Department of Natural Resources and Environmental Control

Division of Air Quality

Regulation Proposal

7 DE Admin. Code 1130 “Title V State Operating Permit Program”

Technical Support Document

April 2024

INTRODUCTION

The Division of Air Quality (AQ) of the Department of Natural Resources and Environmental Control (DNREC) is proposing to amend 7 **DE Admin. Code** 1130, Title V State Operating Permit Program. The proposed amendments would address Section 6.0 "Permit Contents", subsections 6.7 and 6.1.3.3.3.1.

Title V of the Clean Air Act (CAA) requires the Environmental Protection Agency (EPA) to implement air quality operating permits (Title V permits) for major sources of air emissions. Title V permits apply to sources whose emissions meet or exceed Major Source levels. Major source thresholds for Delaware are shown in Table 1. 7 **DE Admin. Code** of 1130 was adopted to implement the federal requirements for Title V permits in Delaware. This regulation establishes the permitting procedures and requirements for Delaware's Title V operating permits.

Table 1. Major Source Thresholds for Delaware Counties

	Volatile Organic Compounds	Nitrogen Oxide	Carbon Monoxide	Sulfur	Particulates	Hazardous Air Pollutants	Other
New Castle	25	25	100	100	100	10	100
Kent	25	25	100	100	100	10	100
Sussex	50	100	100	100	100	10	100

Measured in tons per year. The threshold of 10 tons/year for HAPs is for a single HAP. The annual total threshold for all HAPs in 25 tons/year.

BACKGROUND

Updates to Affirmative Defenses

Title V operating permits require facilities to have specific emission monitoring and reporting requirements to demonstrate compliance, to show that their emissions are below the allowable limits. Understanding that deviations in operation are possible from failure in emission control equipment, the EPA included a provision in a final rule (57 FR 32250[1]) published on July 21, 1992 to allow for some operational flexibility.

[1] Operating Permit Program. EPA Final Rule. 57 FR 32250. July 21, 1992. https://archives.federalregister.gov/issue_slice/1992/7/21/32247-32312.pdf#page=4

The 1992 final rule provided an affirmative defense case for a Title V permitted source to avoid liability for noncompliance when emission limits have been exceeded due to an emergency. As defined in 40 Code of Federal Regulations (CFR) 70.6(g), an "emergency" is a reasonably unforeseeable event beyond the control of the source that requires immediate corrective action to restore normal operation and that is not due to certain factors specified in the rule.

When regulation 1130 was adopted in 1993, affirmative defense language was included in Section 6.0 of 7 **DE Admin. Code** 1130. However, the Delaware provisions included affirmative defense provisions for both "emergencies" and "malfunctions". As defined in regulation 1130, "Malfunction" means any sudden and unavoidable failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the malfunction.

The July 21, 1992 EPA final rule codified in 40 CFR 70.6(g) only included affirmative defense provisions in the case of emergency, while Subsection 6.7 of 7 **DE Admin. Code** 1130 included affirmative defenses for both emergencies and malfunctions. In early 2021, Delaware began the process to amend 7 **DE Admin. Code** 1130, to update public notice and greenhouse gas (GHG) requirements in the regulation, to maintain consistency with EPA regulations. While this action was initially unrelated to affirmative defenses, during the review of existing language in 1130, Delaware found that the affirmative defense provisions in 1130 were not aligned with 40 CFR 70.6(g). Delaware's regulation allowed affirmative defenses for "malfunctions", while 40 CFR 70.6(g) did not.

Delaware amended 7 **DE Admin. Code** 1130 on August 11, 2022 to remove the term "malfunction" and maintain consistency with 40 CFR 70.6(g).

Removal of Affirmative Defenses

The EPA has been considering how to account for excess emissions during different modes of source operation, including emergencies, for more than 40 years. The affirmative defense provisions have been based on many factors such as the structure of the CAA, federal court decisions, other EPA programs, and recommendations from stakeholders. [2]

On September 9, 2010, the EPA issued a final rule (75 FR 54970[3]) that included an affirmative defense within its National Emission Standards for Hazardous Air Pollutants (NESHAP) for Portland cement facilities. This provision created an affirmative defense that sources could assert in civil enforcement proceedings when violations of emission limitations occurred because of malfunctions.

