ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION REGULATION NO. 19

Proposed Changes in Response to the Startup, Shutdown, and Malfunction (SSM) SIP Call

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BACKGROUND

SSM SIP Call published June 12, 2015. 80 FR 33840.

Responds to Sierra Club petition pertaining to provisions in state plans deemed inconsistent with EPA's interpretation of Clean Air Act (CAA) requirements for excess emissions during periods of SSM;	Requires 36 states, **including Arkansas**, to submit corrective SIP Revisions;	Establishes a deadline of **November 22, 2016** for submittal of corrective SIP revisions; and	Revises and clarifies EPA's guidance concerning its interpretation of CAA requirements with respect to SSM.

The Arkansas Attorney General is among 17 Attorneys General that are challenging the SSM SIP Call.

ARKANSAS PROVISIONS SUBJECT TO SSM SIP CALL

EPA found provisions in APC&EC Reg. 19.602 and Reg. 19.1004(H) substantially inadequate to meet CAA requirements pertaining to periods of SSM.

- Specific objections to these provisions were that:
  - Reg. 19.602 provides a **"complete affirmative defense"** for excess emissions that occur during emergency periods
  - Reg. 19.1004(H) provides an **automatic exemption** for excess emissions of volatile organic compounds for sources located in Pulaski County due to malfunctions

EPA has determined that automatic exemptions from emission limits during periods of startup, shutdown, and malfunction are "impermissible provisions" that are inconsistent with CAA requirements.

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OPTIONS FOR CORRECTING "IMPERMISSIBLE PROVISIONS"

Multiple approaches to complying with the SSM SIP Call all of which require removal of the following:

- automatic exemption provisions
- director's discretion provisions
- enforcement discretion provisions
- affirmative defense provisions

Examples provided by EPA:

- Removal of "impermissible provision" without altering any other aspects of the SIP provision at issue
- Replacing the "impermissible provision" with **alternative emission limitations** explicitly applicable to periods of SSM
- Removal of the "impermissible provision" and a total revision of emission limitations that apply **at all times** (not just during SSM)

ADEQ PROPOSED REVISIONS TO REGULATION 19

Reg. 19.602(A)

- Removal of "complete affirmative defense" language
- Addition of language establishing Reg. 19.602(A)(1 – 4) as criteria and procedures for determining whether excess emissions due to an emergency are avoidable and whether enforcement action by ADEQ is warranted

Reg. 19.1004(H)(1)

- Removal of language which states that emissions in excess of these regulations due to SSM will not be considered a violation of these regulations
- Addition of language establishing Reg. 19.1004(H)(1)(a – e) as criteria and procedures for determining whether excess emissions due to an emergency are avoidable and whether enforcement action by ADEQ is warranted

Both revisions include a **rescission clause** that would restore the complete affirmative defense should the SSM SIP Call be stayed, vacated, or withdrawn.

ADEQ PROPOSED REVISIONS TO REGULATION 19.602(A)

Reg. 19.602 Emergency Conditions

An "emergency" means any situation arising from the sudden and reasonably unforeseeable events beyond the control of the source with an operating permit, including natural disasters, 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 upset condition. An emergency shall not include non-compliance to the extent caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error.

(A) ~~An emergency constitutes a complete affirmative defense to an action brought for non-compliance with such technology-based limitations if the following conditions are met. The affirmative defense of emergency shall demonstrate~~ In determining whether a period of excess emissions is avoidable, and whether enforcement action is warranted, the Department, based upon information submitted by the owner or operator through properly signed contemporaneous operating logs, or such other relevant evidence, shall consider whether the following criteria are met ~~that~~:

(1) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(2) The permitted facility was at the time being properly operated;

(3) 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

(4) The permittee submitted notice of the upset to the Department by the end of the next business day after the emergency. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(B) [RESERVED]

- We altered language to reflect that the factors listed in Reg. 19.602(A)(1)-(4) will now be factors considered in whether or not enforcement discretion is warranted.
- We reviewed the changes for consistency with the five factors set forth in the public notice for use of a discretionary approach. 80 FR 33840 at 33980-33981.

ADEQ PROPOSED REVISIONS TO REGULATION 19.602(C): RESCISSION CLAUSE

(C) If any provision of "SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction" (80 FR 33840) is subsequently suspended by EPA or stayed by a federal court, then demonstration that conditions 19.602(A)(1 – 4) have been met will constitute a complete affirmative defense for emergency conditions until the completion of the reconsideration process or the resolution of the proceeding performing judicial review. This period shall begin and end on the date specified in the notices of stay published in the Federal Register for that section or subsection.

If "SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction" (80 FR 33840) is withdrawn by EPA, vacated by a federal court, or otherwise nullified by federal legislation, then demonstration that conditions 19.602(A)(1 – 4) have been met will constitute a complete affirmative defense for emergency conditions following the date specified in the notice of vacatur or withdrawal published in the Federal Register.

- This language is based on a rescission clause approved in a revision to the Jefferson County portion of a Kentucky SIP, which modified certain NSR and PSD permitting regulations. 77 FR 62150.

Two Factors critical in the Jefferson County rulemaking:

- (1) Whether the **public will be given reasonable notice** of any change to the SIP that occurs as a result of the automatic rescission clause;
- (2) Whether any future change to the SIP that occurs as a result of the automatic rescission clause will be **consistent with EPA's interpretation** of the court action.

ADEQ PROPOSED REVISIONS TO REGULATION 19.1004(H)

(H) Malfunctions, Breakdowns, Upsets

(1) In determining whether enforcement action is warranted for ~~Emissions~~ emissions in excess of these Regulations which are temporary and result solely from a sudden and unavoidable breakdown, malfunction or upset of process or emission control equipment, or sudden and unavoidable upset of operation, as per referenced in Reg. 19.601 and Reg. 19602, the Department, based on information submitted by the owner or operator shall consider whether the following criteria are met ~~will not be considered a violation of these Regulations provided~~:

(a) the owner or operator notifies the Department of any such occurrence by the end of the next business day of the occurrence; and

(b) the owner or operator demonstrates to the Director that the suggested period of time for correction is as expeditious as practicable; and

(c) the breakdown or upset is determined by the Director to be unavoidable and not the result of negligence; and

(d) within five (5) days after the beginning of the occurrence, a written report is submitted to the Director which includes the cause and nature of the event, estimated quantity of volatile organic compounds emitted, time of emission and to prevent recurrence; and

(e) the Director is immediately notified when corrective measures have been accomplished.

(2) [RESERVED]

- 19.1004(H) currently provides an exemption to facilities during malfunctions, breakdowns, and upsets.
- The proposed language alters the subsection to provide for an enforcement discretion approach to malfunctions, breakdowns, and upsets.
- Accompanying rescission clause mirrors language in Reg. 19.602.

ARKANSAS SSM SIP REVISION

ADEQ's approach is consistent with EPA's allowance for the inclusion of criteria and procedures for the use of **enforcement discretion by air agency personnel** in the preamble of the SSM SIP call (80 FR 33844).

Options for SIP Revision

- Revise Regulation 19 and **withdraw** Reg. 19.602 and Reg. 19.1004(H) from the SIP (EPA's preference)
- Revise Regulation 19 **include** revision of Reg. 19.602 and Reg. 19.1004(H) in SIP revision submittal (Stakeholders' preference)

ADEQ anticipates adopting the necessary revisions to Regulation 19 in October of 2016 and submitting a SIP Revision including the changes to Reg. 19.602 and Reg. 19.1004(H) in early 2017.

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QUESTIONS?

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