

ATTACHMENT A

Draft Staff Report

July 8, 2024

Santa Barbara County Air Pollution Control District  
Community Advisory Council

260 San Antonio Road, Suite A  
Santa Barbara, California 93110



air pollution control district  
SANTA BARBARA COUNTY

**Staff Report for Regulation XIII – Part 70 Operating Permits**  
**Emergency Affirmative Defense Provisions**

**Date: June 24, 2024**

Aeron Arlin Genet  
Air Pollution Control Officer

Prepared By:  
Tim Mitro  
Air Quality Engineer

Main Office  
260 N. San Antonio Road, Suite A  
Santa Barbara, California 93110  
Telephone (805) 979-8050  
[www.OurAir.org](http://www.OurAir.org)

North County Office  
301 E Cook St, Suite L  
Santa Maria, CA 93454

Our Mission  
*Our mission is to protect the people and the environment of  
Santa Barbara County from the effects of air pollution.*

## TABLE OF CONTENTS

<u>SECTION</u>	<u>Page #</u>
<b>1. Executive Summary .....</b>	<b>1</b>
<b>2. Background .....</b>	<b>2</b>
2.1 Title V & Part 70 Background	
2.2 Emergency Affirmative Defense Background	
<b>3. Proposed Amendments.....</b>	<b>4</b>
3.1 Removal of Title V Emergency Affirmative Defense Provisions	
3.2 Administrative Revisions	
<b>4. Rule Impacts and Other Rule Evaluations.....</b>	<b>5</b>
4.1 Industry and Fiscal Impacts	
4.2 Environmental Impacts	
4.3 California Environmental Quality Act (CEQA) Requirements	
4.4 Socioeconomic Impacts	
4.5 Rule Consistency Analysis	
<b>5. Public Review &amp; Stakeholder Engagement.....</b>	<b>7</b>
5.1 EPA Review	
5.2 Community Advisory Council and Outreach	
5.3 Public Hearings	
<b>6. References.....</b>	<b>7</b>

## 1. Executive Summary

On July 21, 2023, the United States Environmental Protection Agency (EPA) issued a final rule in the federal register that removed the emergency affirmative defense provisions from the EPA's Title V operating permit regulations. For those local agencies that have emergency affirmative defense provisions included in their federally-approved Title V program, the EPA requires the local agencies to revise their rule sets no later than August 21, 2024 to incorporate the recent changes. Hence, the Santa Barbara County Air Pollution Control District (District) is proposing to amend District Regulation XIII, Part 70 Operating Permit Program to:

- 1) Remove the Emergency Affirmative Defense provisions to align our District rules with the recently revised EPA Title V regulation, and
- 2) Include minor changes to definitions and compliance requirements consistent with the federal Clean Air Act (CAA).

There are currently 17 major stationary sources within the District that have Part 70 permits.<sup>1</sup> None of the stationary sources have ever needed to use the Emergency Affirmative Defense provisions in the past 31 years, and the proposed amendments are anticipated to have negligible impacts on industry.

---

<sup>1</sup> Major stationary sources of air pollution typically have a criteria pollutant potential to emit that exceeds 100 tons per year. The full definition can be found in Rule 1301, Part 70 Operating Permits, under the definition "Part 70 Source."

## 2. Background

### 2.1 Title V & Part 70 Background

The federal Clean Air Act (CAA) is the comprehensive law that regulates air emissions from stationary and mobile sources. In 1992, the EPA promulgated regulations applicable to the operation of major stationary sources of air pollutants under Title V of the CAA. These regulations (as codified in 40 Code of Federal Regulations (CFR) Part 70) enacted new requirements where major stationary sources of air pollution had to obtain federally-approved operating permits. State and local agencies typically issue these federally-approved permits once their program meets all EPA requirements.

In 1993, the District adopted Regulation XIII – Part 70 Operating Permits to have an EPA-approved operating permit program for major stationary sources of air pollution. The regulation is composed of five separate rules, as shown in Table 1 below. These rules contain permit application requirements, terms and conditions that are needed in each permit, as well as the procedures to issue, reissue or modify the operating permits. There have only been a handful of amendments to these rules throughout the last 31 years, with most of the amendments focused on responding to updated EPA determinations.

**Table 1 – Regulation XIII – Part 70 Operating Permit Program**

<b>Rule #</b>	<b>Rule Name</b>	<b>Year Last Amended</b>	<b>Last Amended Reason</b>
<b>1301</b>	General Information	2016	New Source Review (NSR) changes
<b>1302</b>	Permit Application	1993	--
<b>1303</b>	Permits	2001	EPA corrections
<b>1304</b>	Issuance, Renewal, Modification, and Reopening	2018	E-notice procedures
<b>1305</b>	Enforcement	1993	--

### 2.2 Emergency Affirmative Defense Background

When the EPA adopted the initial Title V regulations in 1992, the regulations contained provisions for emergency affirmative defenses. These provisions stated that if a technology-based emission limitation was exceeded at a permitted source due to an emergency, the permittee could assert an affirmative defense to avoid liability in an enforcement proceeding. An affirmative defense can demonstrate why, despite violations of an emission limit, the source should not be assessed penalties for the exceedance.

