

## **WAC 173-400-107 Excess Emissions**

The revised section was omitted from the final rule. Please see our specific comments on the proposed WAC 173-400-107 rule revisions, dated October 20, 2004, in our November 24, 2004 comment letter.

The EPA had these comments:

EPA appreciates the many changes that Washington has proposed to make to WAC 173-400-107. For example, Ecology has clarified that the affirmative defense provides an excuse from penalties, but not from an action for injunctive relief; added a requirement to keep a contemporaneous record of excess emissions as a condition of relief; and clarified the contents of the written report a source must file as a condition of relief.

EPA continues to believe, however, that additional revisions are needed for WAC 173-400-107 to meet CAA requirements. EPA's interpretation of the CAA for state excess emission provisions is set forth in the Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Monitoring, and Robert Perciasepe, Assistant Administrator for Air And Radiation, to the Regional Administrators, entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 20, 1999) (EPA's Excess Emissions Policy). Our remaining concerns with WAC 173-400-107 are as follows:

- An affirmative defense to a penalty action is not appropriate where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments. See EPA's Excess Emissions Policy, pp. 2-3, Attachment pp. 3 and 5. Several states that have recently revised their excess emission rules to address this issue have added language stating that the affirmative defense is not available if the excess emissions caused or contributed to an exceedance of the NAAQS or PSD increments. See Arizona, AAR R18-2-310(B)(7) and (C)(1)(f); Maricopa County, MCESD R140-401.7 and -402.1(f); Michigan, MDEQ R 336.1916(2); Texas, TCEQ 101.222(b)(11). Washington should add similar language as a criterion for obtaining the affirmative defense.

### **Response #107-4**

Ecology has clarified that if there is a monitored exceedance of any relevant ambient air quality standard, the defense will not be granted. This however does not address whether the excess emission contributes to exceedance of PSD increment.

EPA continued to comment:

- An affirmative defense for excess emissions due to certain unavoidable events cannot extend to state law provisions that derive from federally promulgated performance standards or emission limits, such as NSPS or NESHAP standards. This would also apply to PSD permits issued by EPA.

### **Response #107-5**

The language in the rule has changed say: “This provision applies to all emission standards or limitations except for those . . . Contained in permits issued under the PSD rules when there are no excess emissions provisions in the permit. I’m not sure this hits the mark, I think the point of our comment was that permits often already account for excess emissions and that the excess emissions provisions in the permit govern.

### **Comment #107-6**

EPA also commented:

- WAC 173-400-107(4) provides an affirmative defense to a penalty action for excess emissions during startup and shutdown if certain conditions are met. Our understanding is that Washington believes this provision is consistent with CAA requirements for such startup and shutdown provisions, as discussed in EPA’s Excess Emissions Policy. See EPA’s Excess Emissions Policy, Attachment p. 6. After carefully reviewing subparagraph (4), however, we continue to believe that subparagraph (4) does not contain the following elements necessary to meet the requirements of the CAA:
  - a. The periods of excess emissions that occurred during startup and shutdown were short and infrequent. (not specifically addressed)
  - b. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance.
  - c. At all times the facility was operated in a manner consistent with good practices for minimizing emissions. (not specifically addressed)
  - d. The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable. (not specifically addressed)
  - e. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality (not just that you minimized emissions). (not specifically addressed)
  - f. All emission monitoring systems were kept in operation if at all possible. [I suggest that you include this provision in the paragraph re: Reporting and Recording of Excess Emissions]

See EPA’s Excess Emissions Policy, Attachment p. 6.

### **Response #107-6**

Ecology believes that all of the criteria in the guidance document are included in the rule and will make that demonstration when we submit the rule for inclusion in the SIP. [There is a risk to this approach and we may want to talk about this sooner than later to confirm that your thinking is in line with ours.]

### **Comment #107-7**

EPA had the following concern:

- WAC 173-400-107(5) provides an affirmative defense for excess emissions due to scheduled maintenance provided certain criteria are met. This is inappropriate under the CAA because sources should be able to schedule maintenance that might otherwise lead to excess emissions to coincide with maintenance of production equipment or other facility shutdowns. Note, for example, that although emission limits in the New Source Performance Standards generally do not apply during startup, shutdown, or malfunction, 40 CFR 60.8(c) and 40 CFR 60.11(c), the exception does not extend to scheduled maintenance. The incentive to use appropriate scheduling/practices to avoid excess emissions during scheduled maintenance should not be diminished by providing an affirmative defense. In this regard, you should note that EPA's 1999 Excess Emissions Policy does not discuss allowing an affirmative defense for excess emissions during maintenance activities. This omission was intentional and based on our interpretation of the CAA that any excess emissions during maintenance activities should be addressed only through the exercise of enforcement discretion and not through the provision of an affirmative defense to penalties. For additional discussion of how we view maintenance activities, see the April 27, 1977 (42 FR 21472) and November 8, 1977 (42 FR 58171) Federal Register notices.

