

**NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING  
TO CONSIDER REPEAL AND REPLACEMENT OF 20.2.70 NMAC, OPERATING PERMITS AND  
TITLE V PROGRAM REVISION, EIB 25-10 (R)**

The New Mexico Environmental Improvement Board (“Board”) will hold a public hearing beginning on July 18, 2025, at 9:00 a.m. to consider EIB 25-10 (R) – In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC – Operating Permits and Title V Program Revision. The Board may make a decision on the proposed repeal and replacement and Title V revision at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department (“NMED”) events calendar at [<https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140>], under the calendar entry corresponding to the hearing start date. From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [<https://nmed.commentinput.com/?id=ci5hWrFaZ>] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, [pamela.jones@env.nm.gov](mailto:pamela.jones@env.nm.gov).

The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt New Mexico’s proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency (“EPA”) directing the removal of certain affirmative defense provisions in New Mexico’s Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the “Applicable Requirements” cited at 40 CFR 70.2.(7) is missing from the definition of “Applicable Requirement”, at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to “total suspended particulate matter” at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate (“TSP”) in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that “When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the records center) and officially adopt the current style and formatting requirements in conjunction with the amendment”. The Department will address these changes at the same time as the affirmative defense provisions are removed.

The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico’s Title V program.

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), which is applicable to state, local, and tribal permitting authorities, and 71.6(g), applicable when EPA is the permitting authority.

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.

These emergency affirmative defense provisions have never been required elements of state operating permit programs or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in Title V permits.

The EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA 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 *Natural Resources Defense Council ("NRDC") v. EPA*, 749 F.3d 1055. (D.C. Cir. 2014).

State, local and tribal permitting authorities whose Title V programs contain impermissible affirmative defense provisions must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved Title V programs. The EPA expects that states with Title V programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of EPA's final rule. (i.e., by August 21, 2024). On August 21, 2024, the Department submitted a letter to EPA requesting an extension of this deadline until August 21, 2025. On September 17, 2024, this request was granted.

States must also remove Title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either: (1) the effective date of EPA's final rule (i.e. 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 an affirmative defense provision in an EPA-approved title V program.

The full text of the Bureau's proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED's Proposed Air Quality Regulations and Plans web page at [ <https://www.env.nm.gov/air-quality/proposed-regs/> ]; or in hard copy during regular business hours at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or [neal.butt@env.nm.gov](mailto:neal.butt@env.nm.gov) .

The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; and other applicable procedures.

All interested persons will be given a reasonable opportunity at the hearing to submit relevant evidence, data, views, and arguments, orally and in writing; to introduce exhibits; and to examine witnesses. Any person who intends to present technical testimony at the hearing shall file a Notice of Intent to present technical testimony with the Board Administrator. The Notice of Intent shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background; (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present; (4) include a copy of the direct testimony of each technical witness in narrative form; (5) include the text of any recommended modifications to the proposed regulatory change; and (6) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

Notices of intent to present technical testimony must be received by the Board no later than 5:00 pm on June 27, 2025, and should reference the docket number (EIB 25-10 (R)) and date of the hearing (July 18, 2025). Notices of intent to present technical testimony shall be submitted to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, [pamela.jones@env.nm.gov](mailto:pamela.jones@env.nm.gov).

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing.

Persons requiring language interpretation services or having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing should contact Pamela Jones at least 14 days prior to the hearing or as soon as possible at (505) 660-4305 or [pamela.jones@env.nm.gov](mailto:pamela.jones@env.nm.gov). TDD or TDY users please dial 7-1-1 or 800-659-8331 to access this number via Relay New Mexico.

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 and 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact Kate Cardenas, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, [nd.coordinator@env.nm.gov](mailto:nd.coordinator@env.nm.gov).

If you believe that you have been discriminated against with respect to an NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit <https://www.env.nm.gov/non-employee-discrimination-complaint-page/> to learn how and where to file a complaint of discrimination.