An “emergency”, as defined in District Rule 1301, means any situation arising from sudden and reasonably unforeseeable events beyond the control of a permittee, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the stationary 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 preventive maintenance, careless or improper operation, or operator error.

To claim an emergency affirmative defense, the permittee must follow all of the criteria listed in District Rule 1303, which includes:

- 1) The permittee documents with operating logs that an emergency occurred and identifies the cause(s) of the emergency;
- 2) The permittee documents that the source was being properly operated at the time the emergency occurred;
- 3) The permittee demonstrates that all reasonable steps were taken to minimize emissions in excess of permit requirements;
- 4) The permittee submitted a description of the emergency and all mitigating and corrective actions taken to the District within two (2) working days of the emergency.
- 5) The permittee demonstrates that the emergency was not due to the permittee's negligence or willful misconduct.

However, in 2014, the D.C. Circuit Court of Appeals vacated affirmative defense provisions contained in the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Portland cement industry.<sup>2</sup> In the decision, the D.C. Circuit concluded that the EPA lacked the authority to create these affirmative defense provisions because they contradicted fundamental requirements of the CAA concerning the authority of courts to decide whether to assess civil penalties in CAA enforcement suits. Due to this decision, EPA started to reevaluate its interpretation of the CAA with respect to affirmative defense provisions in the Title V program.

In 2016, EPA proposed changes to the Title V program to remove the emergency affirmative defense provisions. However, the 2016 changes were not finalized.

In 2022, EPA repropoed the removal of the emergency affirmative defense provisions from the Title V program. Then on July 21, 2023, the EPA published a final rule in the federal register that fully removed the emergency affirmative defense provisions from the EPA's Title V operating permit program in 40 CFR Part 70.<sup>3</sup> As a result, affected state, local, and tribal permitting authorities have to submit program revisions to the EPA to remove any Title V affirmative defense provisions from their EPA-approved Title V programs no later than August 21, 2024.

---

<sup>2</sup> *Natural Res. Def. Council v. Env'tl. Prot. Agency*, 749 F.3d 1055 (D.C. Cir. 2014)

<sup>3</sup> *Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program*, 88 Federal Register 47029 (July 21, 2023)

### 3. Proposed Amendments

#### 3.1 Removal of Title V Emergency Affirmative Defense Provisions

As discussed in Section 2.2 of this document, the EPA removed the emergency affirmative defense provisions from their Title V operating permit regulations. Consequently, to make conforming revisions to the District's EPA-approved Title V program, the District is proposing to revise Rules 1301 and 1303 to remove the affected text related to affirmative defenses. Upon implementation of the proposed amendments, any excess emissions during periods of emergencies may be subject to monetary penalties.

Despite the above, please note that per the District's Mutual Settlement Program, the District factors in multiple components in deciding the appropriate penalty for violations of emission standards. Even if the Emergency Affirmative Defense provisions are removed, an emergency and the source's actions in responding to and mitigating any excess emissions associated with the emergency would still be factored into the overall penalty calculation. This is consistent with the Penalty Assessment Criteria in the CAA where the EPA Administrator or the court, as appropriate, takes into consideration the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

Furthermore, District Rule 505 – Breakdown Conditions – addresses situations where the failure or malfunction of air pollution control equipment causes a violation of an emission limit. Breakdowns are not specifically connected to emergencies, but they may provide regulatory relief from enforcement action and monetary penalties if all of the provisions of Rule 505 are satisfied. If a breakdown persists for more than 24 hours or the end of the production run (whichever comes first), the stationary source may also apply for an emergency variance from the District's Hearing Board.<sup>4</sup>

#### 3.2 Administrative Revisions

Additionally, as part of this rule amendment project, the District is proposing to make a few administrative revisions to make sure that the rules contain all necessary provisions for a federally-approved program. This includes adding the definition of "Draft Operating Permit" to Rule 1301 and adding text to the Compliance Certification section in Rule 1302.D.3 related to "knowingly making a false certification or omitting material information." These revisions will result in no change to the Title V permitting process or how the District administers the program.

---

<sup>4</sup> Additional information on breakdowns and variances can be found at: [www.ourair.org/breakdowns/](http://www.ourair.org/breakdowns/) and [www.ourair.org/variance/](http://www.ourair.org/variance/). Please note that the EPA does not recognize California's variance program; therefore, a variance does not protect the source from Federal enforcement actions.

