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August 15, 2016

VIA E-MAIL: http://www.regulations.gov

Mr. Matthew Spangler
U.S. Environmental Protection Agency
Office of Air Quality Planning & Standards
Air Quality Planning Division (C504-05)
Research Triangle Park, NC 27711

RE: Proposed Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program
81 Fed. Reg. 38645 (June 14, 2016)
Docket ID No. EPA-HQ-OAR-2016-0186

Dear Mr. Spangler:

Attached please find the Comments of The Ohio Chemistry Technology Council, The Ohio Chamber of Commerce, and The Ohio Manufacturers' Association on U.S. EPA's Proposed Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program, 81 Fed. Reg. 38645 (June 14, 2016), Docket ID No. EPA-HQ-OAR-2016-0186.

Please direct to the undersigned counsel any questions regarding the attached comments.

Very truly yours,

Robert L. Brubaker

Robert L. Brubaker

Eric B. Gallon

Eric B. Gallon

Counsel for The Ohio Chemistry Technology Council and The Ohio Chamber of Commerce

Frank L. Merrill, by RLB

Frank L. Merrill

Environmental Counsel for The Ohio Manufacturers' Association

RLB/EBG:mkd
Attachment

Comments of
The Ohio Chemistry Technology Council,
The Ohio Chamber of Commerce,
and
The Ohio Manufacturers' Association

Comments on EPA's proposed removal of
Title V affirmative defense provisions for emergencies
81 Fed. Reg. 38,645 (June 14, 2016)

August 15, 2016

Introduction

The Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, and the Ohio Manufacturers' Association (the "Commenters") respectfully submit the following recommendations in response to EPA's proposed removal of the emergency affirmative defense provisions in the Title V permit program rules in 40 CFR Parts 70 and 71 (81 Fed. Reg. 38,645 (June 14, 2016)).

The Ohio Chemistry Technology Council represents the interests of over 80 chemistry industry related companies that do business in Ohio. The Ohio Chamber of Commerce represents the interests of over8,000 member companies, including manufacturers, utilities, and small businesses, in addition to hosting the Ohio Small Business Council. The Ohio Manufacturers' Association represents the interests of over 1,400 member companies to protect and grow Ohio manufacturing. The Commenters members are subject to regulation by Ohio's Clean Air Act State Implementation Plan (SIP) and fully-approved Title V operating permit program, and have a direct and substantial interest in the action proposed by EPA.

Properly designed and maintained equipment sometimes fails. This is especially true of increasingly ambitious, cutting-edge technology "forced" as a matter of Clean Air Act policy. It is also true of equipment exposed to extreme temperatures or pressures, abrasion, or other exceptionally harsh operating conditions. Lightning strikes can disable air pollution controls. A squirrel can knock out a transformer that supplies power to an electrostatic precipitator or baghouse. Computerized control systems crash from time to time. Sabotage or criminal mischief can create life-threatening danger that elevates safety considerations above all other priorities. Yet EPA has proposed to remove the affirmative defense for emergencies from the Title V operating program rules.

EPA has given two reasons for removing the "emergency" defense rules:

1) EPA deems the rules "inconsistent with the enforcement structure of the Clean Air Act"; and
2) EPA deems the rules inconsistent with two D.C. Circuit decisions involving rules promulgated under section 112 of the Clean Air Act: *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) and *Sierra Club v. Johnson*, 551 F.3d 1019 (D.C. Cir. 2008).

Neither rationale justifies the proposed rule change. For the reasons provided below, the commenters respectfully request that EPA abandon its proposed rule changes or, at a minimum, narrow their scope so as not to prevent federal, state, and local air agencies from retaining the Title V affirmative defense for violations during emergency situations.

I. EPA's newly-discovered "enforcement structure" of the Clean Air Act does not justify an abrupt departure from the historical interpretation and administration of the Act

Congress never aimed the Clean Air Act's "enforcement structure" at prohibiting or punishing unavoidable, unwanted, and expensive emergencies and upsets. And it never required unattainable, absolute perfection for command-and-control technology. Instead, the structure and context of the Act as a whole emphasizes balance and nuance when promulgating technology-based standards. And neither *NRDC* nor *Sierra Club* justifies EPA's proposed rulemaking. Indeed, EPA's proposed rule change would go well beyond anything decided in those two D.C. Circuit cases. EPA's broad and vague new notions of the "enforcement structure" of the Clean Air Act cannot be reconciled with congressional directives for standards that are "achievable" and "adequately demonstrated," taking into account costs, and with EPA's recognition throughout the history of the Clean Air Act, until now, that enforcement and penalties are not appropriate for unavoidable upsets or breakdowns.

II. The interests in finality and repose of 20-year-old approvals of State Title V permit programs outweigh any justification for a late-maturing policy preference to renege on those approvals

Title V permit holders have a compelling interest in predictability, finality, and repose with respect to EPA approval of state Title V permit programs. EPA approved Ohio's Title V permit program, with the emergency circumstances provisions EPA invited in its Part 70 rules, more than 20 years ago. No one challenged those provisions when EPA adopted them (even though there were, at the time, myriad challenges to other parts of those rules) or when EPA gave final approval to those provisions in the Title V rules for Ohio and some forty-two other states.

