

Hearing To
Repeal Section 20.11.90.12 NMAC, *Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance*;
Replace With 20.11.49 NMAC, *Excess Emissions*;
Amend 20.11.65 NMAC, *Volatile Organic Compounds*, &
20.11.69 NMAC, *Pathological Waste Destructors*;
Submit to EPA

AQCB Petition No. 2009-4

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Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ I. EPA's policy: treat all excess emissions as violations subject only to affirmative defenses for civil penalties in certain circumstances.
- ◆ II. Updates the AQD's excess emissions program to conform to EPA guidance

Proposed Repeal & Replacement of 20.11.90.12 NMAC

Comments

■ EPA

■ Public

Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ Background
 - ◆ Genesis Of the Rule
 - ◆ Magnitude of the problem
 - ◆ Necessity to revise the rule
 - ◆ ‘nuts and bolts’
 - ◆ Patterned after the State’s rule.
 - ◆ Reasons
 - Does not conform to EPA guidance
 - Possible litigation
 - Uncertainty for the regulated community
 - Delays in the issuance of Title V and prevention of significant deterioration permits
- Affirmative defense
Enforcement discretion

Proposed Repeal & Replacement of 20.11.90.12 NMAC

Stakeholder Outreach

April 23, 2009

Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ Current rule
- ◆ Context
- ◆ “Upset” => “Abnormal operating conditions”
- ◆ “Secretary” => “Director”
- ◆ “Deliberate”
- ◆ “Section” of Regulation #1
- ◆ Stand-alone “Regulation”
- ◆ emissions of air contaminants in excess of limits set by these air pollution control regulations, which is a direct result of breakdown
- ◆ abnormal operating conditions, or ... shutdown ... or ... maintenance is not a violation ... provided:
- ◆ ...scheduled maintenance, ... occurrence is reported in advance ... work is performed during periods of non-operation ...
- ◆ breakdown ... or abnormal operating conditions, ... occurrence has been reported ... no later than two (2) hours after the occurrence,
- ◆ Repairs are made with maximum, reasonable effort, ...
- ◆ ... emission ... minimized ... during breakdown ... abnormal operating conditions or scheduled maintenance.
- ◆ ... emission of air contaminants of a nature or in quantities, which would endanger public health or safety, ... stopped entirely or reduced to harmless levels as soon as possible.
- ◆ Breakdown ... or abnormal operating conditions do not occur with such frequency that careless, marginal, unsafe or deliberate abnormal operation is indicated”

Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ Current rule is not consistent with EPA's guidance
- ◆ EPA policy regarding affirmative defenses.
- ◆ Memoranda: 1982, 1983, 1999 and 2001
- ◆ All excess emissions, without exception, are violations of an applicable emission limitation
- ◆ Affirmative defenses for civil penalty only for malfunctions, startups and shutdowns
- ◆ Malfunction
 - “a sudden and unavoidable failure of process or air pollution control equipment which is entirely beyond the control of the owner or operator”.
- ◆ No defense for routine or predictable emissions during startup and shutdown

Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ All excess emissions are violations
- ◆ Affirmative defenses for malfunctions and then some startups and shutdowns
- ◆ Establishes clear and consistent reporting and data requirements
- ◆ Incorporates EPA's criteria for affirmative defenses.
- ◆ The replacement rule comports with EPA's criteria. The Department deviated from the EPA criteria only to the extent necessary to accommodate the structure of the proposed rule.
- ◆ EPA reviewed a draft of this proposed rule from May 7 to June 19th. Their comments are shown as AQD Exhibit 5a, in which they state that after reviewing the proposed rule, they fully support our consideration for the repeal and replacement of the current excess emissions rule.

Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ **How the proposed regulation is designed and will be implemented.**
- ◆ Sections 14 and 15 contain provisions required by the EPA 1999 policy; Section 16 contains affirmative defenses consistent with EPA policy; Section 17 establishes requirements for root cause and corrective action analysis; and Subsection 20.11.49.16.E and Section 18 specify how the rule will be implemented.

Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ Section 14- “Operation Resulting in an Excess Emission”
- ◆ 1. All excess emissions are violations of the applicable emission limitation and may be subject to an enforcement action.
- ◆ And the other provision specifies that:
- ◆ 2. During an excess emission, the source and associated air pollution control equipment must be operated in a manner consistent with good air pollution control practices for minimizing emissions.
- ◆ Both of these provisions are directly from the 1999 EPA policy

Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ Section 15
- ◆ Notification requirements
 - deadlines for submitting reports
 - information that is to be included in these reports.
- ◆ Deadline for submitting an initial report
 - next regular business day after discovery
 - final excess emission report is 10 days after the end of the excess emission
 - excess emission extends beyond 10 days, the owner or operator shall submit the final report to the department within 72 hours of the date and time the excess emission ceased.
- ◆ Alternative reporting
 - 20.11.49.15 NMAC
 - duplicate the requirements
 - electronic reporting
 - more information
 - permit number, the air quality regulation or permit condition that was exceeded, whether the owner or operator attributes the excess emission to malfunction, startup, shutdown or emergency.
- ◆ Signed certification

Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ Subsections 20.11.49.16A and 16.B-affirmative defenses for malfunction, startup and shutdown respectively
- ◆ source bears the burden of proving each affirmative defense criterion
- ◆ source would remain liable for injunctive relief- still have to implement the corrective actions required to eliminate the excess emission events or to prevent an event of excess emissions

- ◆ affirmative defense sections
- ◆ Subsection 20.11.49.16A – malfunction
 - demonstrate that the excess emission was caused by a malfunction
 - .demonstrate that the excess emission did not stem from any activity or event that could have been foreseen or avoided or planned-for and could not have been avoided by better operation and maintenance practices.
- ◆ Requirements for startup and shutdown
 - demonstrate -did occur during a startup or a shutdown; was of minimal duration; could not have been prevented through careful planning and design; and was not part of a recurring pattern indicative of inadequate design operation or maintenance.
- ◆ common to both sections
 - Subsection 20.11.49.16.C -affirmative defense provisions for emergency
 - technology-based requirements
 - demonstrate -emergency occurred.
- ◆ source must also demonstrate
 - the source was being properly operated and all reasonable steps were taken to minimize levels of emissions and that the notification requirements were fulfilled.
- ◆ Subsection 20.11.49.16.E - “Department’s Determination of Adequacy of Affirmative Defense”.
 - source cannot challenge a decision until the Department commences an administrative or a judicial action.

Proposed Repeal & Replacement of 20.11.90.12 NMAC

- ◆ Root cause and corrective action analysis
 - “National Petroleum Refinery Initiative”
 - “Navajo Consent Decree”.
 - identify the root
 - written request of the Department
 - Department of Energy’s “Root Cause Analysis Guidance Document, 1992”
 - confidential business protection
- ◆ Section 18 - “*Future Enforcement Action*”
 - right to commence an enforcement action for an excess emission ...positive determination regarding an affirmative defense
 - Design forms to report excess emissions
 - procedure to submit excess emission reports electronically

A close-up photograph of a turkey's face, showing its dark, textured feathers and a large, prominent eye with a reddish-brown iris. The turkey is looking slightly to the left. In the upper right corner, there is a light blue thought bubble with a black outline, containing the word "QUESTIONS?" in a bold, black, sans-serif font. Several small, light blue circles are scattered across the turkey's face, suggesting a trail of thought or a sequence of questions.

QUESTIONS?