



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

100 Cambridge Street Suite 900 Boston, MA 02114 • 617-292-5500

Maura T. Healey
Governor

Kimberley Driscoll
Lieutenant Governor

Rebecca L. Tepper
Secretary

Bonnie Heiple
Commissioner

BACKGROUND DOCUMENT

ON PROPOSED ADMENDMENTS TO

310 CMR 7.00 Appendix C

Operating Permit and Compliance Program

August 29, 2025

Regulatory Authority:
M.G.L. c. 21A, §§ 2 and 8
M.G.L. c. 111, §§ 2C and 142A through 142N

This information is available in alternate format. Please contact Melixza Esenyie at 617-626-1282.
TTY# MassRelay Service 1-800-439-2370
MassDEP Website: www.mass.gov/dep

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I. SUMMARY

The Massachusetts Department of Environmental Protection (MassDEP) is proposing to amend 310 CMR 7.00 Appendix C *Operating Permit and Compliance Program* to remove the Emergency Affirmative Defense provisions as required by recently updated U.S. Environmental Protection Agency (EPA) regulations.

II. BACKGROUND

Through a final rulemaking, on July 12, 2023, EPA removed the “emergency” affirmative defense provisions from Clean Air Act (CAA) Title V Operating Permit regulations (88 FR 47029) effective August 21, 2023. These provisions allowed a stationary source to use this affirmative defense in an enforcement case to avoid liability for noncompliance with technology-based emission limits contained in the source’s Title V permit provided the source could demonstrate that any excess emissions occurred as the result of an “emergency.” EPA removed these provisions from 40 CFR 70.6(g) (applicable to state/local/tribal permitting authorities) and 40 CFR 71.6(g) (applicable when EPA is the permitting authority) because they are inconsistent with EPA’s interpretation of the enforcement structure of the Clean Air Act in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit, primarily the court’s 2014 decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014).¹ In *NRDC* the court held that the affirmative defense for private civil suits exceeds EPA’s statutory authority and vacated the portions of the 2013 Rule pertaining to the defense.

The removal of these defense provisions is also consistent with other recent EPA actions involving affirmative defenses and would harmonize the EPA’s treatment of affirmative defenses across different CAA programs. In light of the *NRDC* decision and the EPA’s reevaluation of the CAA, the EPA interprets the enforcement provisions in sections 113 and 304 of the CAA to preclude affirmative defense provisions that would operate to limit a court’s authority or discretion to determine the appropriate remedy in an enforcement action. Section 304(a) grants the federal district courts jurisdiction to determine liability and to impose penalties in enforcement suits brought by citizens. Similarly, section 113(b) grants the federal district courts jurisdiction, in enforcement actions brought by the U.S. Department of Justice (DOJ) on behalf of the EPA, to determine liability and to impose remedies of various kinds, including injunctive relief and monetary penalties. These grants of jurisdiction come directly from Congress, and the EPA is not authorized to alter or eliminate this authority.

While EPA has never required that these emergency affirmative defense provisions be required elements of state operating permit programs or of individual operating permits, some state, local, and tribal programs, such as MassDEP’s operating permit program, have adopted such provisions and include these affirmative defenses in Title V permits, and EPA’s final rule requires that such provisions be removed within one year, or according to an extension provided by EPA.

¹ For additional information on EPA’s final rule see <https://www.federalregister.gov/documents/2023/07/21/2023-15067/removal-of-title-v-emergency-affirmative-defense-provisions-from-state-operating-permit-programs-and>

MassDEP's operating permit regulations at 310 CMR 7.00: Appendix C(16) contain emergency affirmative defense provisions that must be removed. MassDEP has been given an extension by EPA to remove the provisions from its regulations by August 21, 2025. Therefore, to comply with EPA's recently adopted amendments to its Title V Operating Permit regulations, MassDEP is proposing to remove 310 CMR 7.00: Appendix C(16) *Emergency Conditions* in its entirety as required by EPA's final rule.

III. DESCRIPTION OF PROPOSED AMENDMENTS

The proposed amendment deletes in its entirety 310 CMR 7.00 Appendix C(16) *Emergency Conditions*.

IV. IMPACTS OF PROPOSED AMENDMENTS

1. Economic Impacts

The proposed amendments are not expected to have any economic impacts because the rule removes a legal defense to a potential penalty that has never been asserted by a Massachusetts Operating Permit facility and that is no longer legally allowed.

2. Impacts on Massachusetts Municipalities

Pursuant to Executive Order 145, state agencies must assess the fiscal impact of new regulations on the Commonwealth's municipalities. The proposed amendments do not impose additional requirements directly on municipalities. Municipalities facilities that hold Operating Permits will no longer be able to assert an emergency affirmative defense in a MassDEP enforcement case; however, such assertions have rarely if ever been used. MassDEP notes that ownership and operation of a power plant, which municipalities may voluntarily undertake, is not a mandated municipal service. Therefore, costs associated with operation of a power plant are not mandated costs subject to the restrictions of Proposition 2 ½ (*Town of Norfolk v. Department of Environmental Quality Engineering*, 407 Mass 233 (1990)).

3. Massachusetts Environmental Policy Act (MEPA)

Pursuant to 301 CMR 11.03(12) (Massachusetts Environmental Policy Act Regulations), MassDEP is not required to file an Environmental Notification Form (ENF) regarding the proposed regulations because the regulations do not reduce standards for environmental protection, nor do they reduce opportunities for public involvement in review processes or public access to information generated or provided in accordance with the regulations.

V. PUBLIC HEARING AND COMMENT

MassDEP will hold public hearings and a 30-day comment period on the proposed regulation amendments in accordance with M.G.L c. 30A. MassDEP will submit the final regulations to EPA as a revision to its Title V Operating Permit State Plan. The public hearings notice and

proposed regulations are available on MassDEP's website at: <https://www.mass.gov/service-details/massdep-public-hearings-comment-opportunities>. For further information, please contact Laura Warren at Laura.L.Warren@mass.gov.