Nothing in Title V or elsewhere in the Clean Air Act empowers or authorizes EPA to renege on its final approval of a state Title V permit program because EPA prefers a supposed "improvement" to what was already approved. Such instability would be inimical to the congressional design and purpose of Title V. It would also be highly disruptive to state and local governments and to entities subject to Title V permitting, both public and private.

State rulemakings to revise Title V permit program rules involve considerable costs and human resources. They are not to be undertaken lightly, on the basis of whimsical changes in policy preferences. The deluge of EPA's recent Clean Air Act rulemakings is already straining limited state resources; EPA should not further burden and divert those limited resources from much more important regulatory imperatives and priorities.

III. The proposal goes far beyond anything decided in the two D.C. Circuit cases relied upon for it

The case most relied upon for the proposed removal of the Title V emergency provisions is *NRDC*. That case is inapposite to the proposal in three significant ways. First, it involves private party citizen suit enforcement, not U.S. EPA or state environmental agency enforcement. Second, it involves rulemaking under section 112 of the Act, not section 110, 111, or Title V. And third, it involves a *timely* appeal of EPA rulemaking, not a reopening of settled law finalized over two decades ago.

NRDC's unremarkable holding is that, in the context of a challenge to a promulgated emission standard rule that establishes an enforceable compliance obligation, EPA cannot displace the exclusive jurisdiction of district courts to decide in a Clean Air Act citizen suit what, if any, remedy to provide for proven violations of that enforceable compliance obligation. *NRDC* does not prohibit any and all affirmative defenses under the Clean Air Act. Nor does it impair the inherent enforcement discretion vested in EPA and state agencies. It therefore provides no basis for changing the rules for *government* decisions to allow an affirmative defense in emergency situations, as opposed to private citizen suits. Second, *NRDC* arises in the context of CAA § 112; it did not involve the statutory or constitutional issues implicated by a strict anti-emergency interpretation of other parts of the Clean Air Act. Third, the case was a timely appeal under CAA § 307 from EPA's final rulemaking action. The Court did not opine on whether other citizen suit plaintiffs might have waived their rights to make similar arguments that were not raised in timely § 307 appeals of other Clean Air Act final actions.

The proposal uses, as an "alternative but additional justification," a stretched and strained over-reading of *Sierra Club*. EPA asserts that *Sierra Club* stands for the proposition that "the CAA requires that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise." However, the rationale in *Sierra Club* is anchored to the unique language of Clean Air Act § 112, and does not exist for the very different language and context applicable to Clean Air Act § 110 SIPs or § 111 NSPSs. Existing emission limitations in the Ohio SIP apply "continuously" to the performance criteria and operating modes to which they were designed and intended to apply. Even if *Sierra Club* "requires that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise," the word "continuously" does not mean constantly, every moment, in real time, during any and all operating modes, with or without a duly promulgated, reliable and reproducible method for testing compliance or non-compliance. Such an extreme, out-of-context interpretation of the word "continuously" is at odds with its origin in Clean Air Act § 302(k), where it was intended to prohibit "supplementary control systems." *See* 40 CFR 51.119; *see also* EPA's March 28,

2016 Initial Brief in *State of West Virginia v. EPA*, No. 15-1363, at p. 67. It certainly was not Ohio's legal interpretation when it promulgated technology-based SIP rules, or EPA's legal interpretation when it approved Ohio's SIP rules over the past 45 years.

IV. Any change to the Part 70/Part 71 affirmative defense provisions should be confined to private citizen suits

According to EPA, this rulemaking is primarily necessitated by the D.C. Circuit's ruling in *NRDC*. But *NRDC* concerns *private* (not government) suits, where a "violation" of an enforceable compliance obligation has been proven in an Article III court. *NRDC* stands for the proposition that when EPA promulgates an enforceable emission standard, EPA cannot remove an Article III court's jurisdiction to decide whether civil penalties are appropriate in a citizen suit to enforce that standard. If EPA decides it must make a revision to the affirmative defense provision for emergencies in the Title V permit program rules, despite the absence of any compelling need or deadline to do so, that change should be no more broad than the scope of the court's holding in *NRDC*. *NRDC* provides absolutely no basis for changing the criteria under which EPA or state agencies would grant an affirmative defense due to qualifying emergency circumstances. *NRDC* does not undermine the sound policy and common sense reasons for promulgating the Title V emergency provisions in the Part 70 and 71 rules in the first place, and for approving emergency defense provisions in Ohio's and other states' Title V permit programs two decades ago. EPA should withdraw its proposal altogether, or at the very least withdraw it and replace it with a proposal that only removes the affirmative defense in citizen suits.

Brubaker, Robert L.

From: Regulations.gov <no-reply@regulations.gov>
Sent: Monday, August 15, 2016 11:13 AM
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Document Type: Rulemaking
Title: Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program
Document ID: EPA-HQ-OAR-2016-0186-0001

Comment:
Comments submitted on behalf of The Ohio Chemistry Technology Council, The Ohio Chamber of Commerce, and The Ohio Manufacturers' Association on U.S. EPA's Proposed Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program

Uploaded File(s):

- Comments-ProposedRemovalofTitleVEmergency.pdf

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Organization Name: The Ohio Chemistry Technology Council, The Ohio Chamber of Commerce, and The Ohio Manufacturers' Association
Submitter's Representative: Robert L. Brubaker, Esq.

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