## **4. Rule Impacts and Other Rule Evaluations**

### **4.1 Industry and Fiscal Impacts**

There are currently 17 stationary sources within the District that have Part 70 permits, and none of the stationary sources have ever needed to use the Emergency Affirmative Defense provisions in the past 31 years. In order to implement the program amendments, the affirmative defense provisions included within individual operating permits will also need to be removed. These permit changes will occur in the ordinary course of business as permits are periodically renewed, revised, or reopened for other reasons. Hence, the proposed amendments are anticipated to have negligible impacts on industry.

### **4.2 Environmental Impacts**

California Public Resources Code §21159 requires the District to perform an analysis of the reasonably foreseeable environmental impacts if a rule or regulation sets a performance standard or requires the installation of pollution-control equipment. The proposed rule amendments are administrative in nature and do not involve performance standards or pollution-control equipment. Therefore, there is no reasonable possibility that the proposed amendments will have a significant effect on the environment.

### **4.3 California Environmental Quality Act (CEQA) Requirements**

The California Environmental Quality Act (CEQA) requires environmental review for discretionary actions undertaken by a public agency. This rule project is anticipated to be exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3) – Common Sense Exemption. According to §15061(b)(3) of the CEQA Guidelines, a project is exempt from CEQA if, “(t)he activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.” This rulemaking project consists of amending the District’s Part 70 Operating Permit Program to comply with recent changes to federal rules and regulations. Because the proposed project makes administrative amendments without requiring any physical modifications to conform with U.S. EPA regulations, it can be seen with certainty that implementing the proposed project would not cause a significant adverse effect on the environment. Therefore, substantial evidence supports the District’s determination that this rule project will not have any significant adverse effects on the environment and the proposed project is exempt from CEQA.

A CEQA determination will be made when the proposed rule package is brought to the District Board for adoption.

### **4.4 Socioeconomic Impacts**

California Health and Safety Code §40728.5 requires air districts with populations greater than 500,000 people to consider the socioeconomic impact of any new rule if air quality or emission limits are significantly affected. Based on the 2020 census data, the population of Santa Barbara County was approximately 450,000 persons. Using the expected growth rates for the County, the current population estimate is still below the 500,000 person threshold. Furthermore, the



proposed amendments will not strengthen an emission limitation. Therefore, the District is not required to perform a socioeconomic impact analysis for the proposed rule amendments.

#### **4.5 Rule Consistency Analysis**

Pursuant to California Health and Safety Code §40727.2(g), a rule consistency analysis of the proposed rules is required if the rules strengthen emission limits or impose more stringent monitoring, reporting, or recordkeeping requirements. The proposed rules do not strengthen emission limits or impose more stringent monitoring, reporting, or recordkeeping requirements; therefore, a rule consistency analysis is not required.

## 5. Public Review & Stakeholder Engagement

### 5.1 EPA Review

On April 15, 2024, staff distributed the draft rule language and the rationale for the changes to the EPA for a 30-day review period. The EPA informally agreed with the recommended changes and had no additional comments.

### 5.2 Community Advisory Council and Outreach

To facilitate the participation of the public and the regulated community in the development of the District's regulatory program, the District created the Community Advisory Council (CAC). The CAC is composed of representatives appointed by the District's Board of Directors. Its charter is, among other things, to review proposed changes to the District's Rules and Regulations and make recommendations to the Board of Directors on these changes.

Ahead of the CAC meeting, on June 24, 2024, the District published the draft rules and staff report on its website and informed the permitted major stationary sources and all stakeholders and subscribers on the District's listserv about the proposed changes.

At the CAC meeting on July 8, 2024 in Buellton, staff will provide a presentation on all of the proposed changes, answer questions from the CAC members, and provide an opportunity for public comment. The CAC may then vote whether to approve staff's recommendation that the Board of Directors adopt the proposed amendments to District Regulation XIII.

### 5.3 Public Hearings

In accordance with California Health and Safety Code §40725, the proposed amendments are anticipated to be publicly noticed on July 11, 2024 and made available at the District offices and on the District's website. The public hearing before the Board of Directors is scheduled for August 15, 2024. Members of the public may attend the Board meeting and can provide comments on the proposed amendments prior to or at the hearing.

## 6. References

- 1) Natural Res. Def. Council v. Env'tl. Prot. Agency, 749 F.3d 1055 (D.C. Cir. 2014)
- 2) Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program, 88 Federal Register 47029 (July 21, 2023)
- 3) EPA Fact Sheet: Final Removal of Title V Emergency Affirmative Defense Provisions, located at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>