Note, however, that although EPA believes that providing an affirmative defense for excess emissions during scheduled maintenance is not consistent with the CAA, EPA does believe that a state can provide, consistent with the CAA, that excess emissions due to a malfunction that occurs during scheduled maintenance can be subject to the same affirmative defense that applies for excess emissions during malfunctions. For example, Arizona's SIP-approved excess emissions provision states:

*"If excess emissions occur due to a malfunction during scheduled maintenance, then those instances will be treated as other malfunctions subject to subsection (B)."*

See Arizona Administrative Code, R18-2-310(D).

### **Response #107-7**

Ecology has clarified that paragraph (5) applies to upsets during scheduled maintenance. Good, but why have paragraph (5) at all since paragraph (6) already covers upsets (during all periods).

### **Comment #107-8**

EPA commented on the following point:

- WAC 173-400-107(6) provides an affirmative defense to a penalty action for excess emissions due to a malfunction if certain conditions are met. Our understanding is that Washington believes this provision is consistent with CAA requirements for such malfunction provisions, as discussed in EPA's Excess Emissions Policy. See EPA's Excess Emissions Policy, Attachment pp. 3-4. After carefully reviewing subparagraph

(6), we continue to believe that subparagraph (6) does not contain the following elements necessary to meet the requirements of the CAA:

a. The excess emissions were caused by a sudden, unavoidable breakdown of technology. (not specifically addressed) [Note: R8 just approved CO rule with the following language “The excess emissions were caused by a sudden, unavoidable breakdown of equipment, or a sudden, unavoidable failure of a process to operate in the normal or usual manner, beyond the reasonable control of the owner or operator” which may be another option if the concern is regarding “breakdown of technology”]

b. The excess emissions did not stem from any activity or event that could have been foreseen and avoided, or planned for.

c. To the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions. (not specifically addressed)

d. Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable.

e. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions.

f. All emission monitoring systems were kept in operation if at all possible.

See EPA’s Excess Emissions Policy, Attachment pp. 3-4.

### **Response #107-8**

Ecology believes that all of the criteria in the guidance document are included in the rule and will make that demonstration when we submit the rule for inclusion in the SIP. [There is a risk to this approach and we may want to talk about this sooner than later to confirm that your thinking is in line with ours]

### **Comment #107-9**

EPA commented:

- EPA’s position is that a State or local authority’s decision that the criteria for obtaining the affirmative defense from penalty are met is not binding on EPA or citizens because such an approach would be inconsistent with the regulatory scheme established in title I of the CAA. See 1999 Excess Emission Policy, pg. 3, Attachment pg. 2. EPA does not believe that either the current WAC 173-400-107 or with the proposed revisions to WAC 173-400-107 can be interpreted to mean that a State or local authority’s decision that the criteria for the affirmative defense are met is binding on EPA or citizens. EPA’s understanding is that Washington is in agreement with EPA on this issue. It would be better if WAC 173-400-107 were revised to make this explicit. In the absence of explicit language, EPA will request a letter from Washington confirming this interpretation and

EPA intends to make clear in any SIP action that a State or local's determination on whether the affirmative defense is met is not binding on EPA or citizens.

**Response #107-9**

Ecology believes that there is nothing in the rule to suggest that the federal law is being over written. In any case, the state does not have the legal authority to reduce any rights that are granted under federal law. There remains some concern with the language in paragraph 1 stating that the rule establishes "criteria by which ecology or a permitting authority may provide an affirmative defense..." This concern could be readily addressed by stating instead "criteria by which a source may establish an affirmative defense..."

Additional Comments carried over from EPA's June 5, 2006 comment letter:

Paragraph (2): This provision is redundant with the language in paragraph (1) and should be deleted. If it is maintained, it should be consistent with the language in (1) by stating "shall be subject to injunctive relief, but shall not be subject to penalty."

Paragraph (3)(b) & (c): Both of these provisions have language stating that they apply only when a source is seeking relief from penalty under this section, but they use different language: "believes to be unavoidable" in (b) versus "for which from penalty is being sought" in (c). Using different language to describe the same concept is confusing.

Please note that these comments contain our current views based on a preliminary review of the draft rule. These views should not be considered our final position, which we will only reach through notice and comment rulemaking after the state has submitted a rule for our approval as a SIP revision.

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