

**STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF PROPOSED REPEAL AND REPLACEMENT OF
20.2.70 NMAC – OPERATING PERMITS AND TITLE V PROGRAM REVISION**

No. EIB 25-10 (R)

**Air Quality Bureau,
Environmental Protection Division
New Mexico Environment Department,**

Petitioner.

FINAL ORDER AND STATEMENT OF REASONS

This matter comes before the New Mexico Environmental Improvement Board (“Board”) upon a petition filed by the New Mexico Environment Department (“Department”) on March 12, 2025, to repeal and replace 20.2.70 NMAC *Operating Permits*.

A public hearing was held on July 18, 2025, with a quorum of the Board present during the hearing. The public hearing was held at 490 Old Santa Fe Trail, Room 322, Santa Fe, NM 87501, and also via the virtual platform Webex.

The Board heard technical testimony from the Department and admitted exhibits into the record. On July 18, 2025, the Board deliberated and voted to repeal and replace the regulations for the reasons that follow:

STATEMENT OF REASONS

1. On July 12, 2023 (88 FR 47029, 7/21/23), the EPA removed the “emergency” affirmative defense provisions from Clean Air Act (“CAA”) operating permit program (Title V)

regulations at 40 CFR 70.6(g) (applicable to state/local/tribal permitting authorities) and 71.6(g) (applicable when EPA is the permitting authority).

2. These provisions established an affirmative defense that stationary sources could have asserted to avoid liability in enforcement cases brought for noncompliance with technology-based emission limits contained in the source's Title V permit, provided that the source demonstrated that excess emissions occurred due to qualifying "emergency" circumstances.
3. 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 CAA in light of recent court decisions from the U.S. Court of Appeals for the D.C. Circuit, specifically the Court's decision in *NRDC v. EPA*, 749 F.3d 1055. (D.C. Cir. 2014).
4. The July 21, 2023, EPA Rule requires 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 (i.e. 20.2.70.304 NMAC, *Emergency Provision*), no later than August 21, 2024. On August 21, 2024, the Bureau submitted a letter to EPA requesting an extension of this deadline until August 21, 2025. On September 17, 2024, this request was granted.
5. In order to implement the program revisions, Title V affirmative defense provisions included within individual operating permits will also need to be removed. As explained in their 2016 proposed rule (81 FR 38652), EPA expects these permit changes will occur in the ordinary course of business as permits are periodically renewed, revised, or reopened for other reasons. 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 the federal rule change (August 21, 2023) (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).

6. To comply with the requirements of the EPA mandate, the Department petitions the Board to remove the affirmative defense provision of its operating permit standards at 20.2.70.304 NMAC, *Emergency Provision*.
7. The Board hereby approves of the proposed amendments to 20.2.70 NMAC as they are written in **NMED Exhibit 10**, for the reasons stated above.

ORDER

By a unanimous vote of a quorum of the Board members, the proposed adoption of the amendments to 20.2.70 NMAC as contained in NMED Exhibit 10 of the Department's June 27, 2025, Notice of Intent to Present Technical Testimony, were approved by the Board on July 18, 2025. Annotations to 20.2.70 NMAC, with any appropriate corrections of typographical errors or formatting, shall be filed with the New Mexico State Records Center as expeditiously as possible by the Department.

SIGNED this 20th day of August, 2025.

Phoebe K. Suina
Digitally signed by
Phoebe K. Suina
Date: 2025.08.20
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Phoebe K. Suina, Chair
New Mexico Environmental Improvement Board

Certificate of Service

I hereby certify that on August 20, 2025 a copy of the foregoing was sent via electronic mail to the persons listed below. A hard copy will be mailed upon request.

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