Department of Ecology
Air Quality Program

To: Rule Advisory Committee for Chapter 173-400 WAC

From: Tom Todd

Date: July 28, 2009

Subject: First Proposal for WAC 173-400-107

The document below shows the differences between the existing language in WAC 173-400-107, and a first proposal to reorder and reorganize this section of the rule. Concepts that were previously found in one paragraph have probably moved to another section of the proposal. But the rule is basically the same. For instance a concept found in the current paragraph (4) may now be now in paragraph (5).

Ecology's objective in revising this rule section is ensuring regulatory clarity and consistent implementation of excess emission provisions statewide. EPA has also expressed concerns that the current rule language doesn't sufficiently incorporate requirements of the 1999 "Herman" guidance document (discussed at our first stakeholder meeting and included in your binder). While Ecology does not take the position that the provisions of this guidance need to be incorporated into our rule to be SIP approvable, we believe that there are provisions that can be further clarified as demonstrated by hearing of examples of inconsistent application of the provision.

The draft provision below reflects our current thinking; we have considered your feedback from the previous rule advisory committee meetings in developing this. This is a first draft and comments are welcome.

WAC 173-400-107 Excess emissions. (1) The owner or operator of a source has[1] the burden of proving to ~~ecology or~~ the permitting authority or the decision-making authority in an enforcement action that excess emissions were unavoidable. This demonstration will be a condition to obtaining relief under subsections (4), (5) and (6) of this section. The affirmative defense will not be granted if the permitting authority determines that the exceedance of any relevant ambient air quality standard has occurred and can be attributed to the source.[2] This section applies to all emission standards or limitations except for those that are:
(a) Regulated under 40 CFR parts 60, 61, 62 or 63 or a permitting authority's adoption by reference of such federal standards, or

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[1] The use of the word "shall" is archaic; Ecology is changing "shall" into today's language without changing the meaning of the text.
[2] This language is an attempt to address the concern that an affirmative defense ". . . is appropriate only when the respective contributions of individual sources to pollutant concentrations in ambient air are such that no single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments." (from the 1999 Herman Memo)

(b) Promulgated under Titles IV or VI of the Clean Air Act, or a permitting authority's adoption by reference of such federal standards.
(c) Found in permitted limits addressed directly within a Notice of Construction Approval Order or in a PSD permit pursuant to the criteria in WAC 173-400-081.

(2) Excess emissions determined to be unavoidable under the procedures and criteria in this section are violations of the underlying statute, regulation, or permit and subject to injunctive relief, but are not subject to penalty by the permitting authority.[3] ~~shall be excused and not subject to penalty.~~

(3) (a) Excess emissions which represent a potential threat to human health or safety ~~or which the owner or operator of the source believes to be unavoidable shall~~ must be reported to ~~ecology or~~ the permitting authority as soon as possible, but in no case later than 12 hours after the excess emissions were discovered. Other excess emissions must be reported within thirty days after the end of the month during which the event occurred or as part of the routine emission monitoring reports.
(b) ~~Upon request by ecology or the authority, the owner(s) or operator(s) of the source(s)shall submit a full~~A follow-up written report must be submitted within 30 days ~~of the~~ after the end of the month during which the event occurred. ~~when the excess emissions were discovered.~~ A written contemporaneous record of all reported excess emissions, for which an affirmative defense is being requested,[4] must be submitted as a part of the report. The written report must include:

(i) Date, time, duration of the episode, and
(ii) Known causes, and
(iii) The quantity of excess emissions, and
(iv) The corrective actions taken, and
(v) Whether emission monitoring systems and pollution control systems were operating, if these were not operating, the time the duration that systems were inoperable, and
(vi) A copy of the written contemporaneous record, and
(vii) the preventive measures to be taken to minimize or eliminate the chance of recurrence.

(c) A written contemporaneous record of all reported excess emissions, for which an affirmative defense is being requested, must be submitted as part of the report. The record must include:

(i) the estimated quantity of emissions released, and
(ii) the method used to determine the quantity of excess emissions, and
(iii) the probable cause of such excess emissions.

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[3] In this subsection we address several concerns; the statement that injunctive relief is a statement that EPA and / or citizens groups are not precluded from action by section 107. Also there is a statement excess emissions are violations of the underlying permit condition, rule or statute.

