



September 8, 2025

The Honorable Katrina Kessler
Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road
St. Paul, MN 55155

Commissioner Kessler:

I write today on behalf of the Minnesota Chamber of Commerce (Chamber), a statewide organization representing more than 6,300 businesses and more than 500,000 employees through Minnesota. As you're likely aware, the D.C. Circuit Court of Appeals last Friday struck down the U.S. Environmental Protection Agency's (EPA) efforts to remove emergency affirmative defenses from its Clean Air Act (CAA) regulations. The Court of Appeals' reversal of EPA's rescissions has the immediate effect of reinstating those defenses to EPA's Part 70 and 71 regulations.

As you're also aware, the EPA's rescissions were the basis on which the Minnesota Pollution Control Agency (MPCA) proposed removing emergency affirmative defenses from its own air permit regulations in November 2024. The MPCA received Administrative Law Judge Jessica Palmer-Denig's report allowing the MPCA to proceed with these rescissions on April 21, 2025. Last Friday—the same day the Court of Appeals reinstated the EPA's regulatory defenses—Interim Chief Administrative Law Judge Tim O'Malley issued his Order approving "clarifying changes" to rules approved by Judge Palmer-Denig pursuant to Minn. Stat. § 14.16.1 To the best of the Minnesota Chamber of Commerce's knowledge, however, MPCA has not yet provided notice to interested persons of its adoption of the rescissions pursuant to Minn. Stat. § 14.16, subd. 1, has not yet issued an order adopting the repeal of these rules pursuant to Minn. R. 1400.2090, has not yet provided a signed order adopting these rule rescissions to the Chief Administrative Law Judge pursuant to Minn. Stat. § 14.16, subd. 3, and has not yet published notice of the repeal of these rules in the State Register, pursuant to Minn. Stat. § 14.18, subd. 1.

The Minnesota Chamber of Commerce ("the Chamber"), on behalf of its members, therefore respectfully requests that, in light of the loss of the legal basis for its proposed regulatory repeals, MPCA cease its promulgation efforts and instead notify the Office of Administrative Hearings pursuant to Minn. R. 1400.2240, subp. 8, of its intent to withdraw its proposal to repeal these rules.

¹ The Office of Administrative Hearings's website has a copy of Interim Chief Judge O'Malley's Order but not a copy of whatever changes MPCA sought approval for by the Chief Judge; thus, it is not known if any of the changes affect the rules at issue in this request.

Background for Request

On July 21, 2023, the EPA published a final rule that removed the emergency affirmative defense provisions from its Title V operating permit program regulations. “Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program”, 88 FR 47029, Docket ID No. EPA-HQ-OAR-2016-0186. The EPA had determined these affirmative defenses were inconsistent with the Clean Air Act’s (CAA) enforcement structure, based on previous federal court decisions. As part of this same action, EPA required states like Minnesota with EPA-approved Title V programs to submit program revisions to the EPA to remove affirmative defense provisions from the states’ programs and from individual operating permits by August 21, 2024, or request a deadline extension to do so by that date. See 88 FR 47046.2

On November 25, 2024, MPCA publicly noticed its intent to repeal all or parts of Minn. Rules 7007.0800, subp. 6, 7007.1146, subp. 5.A(1), 7007.1850, and 7019.3020, subp. 2.A (“MPCA’s Emergency Affirmative Defense Rules”) in conjunction with adopting rules associated with air toxics reporting.

In its Statement of Need and Reasonableness (SONAR) in support of repealing its Emergency Affirmative Defense Rules, MPCA explained the repeals were based on EPA’s rescission of its rules and its demand that Title V program-delegated states do the same, e.g.:

Part 7007.1850 is proposed for repeal to meet this directive from EPA. It is reasonable to update rule language for consistency with federal regulations . . . While this repeal is not directly related to the proposed air toxics emissions reporting rulemaking, it is an urgent matter that EPA is requiring the MPCA and other states to act on . . . The purpose of the proposed repeal of Title V emergency affirmative defense provisions is to align with the CAA and EPA’s directive for states to remove the provisions from state rules.

Statement of Need and Reasonableness In the Matter of Proposed Revisions of Minnesota Rule Chapters 7002, 7005, 7007, and 7019 (SONAR), pp. 25, 52. (Emphases added.) MPCA gave no other, independent basis for repealing the Rules.

Indeed, MPCA even used the EPA rescissions to justify MPCA’s refusal to preserve an emergency affirmative defense for state-only permits:

The existing emergency affirmative defense provisions found in Minnesota rules do not differentiate between individual Title V federal operating permits and non-Title V state operating permits. *The EPA has directed states to remove these provisions from their rules, and since [sic] the rules do not differentiate between federal and state permits, the MPCA does not intend to keep this provision for use in non-Title V state operating permits . . . The MPCA does not intend to make changes to the state permit program that are inconsistent with federal rules, so the MPCA is opting not to keep this rule available for state individual permits . . .* Maintaining state-only emergency defense provisions, while EPA is actively working to remove these provisions from various CAA programs, is counter to maintaining consistency with federal rules.

² EPA granted Minnesota’s request to extend the deadline to repeal its emergency affirmative defense provisions to August 21, 2025. See Statement of Need and Reasonableness In the Matter of Proposed Revisions of Minnesota Rule Chapters 7002, 7005, 7007, and 7019, p. 16.

