NACAA
national association of clean air agencies

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U.S. Environmental Protection Agency

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To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) appreciates this opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) proposed rule, "Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program," which was published in the *Federal Register* on April 1, 2022 (87 Fed. Reg. 19,042). NACAA is the national, nonpartisan, non-profit association of air pollution control agencies in 40 states, including 115 local air agencies, the District of Columbia and four territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the United States. These comments are based on that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

EPA is proposing to remove the "emergency" affirmative defense provisions from the state and federal Title V operating permit program regulations. These provisions, located at 40 C.F.R. §§ 70.6(g) and 71.6(g), allow stationary sources to assert an affirmative defense in enforcement actions brought for noncompliance with technology-based emission limits in their Title V permits when they can demonstrate that the excess emissions occurred as the result of qualifying "emergency" circumstances. EPA has determined that emergency affirmative defenses are inconsistent with the Clean Air Act, D.C. Circuit legal precedent,[1] and the 2015 Startup, Shutdown and Malfunction (SSM) State Implementation Plan (SIP) Policy, which the agency reinstated in September 2021.

This action is a re-proposal of a proposed rule that was published in 2016 under the same title (hereafter, the "2016 Proposal"[2]) but subsequently withdraw

[1] *NRDC v. EPA*, 749 F.3d 105 (D.C. Cir. 2014).

[2] Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Programs, 81 Fed. Reg. 38,645 (June 14, 2016).

in 2018. The 2022 re-proposal is being promulgated under the same docket number, and EPA refers readers to the original, more detailed 2016 Proposal for information about the background, purpose, rationale and legal justification for the proposal, as well as the agency's expectations regarding the process for removing emergency affirmative defense provisions from state and local operating permit program regulations and individual Title V permits. Because the bulk of NACAA's comments relate to the procedural aspects of this proposal, this letter responds largely to statements contained in the 2016 Proposal.

I. Timeline for Amending State and Local Programs that Contain Emergency Affirmative Defense Provisions

Emergency affirmative defense provisions have never been a required part of state Part 70 operating permit programs or individual Title V permits, but some approved state and local programs do include these provisions in their rules (though, in our members' experience, they are very rarely invoked). State and local agencies that have such provisions in their programs will be required to amend their regulations, should this rule be finalized. In the 2016 Proposal, EPA stated that it expects these program revisions "shall" occur within 12 months after the rule's effective date, and expressed the view that 12 months will be "ample" time for many states to accomplish these revisions – in particular, for states that do not require additional legislative authority to achieve the necessary amendments.[3] For those states that do require additional legislative authority or approval to make the necessary changes to their operating permits program, EPA stated that it is considering providing "up to 24 months" to submit program revisions.[4]

Contrary to EPA's assumptions, NACAA members overwhelmingly agree that neither 12 months nor 24 months are sufficient timeframes for state and local agencies to make the necessary revisions to their regulations, regardless of whether additional legislative authority or approval is required. Many state and local agencies are already working to complete long lists of environmental rulemakings at the direction of their legislatures, including rules that are of greater environmental significance and consequence than this action. An average rulemaking, including requisite notice and comment processes, can easily take more than two years to accomplish.

NACAA recommends that EPA allow up to 36 months for state and local agencies to submit program revisions necessitated by this rulemaking. For purposes of clarity and simplicity, we recommend that the 36-month period be applied to all programs, regardless of whether additional legislative authority is needed. This will eliminate the need for agencies to make a demonstration that such legislation is necessary. Three years is also consistent with EPA's process for SIP revisions. Of course, state and local agencies would be free to complete the necessary revisions and make their submissions to EPA on an earlier timeframe.

[3] 81 Fed. Reg. at 38,652.

[4] 81 Fed. Reg. at 38,652.

