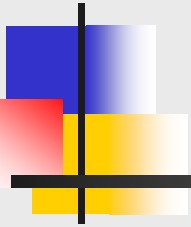


SUBCHAPTER 9 UPDATE

February 25, 2009



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I. Background & History of Rule



Current Rule (OAC 252:100-9-1)

- Reporting (Immediate, Written Report)
- Technological Limitations (Quarterly Report)
- Demonstration of Cause (DOC)
 - Malfunctions
 - Maintenance, Startup or Shutdown
- Existing rule states that subject to an appropriate DOC, Malfunctions, Maintenance, Startup or Shutdown emissions “are exempt from compliance with our emission limitations established in permits, rules and orders of the DEQ”

II. USEPA's Position Regarding Excess Emissions



A. September 20, 1999 Guidance

- "EPA views all excess emissions as violations of the applicable emission limitation. Nevertheless, EPA recognizes that imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner or operator may not be appropriate."
- "States have the discretion to provide a defense to actions for penalties brought for excess emissions that arise during certain malfunction, startup and shutdown episodes."

II. USEPA's Position Regarding Excess Emissions (cont.)



- B. Other policy – no mercy for excess emissions during scheduled maintenance
- C. December 5, 2001 Guidance reaffirms 1999 policy
 - Eric Schaeffer

III. The New Rule



A. Definitions

- “Excess Emissions” means the emission of regulated air pollutants or opacity in excess of an applicable limitation or requirement as specified in the applicable rule(s), enforceable permit, administrative order or judicial order. This term does not include fugitive VOC emissions covered by an existing leak detection and repair program that is required by a federal or state regulation.
- “Excess Emission Episode” means a continuous period of excess emissions occurring from one emission unit.



III. The New Rule (cont.)

A. Definitions (Cont.)

- “Excess Emissions Event” means the period of time during which excess emissions occurred, either continuously or intermittently, as a result of the same primary cause. An excess emission event may include one or more excess emission episodes.
- “Primary Cause” means the fundamental aspect of the cause that can logically be identified. In the event of a series of causes, one leading to another, the fundamental cause is the primary cause.

III. The New Rule (cont.)



B. Immediate Notice (4:30 p.m. the following working day after the first occurrence)

1. NOT required for:

- (a.) Events with primary cause of startup or shutdown, or
- (b.) If excess emissions do not exceed 10% above an opacity limit or standard, or
- (c.) Excess emissions that do not exceed 10% of the applicable non-opacity limit or standard and are less than 200 pounds of the regulated pollutant during any 24 hour period

2. Notice IS required if:

- (a.) Hazardous air pollutant (OAC 252:100-7-1.1) or toxic listed in Appendix O, or
- (b.) Criteria pollutant or ozone precursor in non-attainment area (that is subject to non-attainment provisions)



III. The New Rule (cont.)

C. Excess Emission Event Report

- 30 calendar days after the start of an event

D. Ongoing Events

- “Final” Report due 30 days after end of ongoing event
 - Would an “interim” report be required?

E. Alternative Reporting

- Sources subject to 40 CFR Parts 60, 61 and 63 may submit request for alternative reporting
- Case by case determination
- Failure by Department to act within 90 days of submittal allows the source to report in accordance with the alternative request

III. The New Rule (cont.)



F. Affirmative Defenses (Preponderance of the evidence)

1. **“All periods of excess emissions regardless of cause are violations of the Act and rules promulgated thereunder . . .”**
2. Applies to:
 - Civil or administrative penalties during Startup, shutdown & malfunction
 - Must comply with reporting requirements
3. Malfunctions
 - November 14, 2008 DEQ email regarding “maintenance”
 - Note change to factor (9) (See Shandy letter to DEQ)
4. Startup and Shutdown
 - Note change to factor (8) (See Shandy letter to DEQ)

G. Maintenance Emissions

- DEQ wants them permitted
- November 14, 2008 email references a six month grace period (from July 2009) within which an application may be submitted

III. The New Rule (cont.)



H. Affirmative defense is prohibited for:

1. Claims for injunctive relief.
2. SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception.
 - Does this exception swallow the rule (or at least the intent of the rule)?



III. The New Rule (cont.)

H. Affirmative defense is prohibited for (cont.):

3. Excess emissions that cause an exceedance of the NAAQS or PSD increments.
4. Failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63.
5. Violations of requirements that derive from 40 CFR Parts 60, 61 and 63.
 - Prior draft contained a fatal flaw which DEQ corrected.



III. The New Rule (cont.)

- I. The Director determines whether the source has met the burden to qualify for the affirmative defense.
- J. Practical Implication of “Prohibitions”
 - Citizen Suits



III. The New Rule (cont.)

- K. DEQ Board will consider the rule this Friday (February 27)
- Legislative Approval
 - DEQ anticipates rule will be “final” July, 2009