973).

[28] For example, the Fifth Circuit in *Luminant* held that the EPA's interpretation of the CAA at that time was a ''permissible interpretation of section [113], warranting deference.'' 714 F.3d at 853.

[29] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 42 (1983).

[30] *U.S. Sugar,* 830 F.3d at 607–09.

[31] Some commenters also discussed the EPA's historical policy on exemptions prior to the *Sierra Club* case.

[32] 136 S. Ct. 2117 (2016).

[33] 556 U.S. 502 (2009).

agreed that the justifications provided by the EPA in the 2016 and 2022 proposed rules are sufficient.

Finally, some commenters discussed the perceived inequity or unfairness of the EPA's change in policy and removal of affirmative defense provisions, based in part on the supposition that sources have come to rely on these provisions. Specific comments addressing how the removal of the title V affirmative defense provisions could impact sources are discussed further in section III.D.2. of this document.

Response: The EPA acknowledges the underlying considerations supporting the EPA's past policies—especially the agency's recognition that even well-designed and appropriately operated equipment may sometimes fail due to circumstances beyond the control of the source (such as during emergencies) and that, in certain situations, enforcement for violations of technology-based standards may not be appropriate. This rule does not change that general recognition. As discussed in section III.D.2. of this document, the EPA continues to believe that enforcement may not be warranted under certain specific circumstances, such as during an emergency, as determined on a case-by-case basis by enforcement authorities. The EPA, states, citizens, and the courts retain the discretion and authority to consider such circumstances in evaluating how to respond to exceedances or violations. However, an affirmative defense provision that interferes with the authority of courts to assess penalties is no longer an appropriate or legally sound mechanism to address these situations.

The EPA also acknowledges its past policies regarding different mechanisms to account for excess emissions during periods of SSM and emergencies. Based on these former policies, the EPA previously established affirmative defense provisions in various other CAA program areas, including within previously promulgated FIPs and various NSPS and NESHAP regulations. However, since that time, decisions from the D.C. Circuit, including *Sierra Club* and *NRDC,* have established parameters under the CAA regarding legally permissible approaches for addressing excess emissions during periods of SSM or emergency events. In light of these decisions—particularly the 2014 *NRDC* decision—the EPA has concluded that certain aspects of its prior interpretation of the CAA were not legally permissible under the CAA. Thus, the EPA has revised its interpretation of the CAA with respect to affirmative defense provisions, and this revised interpretation provides the basis for the current action (and similar actions in other CAA program areas).

Following the 2016 proposal, the EPA continued to evaluate SSM provisions, including affirmative defenses, in SIPs. In October 2020, the EPA issued a guidance memorandum that, among other things, expressly superseded a portion of the EPA's interpretation of affirmative defenses presented in the 2015 SSM SIP Policy.[34] However, on September 30, 2021, the EPA issued a guidance memorandum that withdrew the October 2020 memorandum in its entirety and reinstated the legal and policy positions expressed in the 2015 SSM SIP Policy in their entirety.[35] Thus, the EPA's current interpretation of affirmative defenses in the context of SIPs is the interpretation set out in the 2015 SSM SIP Policy.

The EPA's revised interpretation following the *NRDC* decision was, and continues to be, well within the EPA's legal authority, and the EPA has properly exercised its authority to revise its interpretation of the CAA through the appropriate processes. The authority of an agency to change its interpretation of a statute is well-established, provided that it gives a reasoned explanation for the change.[36] The EPA disagrees with commenters that suggest that the EPA has not provided an adequate rationale for this shift in policy, either generally with respect to affirmative defenses or specifically with respect to the title V emergency affirmative defense provisions. The EPA has clearly articulated its revised interpretation of the CAA with respect to affirmative defenses, here and in other documents, including the 2016 proposed rule (as referenced in the 2022 proposed rule), based on the EPA's analysis of the *NRDC* decision.[37] Commenters have not substantiated their claim that the EPA's rationale is inadequate.

4. Consistency With Other CAA Program Areas

Comment: A number of commenters acknowledged and addressed the EPA's desire to ensure consistent agency policy with respect to affirmative defense provisions across different CAA program areas. However, some commenters asserted that consistency between the EPA's title V regulations and other CAA programs is not a rationale for taking this action. Other commenters disagreed that the title V provisions should be removed for consistency with actions like the 2015 SSM SIP Action, arguing that the two actions are distinguishable. Finally, some commenters claimed that removal of the title V affirmative defense would actually undermine the goal of consistency across CAA program areas, because title V permits incorporate emission limits developed under numerous CAA regulatory authorities, and because various NSPS, NESHAP, and SIP regulations currently still contain affirmative defense provisions.

One commenter also suggested that the EPA could resolve any inconsistency between the title V affirmative defense provisions and underlying standards that do not allow an affirmative defense by clarifying through an interpretive rule or rule revision that nationwide standards outweigh affirmative defense provisions under title V.

Response: The EPA is not removing the title V emergency affirmative defense provisions solely for the sake of consistency. Rather, as discussed in the proposal and in section III.A. of this document, these provisions present legal issues substantially similar to those that called for the removal of affirmative defense provisions from other regulations. In addition to the legal considerations supporting the current action, and as previously explained in the preamble to the 2016 proposed rule (as referenced in the 2022 proposal), the EPA believes that it is important to apply, as much as

[34] Memorandum, Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans, 6 (October 9, 2020), available at *https://www.epa.gov/system/files/documents/2021-09/2020-ssm-in-sipsguidance-memo.pdf.* In 2020, EPA also took action relating to an SSM-related affirmative defense in a SIP for Texas, withdrawing a SSM ''SIP call'' in part because the SIP-based affirmative defense was deemed to not be inconsistent with the CAA. *See* 85 FR 7232 (February 7, 2020); *see also* 85 FR 23700 (April 28, 2020) (SIP call withdrawal relating to North Carolina) and 85 FR 73218 (November 17, 2020) (SIP call withdrawal relating to Iowa). Petitions for review of these withdrawal actions were filed in the United States Court of Appeals for the D.C. Circuit. *See Sierra Club* v. *EPA,* No. 20–1115.

[35] September 2021 SSM SIP Memo, *supra* note 5. This memorandum also announced an intent to revisit, among other things, the 2020 action withdrawing the SSM affirmative defense-related SIP call for Texas. Id. at 5. On December 17, 2021, the United States Court of Appeals for the D.C. Circuit granted the EPA's request for a voluntary remand of that 2020 Texas SIP call withdrawal action, as well as the similar SIP call withdrawal actions relating to North Carolina and Iowa, in light of EPA's stated intent to reconsider those actions. *Sierra Club* v. *EPA*, No. 20–1115.

[36] *See, e.g., Encino Motorcars,* 136 S. Ct. at 2125–26; *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502 (2009); *see also Nat'l Cable & Telecomms. Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 981–82 (2005) (agency must adequately explain the reasons for a reversal of policy).

[37] The EPA has clearly explained its general shift in policy with respect to affirmative defense provisions in other documents. *See, e.g.,* 81 FR 36849; SSM SIP Action Supplemental Proposal, 79 FR 55934; SSM SIP Action, 80 FR 33851.

reasonably possible, the EPA's policy concerning affirmative defense provisions consistently across CAA program areas. As previously explained, the EPA has removed affirmative defense provisions from numerous other CAA standards since the 2014 *NRDC* decision.[38] Based on the relationship between title V and these underlying standards, it is particularly important to remove the affirmative defense provisions from the title V program regulations. Title V permits include a wide range of substantive CAA requirements that apply to a source, including SIP provisions and standards developed under CAA sections 111, 112, and 129. Because the title V affirmative defense provisions applied independent of these underlying standards, the title V emergency affirmative defense might be asserted in civil actions or other proceedings involving noncompliance with title V permit terms reflecting standards from which the EPA has recently eliminated affirmative defenses. In this way, the continued presence of the title V affirmative defense provisions could effectively undermine the EPA's efforts to remove affirmative defenses from the underlying standards, as well as the efforts of states to revise SIPs to comply with the 2015 SSM SIP Action. The EPA acknowledges that not all affirmative defense provisions in the EPA's regulations have been removed as of the date of this rule. However, the fact that this is an ongoing process does not provide a basis for retaining or delaying removal of the title V affirmative defense provisions.

Moreover, the EPA does not believe that it would be appropriate to simply clarify in some manner—whether by revising the emergency affirmative defense rules or issuing guidance—that the title V affirmative defense would not apply where the underlying standards do not allow or provide for an affirmative defense. Although this approach could potentially reduce inconsistency between title V provisions and the underlying standards from which affirmative defenses have been removed, it would nonetheless fail to address the more fundamental problem that the title V affirmative defense provisions are, in and of themselves, inconsistent with the enforcement structure of the CAA and thus legally impermissible.

[38] 87 FR 19042, 19044, n. 3 (citing recent EPA rulemakings removing affirmative defense provisions).

5. Relationship to Other CAA Standards

Comment: Commenters raised a number of concerns involving the relationship between the title V emergency affirmative defense and other CAA standards, including section 112 NESHAP, section 111 NSPS, and SIPs. Comments specifically relating to SIPs are discussed in the following subsection.

Commenters claimed generally that the EPA has failed to consider how the CAA requirements related to enforcement must be harmonized with the CAA requirements relating to standard setting and permitting. One commenter claimed that the title V affirmative defense provisions avoid the need to address emergencies in each individual underlying standard, which the commenter characterized as an impractical approach. Another commenter asserted that the title V affirmative defense provisions have effectively become part of the underlying applicable standards, and other commenters suggested that the title V affirmative defense provisions are necessary to ensure that underlying technology-based standards are achievable and adequately demonstrated, taking into account costs. These commenters asserted that removing the affirmative defense would have the effect of making the underlying standards in a permit more stringent than those authorized by the governing standards, in that sources would be subject to a level of control technology that is technologically and economically infeasible. Other commenters suggested that if affirmative defenses are removed, either title V permits or underlying standards would need to provide some other way to account for malfunctions, such as through alternative emission limitations, work practice standards, or malfunction abatement plans.

Some commenters also claimed that the overlap between the title V emergency provisions and various malfunction provisions in NSPS and NESHAP regulations could cause confusion. However, other commenters recognized that the removal of the title V affirmative defense provisions should not have any impact on independent malfunction or emergency provisions contained in underlying technology-based standards.

Lastly, several environmental commenters asserted that EPA must go further and quickly remove ''SSM loopholes'' from other CAA programs, including section 111 NSPS, section 112 NESHAP, and SIPs.