To be clear, Clean Air Act regulations do not compel EPA to set a shorter deadline. On the contrary, 40 C.F.R. § 70.4(a), one of several regulatory sections that EPA cites concerning program and permit revisions,[5] provides in relevant part:

> If part 70 is subsequently revised such that the Administrator determines that it is necessary to require a change to an approved State program, the required revisions to the program shall be submitted within 12 months of the final changes to part 70 *or within such other period as authorized by the Administrator*. (emphasis added)

Furthermore, the statement in 40 C.F.R. § 70.4(i) that program revisions shall occur "within 180 days, or such other period as the Administrator may specify, following notification by the Administrator, or within 2 years of the State demonstrates that additional legal authority is necessary to make the program revision," applies only in cases where the Administrator makes an affirmative determination that a state's permit program is inadequate, pursuant to § 70.10. Here, EPA has explicitly stated that "EPA is not proposing any specific findings with respect to individual state programs or state-issued Title V permits that may contain similar provisions."[6] Thus, this section is inapplicable (and regardless, it still allows the Administrator to specify a timeframe of his or her choosing).

In sum, it is entirely within the discretion of the Administrator to set a reasonable deadline for accomplishing the changes necessitated by this rule. We strongly urge EPA to allow up to 36 months for state and local agencies to complete their rulemaking processes and make the necessary submissions to EPA.

II. Process for EPA Approval of Program Changes

The proposed rule – in particular, the 2016 Proposal – includes a detailed discussion of the form and content that EPA expects states to employ in submitting their program revisions to EPA. However, the proposal lacks an explanation of the process by which EPA intends to approve the program revisions – or whether it expects program revisions to be assumed or implied without any additional action on the part of EPA. It is important for EPA to provide clarity on this point, so that there is no confusion on when a program revision takes effect.

In particular, if EPA intends to publish proposed state and local program revisions in the *Federal Register* and provide a 30-day public comment period, in accordance with 40 C.F.R. § 70.4(i)(2)(ii), it should clearly state this in the final rule. EPA should also specify whether notice of final approval of program revisions will be published in the *Federal Register* or via a letter from the Administrator to state governors or their designees. As the notification-by-letter approach applies in cases of "nonsubstantial program revisions,"[7] NACAA believes that approach would be appropriate here.

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[5] *See, e.g.*, 87 Fed. Reg. at 19,045.

[6] 87 Fed. Reg. at 19,044.

[7] 40 C.F.R. § 70.4(i)(2)(iv).

III. Process for Amending Individual Title V Permits

State and local agencies should be afforded maximum flexibility to remove emergency affirmative defense provisions from individual Title V permits. NACAA agrees with EPA's expectation that revisions to operating permits to remove emergency affirmative defense provisions should "generally occur in the ordinary course of business as the state issues new permits or reviews and revises existing permits."[8] Importantly, we do not believe that state and local agencies should be required to initiate permit reopenings for the purpose of making this change. Rather, state and local agencies should have the option to make the necessary amendments to individual permits when they come up for review in the normal course of business, during the next periodic permit renewal.

IV. Request for Additional Guidance from EPA

In 2016, EPA compiled a "tentative list" of state and local regulations that it believed at the time would be implicated by this rule, should it be finalized, and placed it in the rulemaking docket.[9] The list has not been updated. NACAA requests that EPA update this list as soon as possible, to help assure that state and local agencies are in agreement as to which specific regulatory provisions will require removal.

NACAA is also concerned about potential ambiguity that might arise should a source attempt to invoke an affirmative defense provision in its Title V permit after a state's operating permit program has been amended, but before the permit itself has been amended. EPA should provide clarity on this point in the final rule.

Finally, we understand that states may retain "state-only" affirmative defense provisions in their permitting regulations as "state-only requirements in certain circumstances."[10] We request clarity from EPA as to whether that means that states may include or retain affirmative defense provisions in their operating permit program regulations that are written to apply only to state enforcement actions and not to EPA enforcement or citizen suits.

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Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact either of us, or Karen Mongoven of NACAA at kmongoven@4cleanair.org.

[8] 81 Fed. Reg. at 38,652.

[9] 81 Fed. Reg. at 38,651.

[10] 81 Fed. Reg. at 38,652

Sincerely,

/s/ *Francisco Vega*

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