SONAR, pp. 16, 25. (Emphases added.) Thus, as with its repeal of the Title V defenses, MPCA offered no justification for its failure to create or maintain state-only emergency affirmative defenses beyond the fact that EPA had repealed its defenses and ordered states to do the same.

The Office of Administrative Hearings held the hearing on MPCA's proposed air toxics reporting regulations and its proposed repeal of the Emergency Affirmative Defense Rules on February 27, 2025. Subsequently, ALJ Palmer-Denig issued her April 21, 2025, report ("ALJ Report") finding, among other things, MPCA's justification for repealing the Emergency Affirmative Defense Rules was reasonable because it was based on EPA's demand that Minnesota do so. See ALJ Report, ¶¶ 113-116. Judge Palmer-Denig found no other independent basis for MPCA's proposed action because none was offered by MPCA. *Id.*

As part of its comments on the proposed repeals, the Chamber noted the underlying EPA emergency affirmative defense rescission were the subject of an ongoing challenge before the D.C. Circuit Court of Appeals. See, e.g., Chamber comments, January 15, 2025, p. 6. The Chamber recommended that, in light of the unsettled status of EPA's actions, MPCA should ask EPA for another extension to repeal MPCA's rules until after the challenge to EPA's actions was settled. *Id.* MPCA acknowledged the existence of the legal challenge but rejected the Chamber's requests to ask EPA for another extension or to pause its own rescission efforts until after the appellate court's decision. See SONAR, p. 26.

D.C. Circuit Decision

On September 5, 2025, the D.C. Circuit Court of Appeals struck down EPA's repeal of its emergency defenses. *SSM Litigation Group v. Environmental Protection Agency*, (United States Court of Appeals for the District of Columbia Circuit, Case number 23-1267, September 5, 2025) (copy attached). EPA had justified the repeal of its regulatory defenses on two legal bases: (1) that the affirmative defenses encroached in the judiciary's penalty assessment power; and (2) because the defenses violated the CAA's requirement that emission limits be "continuous." The Court of Appeals concluded on both counts that "EPA's rescission of the affirmative defense was not reasonably explained and not in accordance with law" and reversed EPA's rescission of its emergency defense. *Opinion*, pp. 9, 13. Because it did not order a stay of the effects of its decision, the Court of Appeals' decision had the immediate effect of reinstating the emergency affirmative defenses that EPA had tried to remove from its rules.

Effect of the Court's Decision on MPCA's Pending Repeals and the Need to Withdraw Them

MPCA's entire motivation and justification for its repeal of the Emergency Affirmative Defense Rules was based entirely on EPA's repeal of its affirmative defense under 40 C.F.R. Parts 70 and 71 and its directive to Minnesota and other states to remove such defenses from their own rules. Those defenses have now been reinstated in EPA's rules, however, as of last Friday, September 5, 2025, when the D.C. Circuit Court of Appeals reversed their rescission. Furthermore, MPCA did not provide a justification for repeal of its Emergency Affirmative Defense Rules beyond EPA's rescission actions and its directive to the states. The effect of all this is that MPCA's entire basis for repealing its Emergency Affirmative Defense Rules has now been invalidated, as has EPA's order to Minnesota and other states to repeal their own emergency affirmative defense regulations.

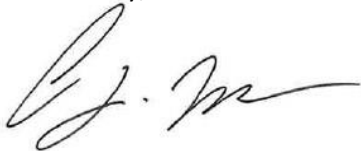
MPCA justified its proposed repeals as necessary to maintain compliance between EPA's and MPCA's regulations. The Court of Appeals has now reinstated the defense rules EPA attempted to repeal in 2023. If MPCA were to move forward with repealing its Emergency Affirmative Defense Rules in light of the

SSM decision, its regulations would then be inconsistent with EPA's now-reinstated regulations. This discrepancy would require MPCA to have to undertake another rulemaking effort to reinstate rules it needlessly and inappropriately had just repealed in order to make MPCA's rules consistent once again with EPA's Title V regulations.

Moreover, MPCA cannot rely on the fact that ALJ Palmer-Denig's approved the proposed repeals as justification for moving forward with them at this time. Judge Palmer-Denig based her determination on the information MPCA had provided her at the time. Furthermore, Judge Palmer-Denig issued her report more than four months ago, well before the Court of Appeals issued its SSM decision. The Chamber does not believe that, if faced with the question of the need and reasonableness of MPCA's proposed repeals following last week's Court of Appeals decision, Judge Palmer-Denig would reach the same conclusion nor would she recommend adoption of the proposed repeals.

The only way for MPCA to avoid an illegal and inappropriate repeal of its Emergency Affirmative Defense Rules and avoid the need to undertake another rulemaking effort to reinstate those rules is to cease any further efforts to repeal those Rules. MPCA should refrain from issuing an order adopting its proposed repeals, it should immediately notify the Office of Administrative Hearings pursuant to Minn. R. 1400.2240, subp. 8, of its intent to withdraw its proposed repeals, and it should take any additional appropriate actions to end its rescission efforts. If it does not do so and instead insists on moving forward with those efforts, MPCA risks subjecting itself to legal challenges for violating relevant provisions of Minn. Stat. Ch. 14 and Minn. R. Ch. 1400.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Morley", with a stylized flourish at the end.

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Cc: Interim Chief Judge Tim O'Malley, Minnesota Office of Administrative Hearings (OAH)

Administrative Law Judge Jessica Palmer-Denig, OAH

Addison Otto, MPCA