Response: Many of the comments relating to malfunction emissions and the development of technology-based standards are either not directly related to the current rule to remove the title V emergency affirmative defense provisions or reflect a misunderstanding about the relationship between the title V affirmative defense provisions and underlying standards included within operating permits. As an initial matter, title V of the CAA does not generally impose new substantive requirements on a source. Rather, title V permits provide a vehicle to clarify in a single document the various CAA requirements applicable to a source. Although title V permits must contain conditions (such as monitoring, recordkeeping, and reporting provisions) necessary to assure compliance with all CAA requirements already applicable to a source, title V of the CAA does not provide the basis for making substantive changes to underlying applicable standards.[39] Therefore, title V permits are not an appropriate mechanism for addressing commenters' concerns related to the development of, for example, alternative emission limits, work practice standards, or malfunction abatement plans. These considerations may be more relevant in the context of developing specific SIP provisions or section 111, 112 or 129 standards.[40]

Moreover, the underlying standards, not the title V affirmative defense provisions, establish the appropriate level of emission controls, accounting for technological, economic, and other considerations, as appropriate. The title V emergency affirmative defense provisions are not, as some commenters suggested, part of the underlying applicable requirements themselves. The title V affirmative defense provisions operated independently from the specific standards and/or emission limits, as well as any emergency, malfunction, or upset provisions contained within underlying applicable

[39] 40 CFR 70.1(b) (requiring all title V sources to have a permit to operate that ''assures compliance by the source with all applicable requirements'' and stating that ''title V does not impose substantive new requirements,'' although it does require imposition of fees and certain compliance measures).

[40] The D.C. Circuit's *U.S. Sugar* decision addressed arguments, raised in the context of challenges to NESHAPs issued under CAA section 112 that did not provide for an affirmative defense for unavoidable malfunctions, that such malfunctions must be accounted for either by an affirmative defense or by appropriate adjustments in the standard-setting itself. The D.C. Circuit upheld the EPA's decision to neither include an affirmative defense nor adjust the underlying standard, as requested by Petitioners, to account for malfunction periods. Instead, the court upheld the EPA's decision to use enforcement discretion to address exceedances that occur during malfunction periods.

requirements. Although the title V provisions provided for an affirmative defense in emergencies, removal of the affirmative defenses would not make underlying technology-based standards more stringent or otherwise have any effect on standards applicable to a source. The title V provisions merely provided an affirmative defense that a source, after having allegedly violated a technology-based emission limitation contained in its title V permit, could assert in an enforcement proceeding brought for alleged violations of the title V permit term reflecting the requirements of the underlying standard. Because the title V affirmative defense did not provide an exemption to any standard or define when a violation of a standard has occurred, a source's compliance status with the underlying standard itself—as well as the source's compliance status with the title V permit term—would not be affected by the presence or absence of an affirmative defense.

Finally, comments discussing the purported need to provide for or address excess emissions associated with malfunctions are immaterial because this action addresses the title V affirmative defense provisions for emergencies, which—although there may be some similarities—are significantly different, and narrower, than malfunction events. For further discussion, see section III.D.3. of this document.

6. Relationship to the 2015 SSM SIP Action

Comment: Multiple commenters addressed the relationship between this action and the 2015 SSM SIP Action. Some commenters asserted that the EPA's current action is based on the 2015 SSM SIP Action, or claimed that the two actions are related for various reasons. Other commenters claimed that the 2015 SSM SIP Action is not at issue in this rulemaking, disagreed with the EPA's statements that certain aspects of the 2015 SSM SIP Action are especially relevant, and attempted to distinguish the types of provisions at issue in the 2015 SSM SIP Action from those at issue here.

Some commenters also specifically discussed the need for states to develop SIP provisions that account for SSM situations (including work practice standards) and claimed that states should not be prohibited from including approved state SSM plans in title V permits. One commenter suggested that removing the title V affirmative defense provisions before SIP issues are resolved could prevent states from incorporating all applicable requirements, including SIP requirements, into title V permits, and another commenter asserted that this title V rule should be withdrawn while states modify their rules to address the 2015 SSM SIP Action. On the other hand, other commenters suggested that by promptly finalizing this title V rule, the EPA can better facilitate the coordination of SSM SIP revisions with title V program revisions and individual operating permit revisions.

Response: This current title V rule is related to the 2015 SSM SIP Action to the extent that each rule is based at least in part on the EPA's view that, in light of the *NRDC* decision, affirmative defense provisions are contrary to the enforcement structure of the CAA.[41] However, this title V action is not ''based on'' the 2015 SSM SIP Action, and the two actions are functionally independent rulemakings, each operating within distinct areas of the CAA's regulatory structure. Therefore, and for the reasons discussed in the preceding subsection discussing the relationship between title V and other CAA standards, this current action involving the title V affirmative defense provisions will not have any effect on states' ability to develop appropriate SIP provisions in response to the 2015 SSM SIP Action, and it will not affect states' ability to ensure that title V permits appropriately reflect all requirements applicable to a source, including revised SIP provisions. In fact, as some commenters indicated, it may be convenient for states to coordinate implementation of any title V permit changes related to the 2015 SSM SIP Action with permit changes related to this rulemaking. Issues regarding implementation of this rule are discussed further in section IV. of this document.

7. Title V of the CAA

Comment: Some commenters noted that while title V of the CAA does not establish or mandate affirmative defense provisions, neither does title V of the CAA prohibit the EPA from establishing affirmative defenses.

Response: The EPA acknowledges that title V of the CAA is silent with respect to affirmative defense provisions; it neither provides for such provisions nor explicitly prohibits them. However, the EPA interprets other provisions of the CAA that apply to enforcement of the title V operating permits program—including sections 113 and 304—to effectively prohibit the creation of affirmative defense provisions, as discussed in section III.A.1. of this document.

8. Constitutional Issues

Comment: Some commenters raised constitutional issues with the removal of the title V emergency affirmative defense provisions. Commenters argued that the imposition of penalties for any conduct that is unavoidable violates basic constitutional protections guaranteed by the Eighth Amendment and due process requirements. Commenters further asserted that explicit affirmative defense provisions are necessary to satisfy minimum constitutional standards, and that alternative approaches, such as the exercise of enforcement discretion, are not sufficient.

Response: The EPA disagrees with commenters with respect to these constitutional arguments. The comments suggest that without the title V affirmative defense, any penalty assessed for violation of a title V permit term during an emergency would be *per se* ''excessive'' or ''arbitrary'' and that the existing CAA enforcement provisions would be facially unconstitutional. The EPA disagrees. It should be reiterated, first, that the title V emergency affirmative defense has never been a required permit term and it has not universally been adopted by all permitting authorities for all permits. Even where the defense may be available, it is, by its own terms, very limited and narrowly circumscribed. Commenters have provided no information indicating that the defense has been asserted with any frequency or, indeed, at all. It is difficult to see how the removal from the EPA's regulations of a narrowly circumscribed, discretionary defense that apparently is infrequently asserted could render the CAA unconstitutional.

Moreover, the CAA does not mandate that EPA automatically initiate an enforcement action, let alone automatically assess a penalty, for a violation of a CAA requirement. EPA has absolute discretion on whether to initiate an enforcement action in any circumstance, including during an emergency.[42] If EPA chooses to initiate an enforcement action in a circumstance involving a violation during an emergency, and chooses to seek a penalty for that violation, the CAA establishes a maximum civil penalty in

[41] This legal rationale is not affected by any differences between affirmative defense provisions implicated by the 2015 SSM SIP Action and those implicated by this action.

[42] *Heckler* v. *Chaney,* 470 U.S. 821 (1985) (holding that decisions of agency not to undertake enforcement action are presumed unreviewable).

section 113(b)[43] but then expressly provides in section 113(e) that the EPA or the courts ''shall take into consideration various criteria—including specifically, ''good faith efforts to comply,'' and, more generally, ''other factors as justice may require.'' Thus, the CAA on its face does not mandate the imposition of any penalty *automatically,* much less one that is *per se* excessive. The commenters fail to provide any specific support for their claim that the statutory penalty provisions of the CAA are facially unconstitutional, instead making only generalized claims.

In addition, *State Farm Mutual Auto Insurance Co.* v. *Campbell,*[44] a case cited by some commenters, provides no support for any claim that removal of the title V affirmative defense would somehow be unconstitutional. *State Farm* involved a claim that a jury award of $145 million in punitive damages was excessive and, accordingly, contrary to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Reaffirming that the Fourteenth Amendment ''prohibits the imposition of grossly excessive or arbitrary punishments,'' the Supreme Court held that, under the particular circumstances of the case, the punitive damages award was excessive and ''an irrational and arbitrary deprivation of property.''[45] Here, no penalties have been assessed at all, and *State Farm* provides no support for the conclusion that—absent the title V emergency affirmative defenses—the CAA's authorization, in accordance with various identified criteria, of possible penalties is necessarily unconstitutional.[46]

The EPA also disagrees with the claims that—absent the title V affirmative defenses—the penalty provisions of the CAA would be facially contrary to the Eighth Amendment. Again, if a party believes that the penalties assessed in a particular enforcement action violate the Eighth Amendment, it can raise that claim at the appropriate time. As with the commenters' due process arguments, Congress has addressed the potential for unfair—or unconstitutional—penalties by setting out various criteria to be considered in determining civil penalties. The penalty criteria in section 113(e) provide an opportunity to raise concerns about imposition of penalties in the event of an emergency similar to that afforded by the title V affirmative defenses, albeit directed at the courts' discretion. The commenters do not explain why they believe these explicit statutory factors do not provide sufficient protection against the imposition of an allegedly unconstitutionally excessive penalty.

D. Potential Impacts

This section discusses various issues involving the effects of removing the title V emergency affirmative defense provisions, focusing primarily on the impact on sources. Overall, the EPA does not believe that removing the emergency affirmative defense provisions will substantially affect the legal rights of title V sources or the decisions sources make when confronted with emergency situations. It is also important to reiterate that the EPA is basing the current action on its interpretation of the CAA in light of relevant caselaw indicating that these affirmative defense provisions must be removed because they are inconsistent with the enforcement structure of the CAA.

1. Scope and Use of Title V Affirmative Defense Provisions

Comment: Multiple state and industry commenters acknowledged the limited scope of the title V affirmative defense provisions, which apply only to emergency situations. Commenters also addressed the relationship between emergencies and malfunctions. While some commenters provided examples of situations that would constitute an emergency but not a malfunction, other commenters asserted that the terms ''emergency'' and ''malfunction'' are closely related in that they both relate to unexpected and unforeseen events.

A number of commenters further acknowledged the limited historical and potential use of the title V emergency affirmative defense provisions. However, commenters suggested that the rule could have greater impacts than might be apparent.

Environmental commenters, on the other hand, characterized large SSM exceedances as routine and claimed that large polluters have used affirmative defense provisions in many citizen enforcement actions. Additionally, these commenters asserted that excess emissions are often the result of operator errors, poor plant design, and a lack of preventive maintenance. Thus, commenters claimed that sources using SSM affirmative defense provisions have lacked an incentive to make investments in accident prevention. Finally, these commenters claimed that emissions during SSM and emergency events can be controlled.

