

**American Foundry Society**  
**Comments on the U.S. Environmental Protection Agency**  
**Proposed Removal of Title V Emergency Affirmative Defense**  
**Provisions from State Operating Permit Programs and**  
**the Federal Operating Permit Programs**  
**Docket ID No. EPA-HQ-OAR-2016-0186**

**May 16, 2022**

The American Foundry Society (AFS) hereby submits the following comments on the April 1, 2022 U.S. Environmental Protection Agency (EPA) proposed rule to remove Title V emergency affirmative defense provisions from state operating permit programs and the federal operating permit programs. 87 Fed. Reg. 19042. AFS urges EPA to withdraw this proposal because the rule is not required by law, would provide no environmental benefits, would unfairly subject facilities to penalties for excess emissions that are outside their control, cannot be reasonably avoided, and would impose an unnecessary burden on regulatory and permitting authorities.

**INDUSTRY OVERVIEW**

AFS is the major trade and technical association for the North American metalcasting industry. AFS has approximately 7,000 members representing over 2,000 metalcasting firms, their suppliers, and customers. The organization exists to provide knowledge and services that strengthen the metalcasting industry for the ultimate benefit of its customers and society. AFS seeks to advance the sciences related to the manufacture and utilization of metalcasting through research, education, and dissemination of technology. AFS also provides leadership in the areas of environmental, safety and industrial hygiene, government affairs, marketing, management, and human resources for the metalcasting industry.

Metal castings are integral to virtually all U.S. manufacturing activities. In the U.S., castings are used to produce 90 percent of all manufactured durable goods and nearly all manufacturing machinery. The industry is composed of more than 1,750 facilities manufacturing castings made from iron, steel, aluminum, and other alloys that have thousands of applications. In addition to the automotive, construction, and defense industries, other major sectors supplied by the metalcasting industry include agriculture, aerospace, energy exploration and conversion, oil and gas, mining, railroad, municipal/water infrastructure, transportation, and health care.

The U.S. metalcasting industry accounts for \$44.3 billion in direct economic benefit and a total national economic impact of \$110.52 billion. It also provides direct employment for nearly 200,000 men and women and supports nearly 500,000 jobs directly and indirectly. The industry supports a direct payroll of approximately \$11.6 billion and more than \$32 billion including indirect wages. Metalcasting facilities are found in every state, and the industry is made up of predominately small businesses. Approximately 80 percent of domestic metalcasters have fewer than 100 employees.

## **RULEMAKING BACKGROUND**

EPA has codified the Clean Air Act (CAA) Title V requirements for state operating permit programs and the federal operating permit programs in 40 CFR Parts 70 and 71. These regulations include provisions for an affirmative defense for facilities in an enforcement action resulting from an exceedance of emission limitations caused by specific emergency circumstances. See 40 CFR §§ 70.6(g) and 71.6(g). The regulations define an “emergency” 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. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error. 40 CFR §§ 70.6(g)(1) and 71.6(g)(1).

The affirmative defense is available if the facility can demonstrate:

through properly signed, contemporaneous operating logs, or other relevant evidence that: (i) An emergency occurred and that the permittee can identify the cause(s) of the emergency; (ii) The permitted facility was at the time being properly operated; (iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and (iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of [paragraph \(a\)\(3\)\(iii\)\(B\)](#) of this section. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken. 40 CFR §§ 70.6(g)(3) and 71.6(g)(3).

On June 14, 2016 EPA proposed to remove the affirmative defense provisions from the Title V regulations, citing the purpose, basis, rationale, and legal justification for the proposed rule. 81 Fed. Reg. 38645. As a member of the SSS Coalition, AFS was a signatory to the SSM Coalition's August 15, 2016 comments on the 2016 proposed rule. On February 23, 2018, EPA withdrew the proposed rule, stating that it did not intend to move forward on the rule due to other priorities. EPA is now, once again, proposing to remove the Title V emergency affirmative defense provisions for essentially the same reasons cited in the 2016 proposal.

### **WITHDRAWAL OF THE PROPOSED RULE IS WARRANTED**

For the reasons stated below, AFS believes that the emergency affirmative defense is a critical part of the Title V permitting programs and technology-based emissions limits and that the proposed rule to remove the affirmative defense should be withdrawn.

*Affirmative Defense Provisions Are Narrow in Scope* – The emergency affirmative defense does not provide facilities a “regulatory loophole” that authorizes it to exceed the technology-based emission limitations as it chooses. Rather it provides a shield from enforcement actions when the emissions limits have been exceeded due to emergency circumstances beyond the control of the facility. Emergency is defined as “sudden and

reasonably foreseeable events beyond the control of the source,” and does not include failures, errors and omissions on the part of the facility operator such as “improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.” 40 CFR §§ 70.6(g)(1) and 71.6(g)(1). In other words, the affirmative defense is only available when the exceedance of the emission limitations could not have been avoided.