[2] Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program. EPA Proposed Rule. 81 FR 38645. June 14, 2016. https://www.govinfo.gov/content/pkg/FR-2016-06-14/pdf/2016-14104.pdf

[3] National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants. EPA Final Rule. 75 FR 54970. September 9, 2010. https://www.govinfo.gov/content/pkg/FR-2010-09-09/pdf/2010-21102.pdf

In response to the 2010 final rule, several environmental organizations, including the Natural Resources Defense Council (NRDC) and the Sierra Club, filed petitions for review with the U.S. Court of Appeals for the D.C. Circuit. The environmental agencies challenged EPA's affirmative defense provisions, arguing that the rule conflicts with aspects of the CAA. In the resulting NRDC v. EPA decision (749 F.3d 1055[4]), the courts vacated affirmative defense provisions contained in EPA's NESHAP for the Portland cement industry. The courts indicated the affirmative defense provision contradicted the enforcement provisions in the CAA by limiting the authority of courts to decide an appropriate remedy in an enforcement action.

The NRDC ruling caused EPA to begin to reconsider the legality of affirmative defense provisions in many of their CAA requirements, including their stance on affirmative defense provisions for state and federal Title V operating permit programs. The requirements for state Title V operating permit programs in 40 CFR Part 70 are applicable to state/local/tribal permitting authorities, while the requirements for federal Title V operating permit programs in 40 CFR Part 71 are applicable when EPA is the permitting authority. Both Part 70 and 71 programs include identical affirmative defense provisions for emergency cases, which are similar to the provisions that were created in the 2010 final rule for the Portland cement industry.

On July 21, 2023, the EPA issued a final rule (88 FR 47029[5]) that removed all "emergency" affirmative defense provisions for state and federal operating permit programs from 40 CFR Part 70.6(g) and 71.6(g). The rule indicates that Title V emergency affirmative defense provisions should be removed because they are inconsistent with the EPA's interpretation of the enforcement structure of the CAA and the removal of the provisions will align with other EPA actions involving affirmative defenses. In addition, the final rule requires all states with a Part 70 program containing impermissible affirmative defense provisions to submit a program revision by August 21, 2024.

Removal of Affirmative Defense Provisions in Delaware's Title V Operating Permits

In addition to removing affirmative defense provisions from the state Title V permit programs, the July 2023 final rule indicates that any impermissible affirmative defense provisions within individual operating permits that are based on a Title V authority will need to be removed. The EPA expects that any necessary permit changes would 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 the effective date of the July 2023 final rule (for permit terms based on a federal affirmative defense provision) or the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

[4] NRDC v. EPA, 749 F.3d 1055, 1063 (D.C. Cir. 2014). https://www.cadc.uscourts.gov/internet/opinions.nsf/ACAE17D2A8131EDF85257CBE004DD976/$file/10-1371-1488926.pdf

[5] Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program. EPA Final Rule. 88 FR 47029. July 21, 2023. https://www.epa.gov/system/files/documents/2023-07/8961-01-OAR%20Title%20V%20Affirmative%20Defense%20Final%20Rule.pdf

AQ has started the process of removing affirmative defense provisions from their Title V permits during the periodic permit renewal schedule. As shown in Table 2, 30% of Delaware's Title V permits have been updated to remove the provisions as of January 1, 2024. By the end of 2024, AQ estimates 70% of the permits will be updated. AQ will continue to remove the affirmative defense provisions during the periodic reviews until all Title V permits have been updated.

Table 2. Delaware's Title V Permits Status for Affirmative Defense Removal (Jan 1, 2024)

	Affirmative Defense Provision Removed	Affirmative Defense Provision Removal in Progress	Affirmative Defense Provision Remains	Total
Delaware Title V Permits (#)	13	17	13	43
Delaware Title V Permits (%)	30%	40%	30%	100%

PROPOSED AMENDMENTS

The proposed amendments to Section 6.0 "Permit Contents", subsections 6.7 and 6.1.3.3.3.1 are related to affirmative defense requirements. The July 2023 final rule requires all states that have impermissible affirmative defense provisions in their Part 70 and 71 programs revise their programs to remove the provisions by August 21, 2024, as the provisions contradicted the enforcement provisions in the CAA.[6] Therefore, AQ is proposing to remove all affirmative provisions and references from 7 **DE Admin. Code** 1130, Section 6.0, to maintain consistency with current federal regulations.

The amendments are administrative and are not anticipated to result in any emission reductions or increases, as affirmative defenses are used only to avoid "liability" for noncompliance when emission limits have been exceeded. In addition, the proposed amendment is not expected to impact overburdened or underserved communities located in Delaware.

[6] EPA indicates in the July 2023 final rule (page 47051 of 88 FR 47029): "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."