Response: The EPA agrees with commenters that emphasized the limited scope of the title V emergency affirmative defense provisions. Unlike more general affirmative defense provisions addressing excess emissions during equipment malfunctions (which some commenters appear to address), the title V provisions being removed were specific to situations that qualify as an ''emergency,'' defined as ''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.'' 40 CFR 70.6(g)(1). Thus, while the title V emergency affirmative defenses, like affirmative defenses for malfunctions, relate to events that are beyond the control of a source, the title V defenses would only have been available in a more extreme, limited set of circumstances. While it is possible for some overlap in malfunction and emergency situations to exist (*e.g.,* certain emergency events could potentially cause equipment malfunctions), the EPA believes that the majority of exceedances during malfunction events would not be attributable to ''emergencies'' as defined in the title V affirmative defense provisions. In addition, the title V affirmative defense provisions being removed contain various procedural requirements that must be met to assert the defense. *See* 40 CFR 70.6(g)(3). Moreover, as some commenters acknowledged and based on the best information available to the EPA, the title V emergency affirmative defense provisions have rarely, if ever, been asserted in enforcement proceedings. Comments contending that sources frequently or routinely have asserted affirmative defenses appear to relate to SSM affirmative defenses, rather than the narrower title V affirmative defense for emergencies. It is unlikely that the criteria for the title V emergency affirmative defense would have been met in such circumstances, as the title V provisions could not be asserted for (among other things) noncompliance caused by improperly designed equipment, lack of preventative

[43] The maximum statutory civil monetary penalty amounts are adjusted annually for inflation in 40 CFR part 19.

[44] 538 U.S. 408 (2003).

[45] *Id.* at 429.

[46] Additionally, *State Farm* involved a claim under the Fourteenth Amendment, which imposes limitations on the states, not the federal government. This discussion assumes, for the sake of argument, that the principles expressed in *State Farm* would also apply to claims under the Due Process Clause of the Fifth Amendment.

maintenance, careless or improper operation, or operator error.

For these reasons, the EPA does not believe that the removal of the narrowly drawn and apparently infrequently used title V emergency affirmative defense provisions will have a significant impact on sources. Further, as discussed in the following subsection, the EPA, state authorities, and other entities likely would consider the relevant circumstances—especially the relatively unusual, extreme, and unavoidable circumstances that would have qualified under the narrow definition of ''emergency''—in deciding whether to pursue enforcement action or seek penalties, and sources remain free to argue to the court, in the event of an enforcement action, that penalties should not be assessed for these same reasons.

2. Alternatives to an Affirmative Defense: Discretion To Initiate Enforcement and the Discretion of Decision Makers To Determine Appropriate Remedies

Comment: Many commenters expressed concerns that removing the title V emergency affirmative defense provisions would result in less certainty or greater risk of liability to sources confronted with emergency situations. One commenter asserted that even if the EPA is not legally required to provide an affirmative defense in title V permits, the EPA should, to the maximum extent consistent with law, continue to provide and allow states to provide sources relief from the threat of enforcement for exceedances caused by emergencies. Another commenter claimed more generally that the EPA must find other ways to assure sources that they will not be subject to penalties if they operate to provide vital services in an emergency. Commenters generally requested additional guidance from the EPA to provide more certainty to sources in the absence of an explicitly codified affirmative defense.

Most commenters acknowledged the fact that even in the absence of an affirmative defense, the EPA, state, and citizens all retain the discretion to determine whether to bring an enforcement action, based on the unique circumstances of each case. Thus, most commenters acknowledged that not all exceedances of emission limits will automatically result in enforcement actions. One commenter asserted that the EPA routinely uses enforcement discretion to decide which alleged violations to pursue, and that such decisions are often made on the same principles codified in an affirmative defense. Other commenters asserted that the EPA does not intend for true emergencies to result in increased enforcement, and that the EPA's suggested enforcement discretion approach avoids forcing every violation to judicial resolution. Finally, one commenter asserted that the exercise of enforcement discretion by state permitting authorities is appropriate and consistent with CAA sections 113 and 304 and separation of power principles.

However, a number of commenters challenged the sufficiency of relying on enforcement discretion alone to handle excess emissions caused by emergencies. Commenters noted that explicitly codified affirmative defense provisions have the benefit of providing certainty to permittees, promoting consistency to agency actions, and promoting the creation and retention of records necessary to justify agency actions. Commenters claimed that relying on enforcement discretion alone would result in more uncertainty and jeopardy and less harmony among different CAA programs, because enforcement discretion policies may be unwritten and unavailable to the public. Other commenters noted, citing the *U.S. Sugar* decision, that federal and state policies regarding enforcement discretion do nothing to prevent citizens from pursuing enforcement. Some commenters also asserted that an enforcement discretion approach still leaves sources in the difficult position of choosing between proper emergency response and compliance with emission limits. Other commenters claimed that relying on enforcement discretion puts all power in the hands of the EPA, without any checks and balances, and asserted that this contradicts principles of cooperative federalism and exceeds the authority intended in the passage of the CAA.

Some commenters discussed how prior court decisions have treated enforcement discretion. One commenter claimed that the D.C. Circuit in *U.S. Sugar* acknowledged, but did not evaluate, the EPA's reliance on enforcement discretion, and the commenter alleged that the court appeared to have doubts that enforcement discretion alone is sufficient. Another commenter claimed that the *U.S. Sugar* decision did not validate the enforcement discretion approach beyond the context of section 112 standards. Other commenters cited to the 1973 D.C. Circuit opinion in *Portland Cement Assn.* v. *Ruckelshaus*[47] in support of their position that reliance on enforcement discretion is not a sufficient response to addressing excess emissions from malfunctions, and another commenter claimed that the 9th Circuit rejected the EPA's use of enforcement discretion in the 1977 *Marathon Oil*[48] Clean Water Act case.

Some commenters requested that the EPA provide additional guidance to clarify the circumstances under which permitting authorities (including the EPA) should exercise their discretion not to bring enforcement actions. Many commenters encouraged the use of the criteria contained in 40 CFR 70.6(g) in guiding permitting authorities' exercise of enforcement discretion. Some commenters asserted that states should be able to rely on those criteria when exercising their enforcement discretion. Other commenters urged the EPA: to make clear that the EPA would not expect to bring an enforcement action under circumstances meeting those criteria; to make clear that the EPA would continue to use its enforcement discretion in the case of emergency situations; and to create a strong policy statement that the EPA does not support civil penalties in situations meeting those criteria. Commenters, with one quoting a passage from the EPA's brief in the *U.S. Sugar* case, urged the EPA to more fully articulate certain standards for determining whether the EPA would pursue enforcement in a given situation, including consideration of the good faith efforts of a source to minimize emissions, which types of preventative and corrective actions would be considered, and the nature and extent of the root cause analysis that should be employed by sources to ascertain and rectify excess emissions. Another commenter claimed that it is appropriate for permitting authorities to take into account circumstances involving how a source mitigated damage to people and the environment in responding to an emergency.

Relatedly, one commenter suggested that instead of removing the affirmative defense provisions, the EPA should amend them to provide that the affirmative defense may be allowed, if specified conditions are met, at the discretion of the enforcement entity.

Commenters also acknowledged that even when an enforcement action is commenced, the ultimate decision makers also have the discretion to determine whether and to what extent penalties are appropriate in a given situation. Environmental commenters asserted that both the EPA and the *NRDC* court recognized that even

[47] 486 F.2d 375, 399 n.91 (D.C. Cir. 1973).

[48] *Marathon Oil Co* v. *EPA,* 564 F.2d 1253, 1272–73 (9th Cir. 1977).

without an affirmative defense, sources are still free to argue to a court that they should be subject to lesser (or no) civil penalties for any number of reasons, including practical considerations or emergencies. Another commenter noted that the D.C. Circuit in *U.S. Sugar* confirmed that sources may still argue to a court that penalties should not be assessed in a given situation, and that sources may support these arguments with relevant facts, such as the source's compliance history and good faith efforts to comply with emission limits.

However, while some commenters acknowledged that the absence of an affirmative defense would not automatically result in the imposition of particular remedies, other commenters asserted that without an affirmative defense, sources would lack a legal defense in enforcement actions and would be liable for unforeseeable events outside of their control. One commenter claimed that this would be unjust, and that imposing an unjust system would foster disrespect for the law.

Finally, some commenters requested further guidance on how sources could make similar defenses in enforcement proceedings. Commenters requested that the EPA retain or narrow the definition of ''emergency'' in its regulations, as this definition could help guide a court's review of circumstances that are unlikely to warrant punishment, and could provide more certainty to sources.

Response: As discussed in detail in the 2016 proposal,[49] the EPA reiterates that the legal rights and obligations of individual sources potentially subject to enforcement proceedings will not be significantly affected by the removal of emergency affirmative defense provisions from their title V permits. 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, including those resulting from an emergency, will automatically be subject to enforcement or automatically be subject to imposition of penalties or other remedies.

First, any entity that may bring an action to enforce title V permit provisions has enforcement discretion that they may exercise as they deem appropriate in any given circumstance. 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 such emissions, EPA or other relevant entities may well decide that no enforcement action is warranted in a specific case. In the event that an entity decides to bring an enforcement action, it may, nonetheless, take into account the emergency circumstances in deciding what remedies to seek.

The EPA appreciates that relying on enforcement discretion might afford less certainty to sources than an affirmative defense provision. However, as the EPA has explained, the latter approach is not legally consistent with the enforcement structure of the CAA, which among other things imposes a duty on the source to continually comply with emission limits and standards. Moreover, the EPA believes the exercise of enforcement discretion in lieu of a codified affirmative defense provision is both appropriate and sufficient to carry out the mandates established by Congress in the CAA in a fair and equitable fashion, a position that the D.C. Circuit upheld in its *U.S. Sugar* decision.[50] The EPA believes that it is unlikely that entities would initiate an enforcement action for emissions exceedances resulting solely from a true emergency situation that would have qualified under the narrow definition and particular requirements of the title V emergency affirmative defense provisions. The EPA also generally agrees with commenters that the conditions contained in the title V emergency provisions, including but not limited to the nature of the emergency event and the source's efforts to take all reasonable steps to minimize emissions during an emergency, would likely be important considerations to take into account when deciding whether to pursue enforcement, among all other relevant factors. Enforcement discretion decisions necessarily involve case-specific considerations, which should not be confined to the specific conditions contained in the title V emergency affirmative defense provisions.[51] Thus, the EPA will not, in the course of this rulemaking, provide explicit criteria that the EPA, states, or other entities should apply in determining whether to commence an enforcement action. Nothing in this action precludes the EPA from issuing such guidance in other appropriate proceedings or formats if the agency should subsequently determine that to be appropriate.