Furthermore, facilities cannot merely claim the affirmative defense, but must identify the emergency and its cause, provide evidence that the facility was operating properly at the time, and demonstrate that it took all reasonable steps during the emergency to minimize the emissions to the extent possible. Facilities must also provide notice of the emergency to the permitting agency within two days of the emergency when the exceedance occurred. In summary, the affirmative defense is only available when the exceedance is beyond the control of the facility and after the facility provides evidence that it was beyond its control.

***Rationale for Originally Adopting Emergency Affirmative Defense Remains Valid*** –

The rationale for the emergency affirmative defense recognizes the limitations that the technology-based limits have. In setting the technology-based emission standards, the technology may inevitably fail or malfunction during certain periods of operation, such as unavoidable upsets in well-maintained, properly-designed and appropriately-operated process equipment or pollution control devices. EPA had based the emergency affirmative defense on the intent of Congress to ensure that Clean Air Act regulations did not unnecessarily hinder manufacturing facilities and deprive them of operational flexibility. It would be unfair to penalize a facility for an exceedance of the technology-based limits when that exceedance results from the inevitable limitations of the technology, rather than the neglect or bad behavior of the facility operator.

***The Affirmative Defense Is Not an Exemption from Applicable Emission Limits*** –

In the D.C. Circuit Court decision, *Sierra Club v. EPA*, 551 F.3d 1019 (2008), the court concluded that emissions limits must be continuously applicable. Regulations could not

allow facilities to have periods of operation during which they did not have to comply with the emission limits. EPA has, in part, tried to justify this proposed rule claiming that the definition of an emission limit (*i.e.*, continuously applicable) requires that the affirmative defense be removed.

The emergency affirmative defense is not, however, an exemption from continuously applicable emission limits. The affirmative defense provision allows a facility that is subject to an enforcement action (because it had exceeded an emissions limit due to emergency conditions) to avoid a penalty, provided that it demonstrate that the exceedance was caused by an emergency and that the facility was properly designed, maintained and operated at the time. Accordingly, EPA is not required to remove the affirmative defense, because it is not an exemption from continuously applicable emission limits. The affirmative defense is best characterized as a mechanism to avoid an unfair penalty for an exceedance that resulted from an unavoidable emergency beyond the control of the facility operator.

***Removal of Affirmative Defense Would Provide No Environmental Benefits*** – Keep in mind that the emergency affirmative defense is only available when the exceeded emission limits are beyond the control of the facility and are unavoidable. Removal of the emergency affirmative defense would not lead to operational changes at the facility because in order for the affirmative defense to be available the facility must demonstrate that the facility and its process equipment and control devices were well-designed, properly maintained, and appropriately operated. There can be no corrective action prescribed to prevent the exceedance of the emission limit that by definition is beyond the facility's control and cannot reasonably be avoided. Facilities will continue to employ the same technology that was identified as the basis of the technology-based emission limits. The emergency conditions are unavoidable and a product of the limitations of the technology used to set the emission limits. Removal of the emergency affirmative defense would only unfairly subject facilities to penalties for excess emissions that are outside their control and could not reasonably have been avoided.

In addition, removal of the emergency affirmative defense could impose undue burdens on regulatory and permitting authorities. For example, the removal of the affirmative defense from states' Title V permitting regulations and from individual Title V permits would impose a significant administrative burden on state air agencies and EPA regional offices. Substantial administrative resources would be needed for these changes without any accompanying environmental benefits. With no environmental benefits expected from the removal of the emergency affirmative defenses, it is difficult to justify these unnecessary burdens that it will impose on regulatory and permitting authorities.

The proposed rule will provide no environmental benefits and will impose unnecessary and substantial burdens of state and federal regulatory and permitting authorities. Consequently, EPA must withdraw this proposed rule.

## **CONCLUSION**

AFS appreciates the opportunity to provide these comments on the proposed rule to remove Title V emergency affirmative defense provisions from state operating permit programs and the federal operating permit programs. The proposed rule seeks to remove a critical provision that is, by definition, narrow in scope and designed solely to avoid an unfair penalty for an exceedance that resulted from an unavoidable emergency. In addition, the removal of the emergency affirmative defense does not provide an exemption from the continuously applicable emission limits that is required by relevant case law. Finally, the proposed rule would provide no environmental benefits, no incentive to improve operations or pollution control, and would impose unnecessary and substantial burdens on federal and state agencies. For these reasons, EPA should withdraw the proposed rule.

On behalf of AFS, please contact Jeff Hannapel with our AFS Washington office at [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com), if you have any questions or would like additional information about the comments.