[4] The concept of providing a report only when requested has been changed to a mandatory report if a 107 defense is being requested. The clause "for which an affirmative defense is being requested," was added to provide the source an option as to whether or not to keep these records continuously. Chapter 173-401 WAC sources have their own record-keeping requirements. [WAC 173-401-615(3)] Both 400-107 and 401-615 are applicable requirements.

(4)[5] Excess emissions due to startup or shutdown conditions ~~shall~~ must be considered unavoidable provided the source reports as required under subsection (3) of this section and adequately demonstrates:

(a) That the excess emissions were short in duration and could not have been prevented through careful planning and design and better operations and maintenance; and

The emissions were minimized consistent with safety and good air pollution control practice during the start up and shutdown period, and

(i) if a bypass of control equipment occurs, that such bypass is necessary to prevent loss of life, personal injury, or severe property damage, or

(ii) if the bypass is due to cold start up conditions of the control device, the control device is brought to operating temperatures as quickly as possible[6]; and

(c) Steps were taken to minimize the impact of the excess emissions on ambient air quality, and

(d) All emission monitoring systems were kept in operation unless their shutdown is necessary to prevent loss of life, personal injury, or severe property damage; and

(e) The emissions were not anticipated and addressed in permit requirements implementing WAC 173-401-081.

(5)[7] Maintenance. Excess emissions due to scheduled maintenance will be considered unavoidable if the source reports as required under subsection (3) of this section, meets all other applicable requirements of this section[8], and adequately demonstrates that the excess emissions could not have been avoided through reasonable design, better scheduling for maintenance or through better operation and maintenance practices.

(6) Upsets. Excess emissions due to upsets including upsets during maintenance activities will be considered unavoidable provided the source reports as required under subsection (3) of this section and adequately demonstrates that:

(a) The event was beyond the reasonable control of the owner or operator, not caused by poor or inadequate design, operation, maintenance, or any other reasonably preventable condition; and

(b) The event was not of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(c) The operator took immediate and appropriate corrective action in a manner consistent with safety and good air pollution control practice for minimizing emissions during the event, taking into account the total emissions impact of the corrective action, including slowing or shutting down the emission unit as necessary to minimize emissions, when the operator knew or should have known that an emission standard or permit condition was being exceeded.

(d) All emission monitoring systems and pollution control systems were kept operating to the extent possible unless their shutdown is necessary to prevent loss of life, personal injury, or severe property damage.

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[5] The old language is too general and the new language incorporates most of the 1999 Herman guidance.

[6] This part of the rule was added for the case described.

[7] This sub-section is problematic for EPA. The committee should discuss this issue.

[8] We added this to make it clear that there is no short circuit of other excess emission requirements just because such an event happens during maintenance. We think this is the root of EPA's concern.

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Below is a proposal we might consider for the first few subsections of WAC 173-400-107. Instead of what is found in the proposal above we should consider what is below: The proposal below would stand to clarify the issue of excess missions are violations.

[9]**WAC 173-400-107 Excess emissions.** (1) Excess emissions are violations of the underlying statute, regulation, or permit which may be subject to injunctive relief, penalty, or both.

[10](2) Excess emissions determined to be unavoidable under the procedures and criteria in this section are violations of the underlying statute, regulation, or permit and subject to injunctive relief, but are not subject to penalty by the permitting authority.

[11](3) The owner or operator of a source has the burden of proving to the permitting authority or the decision-making authority in an enforcement action that excess emissions were unavoidable. This demonstration will be a condition to obtaining relief under subsections (4), (5) and (6) of this section. The affirmative defense will not be granted if the permitting authority determines that the exceedance of any relevant ambient air quality standard has occurred and can be attributed to the source. This section applies to all emission standards or limitations except for those that are:
(a) Regulated under 40 CFR parts 60, 61, 62 or 63 or a permitting authority's adoption by reference of such federal standards, or
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(c) Found in permitted limits addressed directly within a Notice of Construction Approval Order or in a PSD permit pursuant to the criteria in WAC 173-400-081.

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[9] This is a new sub-section that states any excess emission is a violation.
[10] This is the same as the July 10 proposal in sub-section 2. In this sub-section we introduce the concept of unavoidable excess emissions and the if the emissions are unavoidable, penalties by the permitting authority would not be charged.
[11] This is the same as the July 10 proposal in sub-section 1.