Second, even if an enforcement action is commenced for exceedances caused by an emergency, the absence of an explicitly defined affirmative defense provision does not affect a source's ability to demonstrate to the court (or to the EPA in an administrative enforcement action) that penalties or other kinds of relief are not warranted. Under section 113(e), courts (and the EPA in an administrative enforcement action) must consider various factors when assessing monetary penalties, including the source's compliance history, good faith efforts to comply for the duration of the violation, and ''such other factors as justice may require.'' Thus, with or without an explicit affirmative defense, a 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. The D.C. Circuit has noted that such justifications would be a ''good argument . . . to make to the courts.'' [52] Thus, overall, elimination of the title V emergency affirmative defense provisions will not deprive sources of these defenses in potential enforcement actions. Sources retain all of the arguments they previously could have made. Congress vested the courts with the authority to judge how best to weigh the evidence in an enforcement action and to determine appropriate remedies. The EPA may not, through the title V affirmative defenses, restrict a court's ability to do so, and the EPA does not believe that it would be appropriate, in this action, to provide guidance to the courts with respect to what factors a court should or must consider.

For similar reasons, the EPA does not believe it would be appropriate or necessary to retain the definition of ''emergency'' or any of the other provisions formerly contained in 40 CFR 70.6(g) and 71.6(g) that were associated with the title V affirmative defense. These additional provisions, which were created solely for the purpose of supporting the title V affirmative defense and ensuring that it was narrowly tailored, no longer serve

[49] *See* 81 FR 38653.

[50] In its *U.S. Sugar* decision, the D.C. Circuit upheld the EPA's reliance on case-by-case enforcement discretion as a permissible and reasonable substitute for affirmative defense provisions in accounting for malfunctions within section 112 standards. *U.S. Sugar,* 830 F.3d at 607–09. The EPA believes that the D.C. Circuit's statements in *NRDC* and *U.S. Sugar* are more reflective of the court's current views concerning affirmative defenses and enforcement discretion than the much earlier decisions cited by commenters, including *Portland Cement Assn.* v. *Ruckelshaus.* Arguments suggesting that prior cases, including *Marathon Oil* and *Essex Chemical,* require the EPA to provide affirmative defenses in such situations are contrary to the D.C. Circuit's holdings.

[51] These considerations could potentially be much broader than the title V emergency affirmative defense provisions, and encompass situations where a source would never have been eligible for the emergency affirmative defense.

[52] *NRDC,* 749 F.3d at 1064.

a purpose in the EPA's part 70 and part 71 regulations. For example, the EPA does not believe that retaining a standalone definition of ''emergency'' without any context or application would be helpful to relevant entities determining whether to initiate enforcement or to the courts or an agency determining the appropriate remedies.

As explained in section III.A., affirmative defense provisions by their nature limit or eliminate the authority of federal courts to determine liability or to impose remedies through considerations that differ from 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. Thus, it would not be appropriate to amend the title V affirmative defense provisions to provide that the affirmative defense may be allowed if specified conditions are met, at the discretion of the enforcement entity.

3. Impacts on the Decision Making and Planning of Sources Confronted With Emergency Situations

Comment: Industry commenters raised concerns involving how the removal of the title V affirmative defense provisions will affect how sources plan for and react to emergency situations. Many of these comments asserted that without an affirmative defense provision in their title V permits, sources confronted with an emergency situation would be forced to decide whether to (1) comply with operating permit requirements or (2) deal with the emergency situation in a manner protective of human safety or other public interests, at the risk of being held liable for violating permit terms. Specifically, some commenters asserted that facilities faced with the threat of liability may be less willing to shut down systems in an emergency, creating the risk of more catastrophic accidents. Other commenters suggested that sources might shut down earlier than would normally be the case, which could result in resource shortages that could impede emergency response efforts or area recovery. Commenters asserted that the affirmative defense provisions serve the important purpose of allowing sources the flexibility to continue or resume operations to provide vital services in times of emergency.

One industry commenter, citing discussion in the EPA's 2014 SSM SIP Action Supplemental Proposal, asserted that removing the affirmative defense provisions could result in an additional resource burden for sources, who could be forced to invest in facility improvements in order to protect the source from emergency situations.

Other commenters asserted similar arguments specifically concerning electric grid reliability, asserting that sources would have to weigh compliance obligations against the need to continue generating electricity to avert grid reliability problems. Some commenters generally claimed, without describing specific instances, that the title V emergency affirmative defense provisions, in addition to other available mechanisms for relief from penalties, have helped ensure reliable electric grid operation in emergency situations. Several commenters provided specific examples of these situations.

Commenters presented differing views of whether the definition of ''emergency'' in the title V affirmative defense provisions would encompass reliability or electric system emergencies. One commenter asserted that the definition of ''emergency'' should cover an extreme situation involving critical reliability concerns because the EPA has recognized that CAA rules need to account for the unique interconnected and interdependent operations of power plants. However, another commenter acknowledged that the definition may not be broad enough to cover this situation, but suggested that the EPA recognize that enforcement may be unwarranted not only for unit-specific emergencies, but also for situations where facilities are called upon to support reliability in the context of a larger electric system emergency.

Some commenters claimed that certain electric system operators cannot force a source to continue generating electricity in order to ensure system reliability if doing so would cause the source to violate an environmental requirement, such as a permit condition. Thus, these commenters expressed concern that without the title V affirmative defense—characterized by the commenters as an ''exemption''—electric system operators would not be able to force a source to generate electricity in order to ensure system reliability. Other commenters discussed emergency generation orders issued by the Department of Energy (DOE) under section 202(c) of the Federal Power Act (FPA), 16 U.S.C. 824a(c), by which the DOE may require power plant owners to operate and generate electricity in certain emergency situations. While some commenters expressed concern that a source could face the risk of significant penalties for emissions exceedances resulting from complying with such an order, other commenters discussed an amendment to the FPA that excuses sources from compliance with environmental regulations when necessary to comply with DOE emergency orders. One commenter concluded that this FPA provision should be viewed as complementary to, rather than a substitute for, the title V emergency defense, and another asserted that this legislation indicates congressional support for an emergency defense when electric system reliability is at issue.

Commenters urged the EPA to consult with other agencies with expertise in reliability. Commenters also suggested that the EPA direct federal and state enforcement offices to engage in close consultation with relevant grid operators or reliability authorities prior to initiating enforcement actions where exceedances were caused by a demonstrated reliability need. Commenters also proposed that system operators should be able to submit a reliability analysis in the record of any enforcement proceeding and suggested that courts should not independently assess previously established reliability-related determinations.

Response: The EPA does not believe that the removal of the title V emergency affirmative defense provisions will significantly affect the decision making of sources confronted with emergency situations. Sources confronted with an emergency situation will always have to assess the risk of liability involved with courses of action that would result in exceedances of emission limits contained in title V permits as well as the underlying standards. The EPA does not believe that removing the title V affirmative defense provisions will affect this risk assessment. First, the title V emergency provisions did not provide guaranteed protection from liability. They simply created an affirmative defense that a source, having allegedly violated a technology-based emissions limit, could assert in narrowly defined circumstances after an enforcement action was initiated. Moreover, permittees seeking to assert the defense bore the burden of establishing that a number of required conditions were met.

Second, the incentives that exist for sources to behave in a prudent manner during emergencies remain largely unchanged, even without an explicit affirmative defense. As discussed in section III.D.2. of this document, sources can still argue all available

defenses to an alleged violation and/or assert that penalties should not be imposed, based on the particular circumstances. The ability to assert relevant considerations in this manner is not limited to the particular conditions associated with the title V emergency affirmative defense provisions. The EPA agrees that the need to avert catastrophic accidents, or to avert an electric reliability crisis, or any number of other public interest-related considerations, could be especially relevant to the decision whether to pursue enforcement or impose penalties. The EPA cannot, however, restrict or define—through the operation of an affirmative defense or otherwise—the evidence or considerations that a court may take into account when determining whether penalties should be assessed in a given situation.

Additionally, the EPA does not believe that removing the title V emergency affirmative defense provisions will have a significant effect on how sources plan for emergencies or invest in facility improvements in order to prepare for emergencies. The EPA notes that the comments received on this point, and the EPA's statements in the 2014 SSM Supplemental Proposal cited by commenters, are more relevant to preparing for excess emissions from equipment malfunctions than to preparing for emergencies. Moreover, as discussed previously, removing the affirmative defense provisions should not change the incentives that sources have to prepare for emergencies. Prudent behavior with respect to planning for emergency situations and minimizing emissions during an emergency to the maximum extent possible would be just as advantageous to a source seeking to reduce the possibility that enforcement will be initiated (or seeking to establish that penalties are not appropriate) as it would be to a source attempting to meet the criteria of a codified affirmative defense provision. The EPA believes that such prudent behavior is a matter of good business practice that most, if not all, sources would normally pursue irrespective of an affirmative defense.[53]

Regarding specific comments concerning electric grid reliability, the EPA does not believe that the current action will have a measurable impact on electric grid reliability, and the EPA does not believe that it is necessary to consult with other agencies with expertise in reliability with respect to the limited actions being taken in this rule. As an initial matter, even if the EPA were to retain the existing title V emergency affirmative defense, the availability of that defense in different types of situations involving issues of grid reliability is uncertain. The EPA generally agrees with the commenters suggesting that most electric grid reliability situations would not have qualified as emergencies eligible for the title V affirmative defense, based on the narrow definition of ''emergency'' in the title V regulations being removed through this action.[54] However, again, nothing would prevent the consideration of reliability-related circumstances in determining whether to initiate enforcement or in deciding whether penalties are appropriate.

Additionally, contrary to the assertion of commenters, the removal of the affirmative defense provisions should not affect the ability of electric grid operators to request that sources generate electricity in order to avert grid reliability problems. Some of these comments were based on the mistaken premise that the title V affirmative defense provisions functioned as an exemption to emission limits.[55] Moreover, as other commenters note, Congress has provided various forms of relief in these situations, including the amendment to FPA section 202(c) (exempting sources from compliance with environmental regulations when necessary to comply with a DOE emergency order), as well as provisions such as CAA section 110(f) (authorizing state governors to temporarily suspend certain requirements where the President determines a national or regional energy emergency exists). The EPA cannot here provide any further guarantees in this regard in the form of an affirmative defense, exemption, or other mechanism that would run contrary to the CAA.

4. Perceived Benefits of the Requirements Associated With the Title V Affirmative Defense Provisions

Comment: Some commenters discussed perceived benefits of retaining affirmative defense provisions as written, in addition to the increased certainty and consistency that commenters believe the provisions provided. One commenter claimed that the various demonstration and reporting requirements in the title V emergency affirmative defense provisions serve as incentives for sources to prevent and minimize excess emissions during emergencies, an incentive that the commenter claimed would be lost if the affirmative defense was removed.

