

Regulatory Analysis
LSA Document #24-318

I. Description of Rule

a. History and Background of the Rule – This rulemaking is the result of updated federal regulations at 40 CFR 70.6 and 40 CFR 71.6, concerning removal of the emergency affirmative defense provisions from the United States Environmental Protection Agency's (U.S. EPA) Title V operating permit program regulations. Following the U.S. Court of Appeals for the D.C. Circuit's 2014 decision in *NRDC vs. U.S. EPA*, 749 F.3d 1055, these provisions became inconsistent with U.S. EPA's interpretation of the enforcement structure of the Clean Air Act (88 FR 47029). U.S. EPA expects each state that has a Part 70 program containing impermissible affirmative defense provisions to submit either a program revision or request for extension by August 21, 2024. IDEM requested an extension by this deadline and received an extension to submit a program revision by August 21, 2025.

IDEM is revising its program requirements by repealing the "emergency provisions" at [326 IAC 2-7-16](#) and [326 IAC 2-8-12](#), which contained the now impermissible affirmative defense provisions; updating [326 IAC 2-7-1](#) and [326 IAC 2-7-5](#) to remove now superfluous definitions and to revise the reporting provisions in the Title V operating permit program regulations; and revising [326 IAC 1-6-1](#) to revert to the applicability and notification requirements that were in place prior to the emergency provisions of the Title V and Federally Enforceable State Operating Permit (FESOP) programs.

b. Scope of the Rule – This rule was initiated to update the state rule to be consistent with the revised federal regulations at 40 CFR 70.6 and 40 CFR 71.6, which U.S. EPA revised to remove the emergency affirmative defense provisions from the federal Title V operating permit program regulations.

c. Statement of Need – This rule is necessary to remove provisions in Indiana's rules that now conflict with federal air permitting rules. Indiana is required to make these changes to maintain its authority over the U.S. EPA-approved Title V and State Implementation Plan (SIP)-approved FESOP permit programs.

Bringing Title V and FESOP sources back under the malfunction rule at [326 IAC 1-6](#) is necessary to ensure prompt reporting of upset conditions that could threaten human health and the environment. Such prompt reporting also helps ensure transparency and promotes public awareness.

d. Statutory Authority for the Proposed Rule – Statutory authority for this rule may be found at [IC 13-14-8](#) and [IC 13-17-3](#).

e. Fees, Fines, and Civil Penalties – This rule does not add or increase any fee, fine, or civil penalty on any sources.

II. Fiscal Impact Analysis

a. Anticipated Effective Date of the Rule – The anticipated effective date of this rule is August 2025.

b. Estimated Fiscal Impact on State and Local Government – There is no estimated fiscal impact on state and local government, as this rule only removes the emergency affirmative defense provisions from state rules to ensure consistency with federal regulations.

c. Sources of Expenditures or Revenues Affected by the Rule – This rule does not change or impact sources of expenditures or revenues of state agencies or local government.

III. Impacted Parties

This rule impacts all sources in the state with a Title V operating permit or a FESOP that the emergency affirmative defense provisions might be applicable to. Based on the number of Annual Compliance Certifications IDEM received in 2023, the number of sources impacted by the rule change is 553 Title V sources and 606 FESOP sources, totaling 1,159 sources in the state.

IV. Changes in Proposed Rule

Citation	Summary	Imposed by	If so, where?
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		another source of law?	
326 IAC 1-6-1	Makes "malfunction rule" applicable to sources permitted under 326 IAC 2-7 (Title V) and 2-8 (FESOP)	No	
326 IAC 2-7-1	Deletes definitions for: (12) "Emergency"; (20) Health-based emission limit; and (41) Technology-based emission limit	No	
326 IAC 2-7-5	(1)(F) Deletes requirement for Title V permit to specify permit conditions to which the emergency provision applies; (3)(C)(ii) Clarifies reporting under "malfunction rule" satisfies Title V deviation reporting requirement	No	
326 IAC 2-7-16 and 2-8-12	Repeals emergency provisions, which contain the affirmative defense	Yes	88 FR 47029, citing <i>NRDC vs. EPA</i> , 749 F.3d 1055 (D.C. Cir. 2014).