Response: The components of the title V emergency affirmative defense involving recordkeeping and reporting requirements and the obligation for a source to properly operate its facility and take all reasonable steps to minimize excess emissions (40 CFR 70.6(g)(3) and 71.6(g)(3)) were important to limit the scope of the defense and any potential for abuse. However, the EPA does not agree that removing the affirmative defense will eliminate the incentives for sources to appropriately prepare for and respond to emergency situations, to minimize excess emissions, to maintain proper records of such events, or to notify relevant authorities in a timely manner. Because the CAA requires continuous compliance with applicable emission limitations and emission standards, sources should properly operate and take steps to minimize excess emissions at all times. Sources still have an incentive to do all of these things in the event of an emergency, because doing so would continue to be in their best interests both for compliance purposes and for purposes of defending against an enforcement action. Again, the EPA believes that such prudent behavior is a matter of good business practice that most, if not all, sources would normally pursue irrespective of an affirmative defense.

5. Environmental and Public Health Impacts

Comment: A number of commenters discussed the potential air quality and public health impacts of removing the title V affirmative defense provision. Industry commenters asserted that

[53] Additionally, as discussed in section III.D.3., the title V emergency affirmative defense provisions have rarely, if ever, been asserted in enforcement proceedings. Thus, the EPA does not believe that the removal of the narrowly drawn and apparently infrequently used title V emergency affirmative defense provisions will have a significant impact on sources.

[54] Again, the title V emergency provisions were only available for ''sudden and reasonably unforeseeable events beyond the control of the source'' requiring ''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.'' 40 CFR 70.6(g)(1). This definition of ''emergency'' generally contemplated emergencies directly affecting the operations of a single source. In contrast, the need for one source to continue operating in response to reliability concerns would generally not involve any sort of emergency at that particular source, but rather would likely be motivated by circumstances occurring at a *different* source. For example, one source might be required to generate electricity to make up for power that another source was unable to generate due to an emergency at the other source.

[55] A source faced with demands to continue generating electricity would always have to decide whether doing so could cause it to exceed emission limits in its title V operating permit; the presence or absence of an affirmative defense that could later be asserted in an enforcement proceeding does not change this fact. For further discussion, *see* section III.B.1. of this document.

removing the affirmative defense provisions would not reduce emissions or provide any air quality benefits. Moreover, industry and state commenters claimed that the EPA has not made any demonstration that emissions during emergencies endanger public health or safety or have resulted in problems with attainment of the NAAQS. One commenter claimed that EPA action to remove the title V affirmative defense provisions would be arbitrary and capricious because the action would impose regulatory burdens without any significant benefit, and because the EPA failed to consider the costs and benefits of its proposed action.

On the other hand, environmental commenters claimed that affirmative defense provisions impermissibly allow large facilities to emit massive amounts of pollution in violation of applicable emission limits without consequence. These commenters provided extensive discussion of the health impacts of different pollutants and cited to numerical data and case studies involving the emissions of a number of large industrial facilities. The commenters asserted that this is an environmental justice issue, as these emissions impact surrounding communities, which the commenters claimed are often low-income communities or communities of color. Environmental commenters asserted that the impacts of climate change may increase the incidence of malfunctions due to extreme weather events.

Response: As previously explained, the EPA is removing the affirmative defense provisions from the title V program regulations because these provisions are inconsistent with the EPA's interpretation of the enforcement structure of the CAA. The EPA is not basing this current action on potential air quality benefits, or a weighing of costs and benefits, associated with the removal of these provisions. While the EPA acknowledges that there are benefits to reducing emissions, including reducing impacts to communities with environmental justice concerns, as previously explained, the purpose of this rulemaking is to eliminate the affirmative defense provisions that EPA finds to be inconsistent with the enforcement structure of the Clean Air Act. This action also does not take into account the impact of climate change on the incidence of malfunctions and, as previously explained, emergencies, which—although there may be some similarities—are significantly different, and narrower, than malfunction events.

E. Response to Comments Outside the Scope of This Action

Comment: Several industry commenters requested that EPA should consider removing hospital, medical, and infectious waste incinerators (HMIWI) as a title V source category or consider reducing program requirements applicable to HMIWIs. Separately, one commenter expressed disagreement with the EPA's return to its 2015 SSM SIP Policy.

Response: These comments are not relevant to the current rulemaking action and are outside the scope of this final rule.

IV. Implementation Considerations

This section provides guidance and addresses comments on various aspects related to implementing this final rule. First, as indicated in the 2016 and 2022 proposed rules, as a result of the EPA's removal of 40 CFR 70.6(g), state, local and tribal permitting authorities [56] whose part 70 programs contain impermissible affirmative defense provisions [57] must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved part 70 programs. The part 70 program revision process should follow the procedures in 40 CFR 70.4(a) and (i), as specified in the guidance provided in the following subsections. In summary, the EPA expects that states with part 70 programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of this final rule—*i.e.,* by August 21, 2024. Other considerations associated with program revisions are discussed further in section IV.A. of this document.

States must also remove title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. The EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on an affirmative defense provision in an EPA-approved title V program). Additional considerations associated with permit revisions are discussed further in section IV.B. of this document.

A. Program Revisions

This section clarifies the EPA's expectations for how the final action to remove 40 CFR 70.6(g) will affect state programs and responds to comments involving these considerations. Specifically, this section describes the actions that some states will need to take in order to submit program revisions to remove impermissible affirmative defense provisions.

1. Necessity for State Program Revisions

As indicated in the 2016 and 2022 proposed rules, as a result of the removal of 40 CFR 70.6(g), the EPA has determined that it is necessary for states whose part 70 programs contain impermissible affirmative defense provisions to submit program revisions to the EPA to remove such provisions from their EPA-approved part 70 programs.[58] This determination is based on the EPA's interpretation of the enforcement structure of the CAA, as informed by the *NRDC* decision. The EPA's rationale concerning affirmative defenses, presented in section III.A. of this document, applies equally to affirmative defense provisions within state part 70 operating permit programs, which the EPA now considers to be impermissible. The term ''impermissible affirmative defense provisions'' as used throughout this section is intended to refer to all affirmative defense provisions that, for the same reasons necessitating the EPA's removal of CFR 70.6(g) and 71.6(g), are inconsistent with the CAA. This includes, but is not limited to, any provisions within EPA-approved part 70 programs that are similar to, based on, or function in similar ways to the provisions being removed from 40 CFR 70.6(g). For example, any title V provisions that establish an affirmative defense that could be asserted in a civil enforcement

[56] As noted previously, the term ''state'' is used generically throughout this section to refer to all state, local, U.S. territorial, and tribal permitting authorities that administer EPA-approved part 70 (title V) programs. *See* 40 CFR 70.2 and 71.2.

[57] As specified further in section IV.A.1. of this document, the term ''impermissible affirmative defense provisions'' is intended to refer to all affirmative defense provisions that, for the same reasons necessitating the EPA's removal of CFR 70.6(g) and 71.6(g), are inconsistent with the enforcement structure of the CAA.

[58] To the extent that this document refers to the need to remove affirmative defense provisions from part 70 programs, the EPA is referring to the need for states to submit program revisions to the EPA to remove such provisions from states' EPA-approved part 70 (title V) operating permit programs.

action involving alleged noncompliance with any federally-enforceable standards would be inconsistent with the enforcement structure of the CAA. Such provisions are impermissible regardless of whether the affirmative defense provisions are specific to emergency situations, and regardless of other criteria contained within such provisions. Any provisions in an EPA-approved part 70 program that establish an exemption to emission limitations as described in this document will similarly need to be removed. This action will not have any direct effect on affirmative defense provisions established under other CAA programs, such as the SIP or section 111, 112, or 129 programs.

2. EPA's Authority To Require State Program Revisions

Comment: Multiple commenters objected to the EPA's indication that, if the EPA finalized the removal of 70.6(g), it may be necessary for states with similar affirmative defense provisions to remove those provisions and submit program revisions.

A number of commenters discussed the legal authority by which the EPA could require state program revisions. Environmental commenters suggested that CAA section 502(b), read together with sections 502(d) and (i) and with 40 CFR 70.4, plainly authorizes the EPA to revise the minimum elements of operating permit program regulations when the Administrator determines that revisions are necessary to meet the requirements of the CAA. Other commenters argued that the EPA has no legal basis for imposing its policy preference on states, and some industry commenters claimed that nothing in the CAA authorizes the EPA to withdraw its final approval of a state title V permit program because the EPA prefers a particular improvement to what was already approved, claiming that this would be contrary to Congressional intent and the purpose of title V. One state commenter similarly claimed that requiring program revisions would fundamentally shift the careful balance between the state and the federal governments' regulatory partnership. Some commenters also claimed that requiring states to make title V program changes would constitute a challenge to the legality of state programs and would require a finding that there is no situation where the state program provisions can be applied in a way that is consistent with the Act. One commenter characterized state program revisions as an unfunded mandate, which the commenter asserted should not be imposed on states without a clear and compelling need. One commenter claimed that the EPA has impermissibly extended its interpretation of the *NRDC* case to state operating permit programs.

State commenters discussed the authority of states to tailor the details of their own title V program regulations and potential limits on the EPA's authority to dictate the fine particulars of state programs. One state commenter claimed that by removing the title V emergency affirmative defense provisions, the EPA would substantially raise the minimum elements required by the Act for state operating permit programs, citing 40 CFR 70.1(a). Other state commenters claimed that under title V, similar to CAA section 110 for SIPs, after the EPA sets minimum program requirements, states must meet these minimum requirements but have the authority and discretion to otherwise tailor their program to their specific state requirements, such as by providing for affirmative defenses. State commenters further asserted that the EPA's implementing regulations do not require a state's enforcement program to be set out in any particular manner, while acknowledging that states must have adequate authority to carry out all aspects of the program and submit a description of their enforcement program to the EPA, citing 40 CFR 70.4(b)(3) and (5). One state commenter noted that an acceptable enforcement program should include the ability to account for emissions during distinct periods of operation, including SSM.

Both state and industry commenters also highlighted the fact that the title V emergency provisions have always been discretionary, not required, elements of state programs. One commenter argued that because the affirmative defense provisions were initially discretionary, it should now be up to states to decide whether to retain them. The commenter claimed that this is a logical extension of a state's constitutional authority and that the EPA should not disturb state authorities by disapproving existing state permit programs that contain these provisions.

Response: The EPA agrees with those commenters who asserted that the CAA authorizes the EPA to revise its part 70 implementing regulations when necessary to conform to the CAA, including provisions of the CAA that apply to the enforcement of title V permit requirements. As the CAA and the EPA's implementing regulations are periodically updated to address evolving legal, policy, technical, and scientific information, so must state operating programs be updated. State part 70 program revisions, while infrequent, are a natural and necessary part of a complex regulatory program, and this process is entirely consistent with the principles of cooperative federalism established in title V of the CAA. As various commenters acknowledged, the EPA has the authority to establish the minimum elements for state title V programs. *See* CAA section 502. The EPA's part 70 regulations implement this authority. When the EPA must remove an element from its implementing regulations in order to maintain consistency with CAA requirements, it follows that it would also generally be necessary to revise EPA-approved state part 70 programs to meet the same minimum legal requirements required by the CAA. The EPA acknowledges that states may establish additional permitting requirements, but only to the extent they are not inconsistent with the CAA. *See* CAA section 506(a). States do not have discretion to implement provisions that are inconsistent with the enforcement structure of the CAA or the EPA's part 70 regulations.

As some commenters acknowledged, the EPA's existing part 70 implementing regulations clearly establish a framework by which state part 70 programs may need to occasionally be revised, including when the part 70 regulations are revised or modified. *See, e.g.,* 40 CFR 70.4(a) (if part 70 is revised and the Administrator determines that changes to approved state programs are necessary, states must submit program revisions); 70.4(i) (program revisions may be necessary when relevant federal or state statutes or regulations are modified). The EPA has the authority to approve or disapprove program revisions based on the requirements of the part 70 regulations and the CAA. *See* 40 CFR 70.4(i)(1), (2). Thus, the EPA has authority to require state title V program revisions.

To be clear, the final action being taken in this rule is the removal of the affirmative defense provisions from the EPA's regulations at 40 CFR 70.6(g) and 71.6(g). As a consequence of this regulatory action, it will be necessary for states with part 70 programs containing impermissible affirmative defense provisions to make conforming revisions to their part 70 programs. However, contrary to the assertions of some commenters, the EPA is not, at this time, disapproving or making any finding of deficiency or inadequacy with respect to any particular state program (such as a finding under 40 CFR 70.10), although this type of determination may be appropriate at a later time. This document clarifies the EPA's expectations for how the program revision process will unfold, based on

the EPA's existing implementing regulations and the EPA's longstanding experience in overseeing title V operating permit programs. The EPA intends that this guidance will be useful to permitting authorities and permit holders interested in understanding how removal of the affirmative defense provisions from the EPA's regulations will affect their programs and individual permits, respectively.

The EPA also reiterates, as multiple commenters acknowledged, that the title V affirmative defense provisions have always been discretionary elements of state permitting programs, and the EPA has never required states to adopt these provisions. In fact, a number of state part 70 programs do not appear to contain any such title V affirmative defense provisions. However, contrary to one commenter's assertion, the fact that these provisions were never required elements of state programs does not mean that they now must be deemed appropriate program elements or that states must be allowed to continue implementing them.

Finally, as explained in section V.D. below, 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 new enforceable duty on any state, local or tribal governments or the private sector. As a result of this rule, some states with EPA-approved part 70 programs that contain impermissible affirmative defense provisions will be required to submit program revisions to the EPA, according to the framework established by the EPA's existing regulations. To the extent that such affected states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action do not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

3. Scope of Necessary Program Revisions

Comment: Commenters addressed various aspects of the scope of state program revisions that would be necessary following the removal of 40 CFR 70.6(g). First, some commenters claimed that part 70 program regulations that incorporate by reference 40 CFR 70.6(g) or any state affirmative defense provisions effectively function the same as regulations that expressly include an affirmative defense. Commenters claimed that if these provisions were not removed from state programs, they would create ambiguity and would undermine CAA enforcement. Therefore, these commenters asserted that part 70 program regulations that incorporate by reference any other affirmative defense provisions must also be removed from state programs.

Next, multiple commenters expressed support for the view that states may retain affirmative defense provisions that could be used for alleged noncompliance with permit requirements arising solely from state law. Some commenters asserted that the EPA has no authority to limit the ability of states to provide this type of state-only affirmative defense provision. Another commenter suggested that state-only affirmative defense provisions should be available not only for enforcement actions brought by state agencies, but also for enforcement actions brought by citizens or the EPA. However, other commenters indicated concern that sources could attempt to invoke state-only affirmative defense provisions in enforcement proceedings involving noncompliance with federal requirements, thereby undermining the enforcement of the CAA. These commenters suggested that the EPA provide guidance to clarify that if a state wishes to retain an affirmative defense for noncompliance with state-only requirements, the state must also include clarifying language in their regulations expressly limiting the applicability of such remaining affirmative defense provisions. Commenters also suggested that states identify these state-only program provisions in their title V program revisions.

Additionally, some commenters asserted that states should be able to circumscribe their own authority to enforce even federally enforceable requirements. Commenters suggested that states should be able to provide an affirmative defense to state-initiated enforcement (such as for administrative penalty proceedings) or otherwise restrict their ability to enforce alleged violations of federally-enforceable applicable requirements.

Finally, some commenters disagreed with the EPA's suggestion that states may retain portions 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. The commenters expressed concern that the presence of a definition of ''emergency'' or other recordkeeping, reporting, or work practice requirements could be interpreted as providing for an affirmative defense or otherwise excusing a source from compliance during these periods. However, these commenters also asserted that the EPA should encourage more readily accessible information about excess emission events, in order to better inform surrounding communities of air quality issues.

Response: As previously noted, all impermissible affirmative defense provisions, as specified in section IV.A.1. of this document, will need to be removed from EPA-approved part 70 programs. To reiterate, this encompasses provisions that are similar to, based on, or function in similar ways to the provisions in 40 CFR 70.6(g) that the EPA is removing in this action, including all provisions that effectively establish an affirmative defense that could be asserted in an enforcement action involving alleged noncompliance with any federally-enforceable standards. In light of comments received, the EPA is also providing clarification on various other topics related to the scope of necessary program revisions.

Regarding state part 70 provisions that incorporate other affirmative defense provisions by reference, as a general matter, the EPA agrees with commenters' assertions that incorporating a provision by reference may have the same legal effect as explicitly including the provision within a regulation. Thus, where a state part 70 program incorporates by reference another independently applicable affirmative defense that suffers the same infirmities as those provisions being removed from 40 CFR 70.6(g) and 71.6(g), the state provision incorporating the affirmative defense provision would generally need to be removed.[59]

Concerning the comments supporting the option for states to retain an affirmative defense as a ''state-only'' provision—which would apply solely to rights and responsibilities created by state law and would not apply to, interfere with, or otherwise affect any requirements or remedies under the CAA or federally-enforceable regulations—the EPA agrees that states have the discretion to develop such state-only provisions, as allowed under

[59] It may be possible that some state programs could incorporate 40 CFR 70.6(g) (or a similar state provision) by reference in such a manner as to leave it free from doubt that the incorporating provision would have no legal effect following the removal of 40 CFR 70.6(g) from the EPA's regulations (or following the removal of the state affirmative defense). However, the EPA believes that removal of the incorporating provision would nonetheless be the best practice to avoid the potential for confusion.

state law. However, any such provisions would only be available in enforcement actions brought solely under state law, and they would not be available in enforcement actions brought for alleged violations of any federally-enforceable requirements in a source's title V permit. This rulemaking would have no effect on, and does not preclude states from retaining or creating, such regulations unrelated to the state's EPA-approved part 70 program. State-only affirmative defense provisions that are included within individual operating permits would need to be clearly labeled to indicate their limited applicability. 40 CFR 70.6(b)(2).

However, notwithstanding the ability of states to create state-only affirmative defense provisions within their state regulations, any impermissible affirmative defense provisions contained *within* any EPA-approved part 70 programs will nonetheless need to be removed from the state's EPA-approved part 70 program. In such instances, the state would need to transmit to the EPA a program revision submittal to remove the affirmative defense provision from the body of regulations that comprise the state's official EPA-approved part 70 program. The EPA believes that the best practice for states would be to conduct a rulemaking to remove the affirmative defense provision from the state's current regulations (or to revise the state regulations to clarify the limited applicability of a state-only affirmative defense) and/or a legislative process to remove such provisions from a state statute, in addition to submitting the part 70 program revision to the EPA to formally remove the provision from the state's EPA-approved part 70 program. This would provide clarity for sources and the public and avoid any inconsistency between the state's EPA-approved part 70 program and the state's current regulations and/or statutes.

Regarding comments suggesting that states should be able to limit their own authority to enforce even federally enforceable requirements, as noted in section III.D.2. of this document, permitting authorities always retain the discretion to determine whether to initiate an enforcement action based on the circumstances of a given case. To the extent that a state develops an ''enforcement discretion''-type provision that applied only in its own administrative enforcement actions or only with respect to enforcement actions brought by the state in state courts, such a provision may be appropriate under state rules.[60] However, among the minimum required elements of a title V permit program is the requirement that, consistent with EPA regulations, the permitting authority have adequate authority to assure compliance with applicable standards, requirements, and regulations, and to enforce permits, including the ability to recover civil penalties for each violation. *See* CAA section 502(b)(5), 42 U.S.C. 7661a(b)(5). EPA regulations further provide that approved title V programs must have appropriate enforcement authority, including the authority to seek injunctive relief and to assess or recover civil penalties for violations of any applicable requirement or permit condition. *See* 40 CFR 70.11. Thus, to the extent that states wish to describe certain aspects of their enforcement discretion policy within their part 70 program regulations, this could only be permissible provided that the provision does not effectively undermine or eliminate the state's ability to enforce its title V program, even under the circumstances previously covered by the affirmative defense. For example, it would likely not be permissible for a state to establish criteria that, when met, would effectively preclude the state from enforcing, even in part, a federally-enforceable standard. Nor would it be permissible for any such provision to limit the ability of the EPA or citizens to enforce any federally-enforceable permit terms or to interfere with the authority of the federal courts to determine whether and to what extent certain remedies are appropriate in a given case.

Finally, although states may not retain title V provisions establishing an affirmative defense to noncompliance with federal requirements, the EPA reiterates its position that states may choose to retain certain aspects of their existing program regulations—such as the definition of ''emergency'' and associated reporting and recordkeeping requirements—to support functions unrelated to an affirmative defense, such as prompt reporting requirements. The EPA disagrees with commenters' assertions that the presence of definitions or reporting and recordkeeping requirements associated with emergencies would necessarily imply that an affirmative defense exists or that exceedances of emission limits during emergencies are excused. To the contrary, and although the EPA is not retaining such provisions within its own regulations, states may decide that some of these provisions could potentially serve a useful function for state permitting authorities considering whether to pursue enforcement, for sources faced with the possibility of a state enforcement action, and for the public.

[60] The EPA has previously discussed an analogous issue in the context of SIPs. *See* SSM SIP Action, 80 FR 33855.