V. Benefit Analysis

a. Estimate of Primary and Direct Benefits of the Rule – The primary benefit of this rulemaking is to ensure that state rules are consistent with federal regulations and U.S. EPA's removal of the emergency affirmative defense provisions in 40 CFR 70.6(g) and 40 CFR 71.6(g). Also, the reversion to broader applicability for the malfunction rule ensures the agency continues to receive prompt notifications during unforeseen upset conditions.

b. Estimate of Secondary or Indirect Benefits of the Rule – Consistency with federal air permitting regulations ensures Indiana maintains authority over its Title V and FESOP programs. Continued prompt reporting of emergency situations helps the agency ensure protection of human health and the environment.

c. Estimate of Any Cost Savings to Regulated Industries – There are no cost savings for regulated industries related to this rulemaking, as it only removes the emergency affirmative defense provisions in [326 IAC 2-7-16](#) and [326 IAC 2-8-12](#) and makes other conforming changes to ensure that state rules are consistent with federal regulations.

VI. Cost Analysis

a. Estimate of Compliance Costs for Regulated Entities – There are no compliance costs for regulated entities resulting from this proposed rule. This rule only removes an affirmative defense, which sources rarely used successfully, and imposes malfunction reporting requirements, which are functionally equivalent to reporting requirements imposed by the repealed emergency provisions. In short, the rule essentially maintains the status quo for Title V and FESOP sources.

b. Estimate of Administrative Expenses Imposed by the Rules – There are no administrative expenses imposed by this rulemaking, as any facilities that would need to report an emergency event would utilize the same Part 70 emergency reporting and recordkeeping procedures that are being retained in [326 IAC 2-7-5\(3\)](#) and [326 IAC 2-8-4\(3\)\(C\)](#) and updated in [326 IAC 1-6-1](#).

c. The fees, fines, and civil penalties analysis required by [IC 4-22-2-19.6](#) – This rule does not add or increase a fee, fine, or civil penalty.

d. If the implementation costs of the proposed rule are expected to exceed the threshold set in [IC 4-22-2-22.7\(c\)\(6\)](#) – The combined implementation and compliance costs of the proposed rule are less than \$1,000,000 for sources in the state and therefore do not exceed the threshold set in [IC 4-22-2-22.7\(c\)\(6\)](#).

VII. Sources of Information

To develop this rule, IDEM referenced the results of the U.S. Court of Appeals for the D.C. Circuit's 2014 decision in *NRDC vs. U.S. EPA*, 749 F.3d 1055, which rendered the emergency affirmative defense

provisions inconsistent with U.S. EPA's interpretation of the enforcement structure of the Clean Air Act. See 88 FR 47029. IDEM is subsequently following U.S. EPA's requirements that each state operating a Part 70 program containing impermissible affirmative defense provisions must submit either a program revision or request for a timeline extension by August 21, 2024. IDEM submitted a request for an extension by this deadline and received an extension to submit a program revision by August 21, 2025.

IDEM also relied upon the historical knowledge of program staff in the permitting section of the Office of Air Quality who contributed the information for this rulemaking.

VIII. Regulatory Analysis

This rule results in net benefits in that Indiana will maintain authority over its Title V and FESOP programs by conforming to federal regulation, which now mandates the removal of the emergency affirmative defense. Maintaining emergency reporting requirements by expanding the applicability of the malfunction rule ensures the agency receives valuable information in a timely manner, information that helps it execute its mission to protect human health and the environment.

IX. Contact Information of Staff to Answer Substantive Questions

For further information about this rule, please contact Keelyn Walsh, Senior Environmental Manager, Office of Legal Counsel, Rules Development, at (317) 232-8229; or Billie Franklin, Section Chief, Office of Legal Counsel, Rules Development, at (317) 233-5684.

Notice of First Public Comment Period with Proposed Rule: [20240904-IR-326240318FNA](#)

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