4. Timing Associated With Program Revisions

Comment: Multiple state and industry commenters requested that the EPA allow states additional time to submit any required part 70 program revisions. These commenters all asserted that 12 months is not sufficient time to conduct the administrative processes required to change part 70 program regulations, and suggested that anywhere between 18 and 36 months should be allowed, for various reasons. Some state commenters provided specific examples of the administrative actions associated with rulemakings that would necessitate additional time, including outreach, public hearings and comment periods, rule development, gubernatorial approval, legislative committee review, and legislative approval. One state commenter noted that many states face program and staff resource constraints based on other rulemaking obligations. Another state commenter predicted that necessary rule changes may take longer to promulgate because they will be controversial. Some commenters recommended providing additional time for state program revisions because these affirmative defense provisions are not currently causing any pressing problems with enforcement and there is no urgent need to change the provisions. Finally, one commenter suggested that additional time for state program revisions would be necessary to allow time for sources to implement measures to address the loss of the affirmative defense.

Other commenters, on the other hand, recommended a more limited time frame, while acknowledging the discretion that the EPA has under 40 CFR 70.4(a) to extend program revision deadlines. These commenters supported the EPA's default 12-month submission deadline with the possibility of an extended deadline of up to 24 months, on the grounds that states should be able to easily amend their operating permit rules within months, and that prompt action would facilitate the coordination of SIP revisions and title V revisions (and associated permit revisions). Environmental commenters urged the EPA to require states seeking an extension to specifically request additional time and to demonstrate good cause for the extension, and urged that

such requests be granted only under compelling circumstances. These commenters also suggested additional details concerning the required form, content, and timing of such an extension request.

Response: As discussed in the proposal, the necessary changes to part 70 programs arising from this rule should generally be relatively minor and straightforward, involving the removal of affirmative defense provisions from the state's part 70 program.[61] Because of the nature of the required revisions, the EPA continues to believe that most or many states should be able to complete the necessary program revisions within 12 months. However, the EPA again appreciates that some states may require more time to complete program revisions, based on a number of different factors associated with their administrative process, including the potential need for legislative approval. Therefore, the EPA is allowing states to submit a request to the appropriate EPA Regional office requesting an extension to this 12-month deadline and demonstrating why such an extension is necessary. Such extension requests should include detailed information concerning the steps that the state will take to revise its part 70 program, as well as the specific timing associated with each of these steps. The EPA understands that many states have lengthy rulemaking processes and expects that requests for extension that include the information identified here in sufficient detail would generally be approved. Nonetheless, the EPA will consider each program revision submission and extension request on a case-by-case basis. The EPA expects that each state with a part 70 program containing impermissible affirmative defense provisions will submit a program revision or request for an extension of time to the EPA by August 21, 2024.

5. Program Revision Submittal Details

Comment: Two state commenters discussed the details of any required program revision submittals. One state suggested requiring the following four components: (1) legal authorization to revise the state rules and part 70 program; (2) redlined changes to state rules; (3) timeline for planned removal of affirmative defense from each permit; and (4) a plan to make these changes to individual permits. Another state commenter requested additional clarity on what form of legal authority demonstration would be required for program revision submittals, and suggested that a rulemaking certification (certifying that the rules have been reviewed by legal counsel and have been found to be within the legal authority of the agency) would be sufficient and less burdensome than a formal opinion by the state Attorney General. One state commenter further expressed concern with the additional burden that would be associated with preparing and submitting a revised program plan. Finally, one commenter requested clarification of the EPA's intention to publish proposed program revisions in the **Federal Register** and provide a 30-day public comment period. They requested further clarification on whether the EPA intended to publish notice of approval in the **Federal Register** or issue a letter to state governors or their designees.

Response: As stated in the introduction to this section regarding program revisions, the part 70 program revision process should follow the procedures in 40 CFR 70.4(a) and (i). The EPA's part 70 regulations provide that for state program revisions, the state should submit such documents as the EPA determines to be necessary. *See* 40 CFR 70.4(i)(2)(i). As noted in the 2016 proposal, the EPA expects that program revisions to remove the title V emergency defense provisions will include, at minimum: (1) a redline document identifying the state's proposed revision to its part 70 program rules; (2) a brief statement of the legal authority authorizing the revision; and (3) a schedule and description of the state's plans to remove affirmative defense provisions from individual operating permits. The EPA encourages states to consult with their respective EPA regional offices on the specific contents of their revision submittal packages.

Regarding one commenter's statements concerning the legal authority demonstration component, the EPA reiterates that this component could take various forms depending on the specific circumstances of each state, and a formal opinion by an Attorney General should not be required for the narrow program revisions implicated by this particular rule. For a revision involving only the removal of affirmative defense provisions, a certification indicating that the revisions are within the legal authority of the agency and followed all required administrative (including public participation) requirements should be sufficient. For other program revisions related to the removal of affirmative defense provisions, such as the inclusion of a narrowly tailored enforcement discretion provision, as discussed in section IV.A.3. of this document, the legal authority demonstration should also contain assurances that the state has adequate authority to enforce its part 70 program.[62]

It is unclear what the comments discussing a ''revised program plan'' refer to. The EPA believes that the plan described in this document, involving narrow program revision submittals to remove affirmative defense provisions, is appropriate. As noted in the 2016 proposal, states may, but need not, also include as part of their program revision submittals any other unrelated revisions to state program regulations.

6. Consequences of Failure To Submit Program Revisions

Comment: Some commenters requested that the EPA clarify the consequences for states that refuse to revise their operating permit regulations. Specifically, commenters cited to CAA sections 502(d) and (i) and discussed the possibility of notices of deficiency (NOD), sanctions, and the eventual withdrawal of permitting authority.

Response: Commenters are correct that the EPA has the authority under CAA sections 502(d) and (i), and as specified in the EPA's implementing regulations at 40 CFR 70.10, to issue NODs, issue sanctions, and potentially withdraw approval of part 70 programs under appropriate circumstances, potentially including the failure of a permitting authority to submit required program revisions to the EPA. The EPA would exercise this authority on a case-by-case basis for this element of the program, as it would with any other.

7. Discussion of State-Specific Program Provisions

Comment: In response to requests from the EPA for information about part 70 programs that contain affirmative defense provisions, various commenters discussed certain provisions in specifically identified state part 70

[61] As discussed in section IV.A.3. of this document, this particular revision to remove affirmative defense provisions from a state's EPA-approved part 70 program might not necessarily also involve a notice-and-comment rulemaking to revise the state's current administrative code, although the EPA believes this would be a best practice to ensure clarity.

[62] For example, the state should demonstrate that any such alternative provisions: do not interfere with the authority of courts to determine whether and to what extent certain remedies are appropriate in a given case; do not limit the ability of citizens or the EPA to pursue enforcement; and do not limit the state's ability to enforce its part 70 program, for example by establishing criteria that, when met, would effectively preclude the state from assessing or recovering penalties consistent with 40 CFR 70.11(a)(3).

programs that could be impacted by the final rule.[63] Several commenters also requested an update to the document titled ''Title V Affirmative Defense Provisions in State, Local, and Tribal Part 70 Programs'' that was included in the docket during the 2016 rulemaking process.

Response: The EPA appreciates this additional information. As noted previously, the EPA is not taking any action in this final rule with respect to the adequacy or inadequacy of individual state programs, including specific programs identified in the 2016 document referenced by commenters. The EPA expects that permitting authorities with part 70 programs that have impermissible affirmative defense provisions will follow the process provided in section IV. of this document. EPA Regional offices will work closely with permitting authorities to provide support during this process. States with additional questions about the impact of this rule on their operating permit programs should contact the appropriate EPA Regional office for further assistance.

B. Permit Revisions

This section clarifies the EPA's expectations for the eventual removal of impermissible affirmative defense provisions from individual title V operating permits.

1. Scope of Permit Revisions

Comment: One commenter claimed that title V permits containing affirmative defenses derived from sources of authority other than 40 CFR 70.6(g) would not need to be revised.

Response: In general, any impermissible affirmative defense provisions within individual operating permits that are based on a title V authority and that apply to federally-enforceable requirements will need to be removed. For example, permit conditions that directly rely on 40 CFR 70.6(g) or 71.6(g) would need to be removed following the removal of these provisions from the EPA's regulations. Importantly, however, permit revisions would not be limited to permit conditions based on 40 CFR 70.6(g) and 71.6(g); any permit conditions that rely on a similarly impermissible title V affirmative defense provision contained in (or incorporated by reference into) a state's part 70 program would also have to be removed following state program revisions. On the other hand, and as the EPA explained in the 2016 proposal, this rule will not directly affect affirmative defense provisions contained in title V permits that are derived from independent applicable requirements, such as SIP, NSPS or NESHAP provisions. Finally, should a state decide to retain a ''state-only'' affirmative defense or enforcement discretion-type provision, it may need to eventually amend title V operating permits to explicitly state the limited applicability of the state-only provision. *See* 40 CFR 70.6(b)(2). The discussion provided in the following subsections applies to both the removal of affirmative defense provisions from permits and to the amendment or modification of such permit terms.

2. Burden, Mechanism, and Timing of Permit Revisions

Comment: State commenters and one tribal commenter claimed that the EPA underestimates the burden of removing affirmative defense provisions from individual permits, and challenged the EPA's statement in the proposal that ''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 and sources.'' State commenters explained that thousands of existing operating permits would require some form of revision action to be processed by the state, and that revising certain general permits that apply to multiple sources would require an administrative process similar to a rulemaking.

Numerous state and industry commenters supported the EPA's suggestion that states may utilize a number of existing permit mechanisms to remove affirmative defense provisions from title V permits in the ordinary course of business, such as when the permitting authority next processes a permit renewal or significant permit modification for a source. One state commenter noted that this would be the most sensible and least disruptive and burdensome mechanism to complete permit revisions.

Commenters agreed with the EPA's initial suggestion that the removal of affirmative defense provisions from operating permits could be accomplished through the minor permit revision process and would not constitute a significant permit modification. Further, one state suggested that the EPA adopt a policy interpretation that removal of affirmative defense provisions could be accomplished through the administrative amendment process.

Some commenters also asserted that permit revisions should not be based on any other independent deadline or timeline, and that there is no urgency to remove the provisions. Other commenters, though, urged the EPA to encourage permitting authorities to exercise their discretion to remove the provisions as expeditiously as possible, on the earliest possible occasion.

Commenters also addressed the sequence of program revisions and permit revisions. One commenter expressed concern that potential ambiguity may arise if a source invokes an affirmative defense provision found in the permit, after the program revisions have been approved but the permit has not been amended. Lastly, one tribal commenter expressed its concern that making conforming revisions to permits before programmatic revisions would create inconsistencies that could undermine enforcement.

Response: The EPA acknowledges commenters' general assertions that a large number of existing title V permits across the nation will eventually need to be revised to remove title V affirmative defense provisions. However, the EPA disagrees that this will involve any extraordinary burden on states or sources. The need to occasionally revise individual title V permits is a natural, common, and required feature of the title V operating permits program. Title V operating permits, by their nature, include a wide variety of requirements applicable to a source, and permit changes are periodically necessary to incorporate new or modified applicable requirements, and to reflect physical or operational changes that occur at a source. The EPA's regulations, and all EPA-approved state part 70 programs, contain well-established mechanisms to account for various types of necessary revisions to title V permits. *See, e.g.,* 40 CFR 70.7(d)–(h). The permit revisions that will need to occur as a result of this rulemaking fit well within this existing regulatory framework for occasional permit revisions.

Moreover, the EPA expects permit changes to remove discretionary title V affirmative defense provisions to be a potentially less burdensome process than, for example, the process required to incorporate new applicable

[63] In the proposed rule, the EPA solicited comment on a document titled, ''Title V Affirmative Defense Provisions in State, Local, and tribal Part 70 Programs'' that was included in in the docket associated with this rulemaking (Docket ID No. EPA–HQ–OAR–2016–0186). This document contains a tentative list of part 70 programs that appear to contain affirmative defense provisions that could be affected by this action. The document was intended for informational purposes only and does not reflect any type of determination as to the adequacy or inadequacy of any specific program provisions. The EPA received comments involving provisions within the Texas and Georgia part 70 programs that purportedly incorporate by reference affirmative defense provisions.

requirements in a permit via permit reopening. *See, e.g.,* 40 CFR 70.7(f)(1)(i). As explained in the 2016 proposal, the EPA expects that any necessary permit changes should occur in the ordinary course of business. For example, these revisions could be made when a state processes periodic permit renewals or other permit revisions. Additionally, states may utilize other existing mechanisms to effectuate these permit changes, consistent with each state's approved part 70 program regulations. For example, the EPA does not believe that a permit revision to simply remove a discretionary affirmative defense provision would require significant modification procedures, and permitting authorities may be able to process these changes as minor modifications. Also, in certain circumstances, it may be possible for some permit changes to be made using administrative permit amendment procedures, provided that the removal of the title V emergency provisions would satisfy one of the specific circumstances contemplated within each state's approved part 70 program regulations governing administrative amendments.[64] States may also be able to utilize other streamlined mechanisms for processing multiple permit revisions at once.

Regarding the timing of such permit changes, for state or tribal permitting agencies implementing the federal title V program or part 70 programs that directly rely on 40 CFR 70.6(g), any permit revisions necessary to remove impermissible affirmative defense provisions from individual permits should occur promptly after the effective date of this final rule. For states implementing part 70 programs that contain state affirmative defense provisions, any permit revisions necessary to remove impermissible affirmative defense provisions from individual permits should similarly occur promptly after the EPA's approval of the necessary part 70 program revisions.[65] Generally, states would be expected to remove title V affirmative defense provisions from permits (or clearly label remaining provisions as state-only) at the earliest possible occasion when each permit is next reviewed by the permitting authority, such as the next permit renewal or unrelated permit revision. Thus, at the latest, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

It is important to note that while the EPA is not currently establishing any independent timeline for states to remove these provisions from individual permits, the EPA encourages states to begin removing these provisions from permits prior to the completion of any necessary part 70 program revisions. States may also find it convenient to remove these provisions in the course of completing revisions to permits related to the implementation of the 2015 SSM SIP Action.

3. EPA Objections to Permits

Comment: Some commenters urged the EPA to make clear that the agency will object to title V permits issued after the effective date of the final rule that incorporate or refer to title V affirmative defense provisions.

Response: As previously noted, the EPA expects that any necessary permit revisions will generally occur following program revisions to remove the underlying affirmative defense provisions from each permitting authority's part 70 program regulations. Therefore, although the EPA encourages states to remove title V emergency affirmative defense provisions from operating permits at the earliest possible opportunity (including during permit renewals that occur before program revisions take place), the EPA generally does not anticipate objecting to title V permits that contain emergency affirmative defense provisions during the Agency's 45-day review period until after the relevant permitting authority has made necessary corrections to its approved part 70 program. The Administrator will evaluate any petitions to object to proposed title V operating permits on a case-by-case basis. Statements in this document are not intended to prejudge such petition responses.

As noted in section IV.B.2. of this document, in those state or tribal areas that implement the federal title V program (in 40 CFR part 71) or where the operating permit program directly relies on or incorporates by reference 40 CFR 70.6(g), the EPA expects states to begin the process of removing impermissible affirmative defense provisions from operating permits promptly after the effective date of this final rule, as such permit revisions would not need to await state program revisions.

V. Statutory and Executive Orders 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 removing certain provisions from the EPA's regulations, which should ultimately result in the removal of similar provisions from state, local, and tribal operating permit programs and individual permits. Consequently, some states will be required to submit program revisions to the EPA in order to remove affirmative defense provisions from their EPA-approved part 70 programs, and will eventually be required to remove provisions from individual permits. However, 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.

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 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 (UMRA)

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

[64] In addition to specifying various types of permit changes for which the administrative amendment process would be appropriate, the EPA's regulations in 40 CFR 70.7(d) also provide states with the opportunity to specify additional criteria as part of their part 70 programs, if the EPA Administrator determines that those situations are similar to those specified in 40 CFR 70.7(d).

[65] 81 FR 38645, 38653, n. 35 (June 14, 2016) (acknowledging limits on state discretion where currently-approved state program regulations require inclusion of emergency affirmative defense provisions in state-issued title V permits).

uniquely affect small governments. The action imposes no new enforceable duty on any state, local or tribal governments or the private sector. As a result of this rule, some states with EPA-approved part 70 programs that contain impermissible affirmative defense provisions will be required to submit program revisions to the EPA, according to the framework established by the EPA's existing regulations. To the extent that such affected states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action do not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

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 certain actions, including a program revision (for the part 70 program) and eventual permit revisions, but these actions will not require substantial compliance costs. The EPA conducted outreach with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. A summary of that outreach is provided in the rulemaking docket, Docket ID No. EPA–HQ–OAR–2016–0186, available at *http://www.regulations.gov.*

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

The EPA interprets Executive Order 13045 as applying 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

Executive Order 12898 (59 FR 7629, February 16, 1994) directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color) and low-income populations.

The EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. This action simply removes the emergency affirmative defense provisions from the EPA's operating permit program regulations. As a result of this action, it will also be necessary for some state, local, and tribal permitting authorities to remove similar affirmative defense provisions from their EPA-approved part 70 programs and from individual title V operating permits. These title V provisions existed independently from any specific environmental health standards, and their removal should not affect the establishment of, or compliance with, environmental health or safety standards. It is not practicable to predict whether the removal of these affirmative defense provisions will result in any significant difference in emissions and subsequently whether this action will have any positive or negative effect on people of color, low-income populations and/or Indigenous peoples. Information supporting this Executive Order review is contained in section III.D.5. of this document.

The EPA provided meaningful participation opportunities for people of color, low-income populations and/or Indigenous peoples or tribes in the development of the action through tribal outreach outlined in section V.F. of this document and summarized in the rulemaking docket, Docket ID No. EPA–HQ–OAR–2016–0186, as well as the standard opportunity to provide public comment on each proposal (2016 and 2022).

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the 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) & (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).

VII. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the United States Court of Appeals for the District of Columbia Circuit: (i) when the agency action consists of ''nationally applicable regulations promulgated, or final actions taken, by the Administrator,'' or (ii) when such action is locally or regionally applicable, but ''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.'' For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii).

This final action is ''nationally applicable'' within the meaning of CAA section 307(b)(1). In the alternative, to

the extent a court finds this final action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of ''nationwide scope or effect'' within the meaning of CAA section 307(b)(1).[66] This final action revises 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.[67] Accordingly, this final action is a nationally applicable regulation or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and hereby finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is hereby publishing that finding in the **Federal Register**.

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published 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, nor does it 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.

Michael S. Regan,

Administrator.

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.*

§ 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).

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BILLING CODE 6560–50–P

[66] In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator has also taken into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit's authoritative centralized review versus allowing development of the issue in other contexts and the best use of Agency resources.

[67] In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that the ''nationwide scope or effect'' exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95–294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402–03.

DEPARTMENT OF HOMELAND SECURITY

48 CFR Part 3052

[HSAR Case 2015–001; DHS Docket No. DHS–2017–0006]

RIN 1601–AA76

Homeland Security Acquisition Regulation; Safeguarding of Controlled Unclassified Information; Correction

AGENCY: Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

ACTION: Final rule; correction.

SUMMARY: The Office of Chief Procurement is correcting a final rule published in the **Federal Register** on June 21, 2023, titled *Safeguarding of Controlled Unclassified Information.* The final rule amended the Homeland Security Acquisition Regulation (HSAR) to address requirements for the safeguarding of Controlled Unclassified Information (CUI).

DATES: Effective July 21, 2023.

FOR FURTHER INFORMATION CONTACT: Shaundra Ford, Procurement Analyst, DHS, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, (202) 447–0056, or email *HSAR@hq.dhs.gov.* When using email, include HSAR Case 2015–001 in the subject line.

SUPPLEMENTARY INFORMATION: This correction fixes the amendatory instruction for 3052.204–71, Contractor employee access, to clarify that the text in Alternate II should not be removed, and adds in 3052.212–70, Contract terms and conditions applicable to DHS acquisition of commercial items, two alternative clauses that were inadvertently not included in the final rule.

Correction

In FR Doc. 2023–11270 appearing on page 40560 in the **Federal Register** of Wednesday, June 21, 2023, the following corrections are made:

3052.204–71 [Corrected]

■ 1. On page 40598, in the second column, in part 3052, in amendment 6, the instruction ''Revise clause 3052.204–71 to read as follows:'' is corrected to read: ''Revise section 3052.204–71 to read as follows:''.

■ 2. On page 40599, in the third column, in section 3052.24–71, the regulatory text following Alternate I, starting with ''Alternate II (June 2006)'' to the end of the section, is corrected to read:

3052.24–71 [Corrected]

Alternate II (July 2023)

When the Department has determined contract employee access to controlled unclassified information or Government facilities must be limited to U.S. citizens and lawful permanent residents, but the contract will not require access to information resources, add the following paragraphs:

(g) Each individual employed under the contract shall be a citizen of the United States of America, or an alien who has been lawfully admitted for permanent residence as evidenced by a Permanent Resident Card (USCIS I–551). Any exceptions must be approved by the Department's Chief Security Officer or designee.

(h) Contractors shall identify in their proposals, the names and citizenship of all non-U.S. citizens proposed to work under the contract. Any additions or deletions of non-U.S. citizens after contract award shall also be reported to the Contracting Officer.

(End of clause)

■ 3. On page 40603, in the third column, in part 3052, amendatory instruction 9 for section 3052.212–70 is corrected to read:

■ 9. In section 3052.212–70:

■ a. Revise the date of the clause; and

■ b. Amend paragraph (b) of the clause by:

■ i. Removing the entry for ''3052.204–70'';

■ ii. In the entry for ''3052.204–71'', adding the entry ''Alternate II'' following the entry ''Alternate I''; and

■ iii. Adding in numerical order the entry ''3052.204–72'' followed by the