

IV. Are Michigan's Rules Consistent With the Clean Air Act?

We have reviewed Michigan's submittal. For the reasons discussed below, we have found it to be consistent with the requirements of the Act, as set forth in the applicable EPA policy documents and rules. Therefore, we are approving Michigan's rule revisions for incorporation into the State's SIP.

Definitions

R 336.1102(a), R 336.1104(e), R 336.1107(g), R 336.1108(c), R 336.1118(f) and R 336.1120(i) contain minor administrative revisions, *e.g.* replacing commission with department. All of these revisions are acceptable.

R 336.1105(f) was revised to define "excess emissions" as "emissions of an air contaminant in excess of any applicable emission limitation." R 336.1113(d) was revised to read as follows:

"Malfunction" means any sudden, infrequent and not reasonably preventable failure of a source, process, process equipment, or air pollution control equipment to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

These definitions are consistent with the EPA policy documents listed above which pertain to excess emissions occurring during startup, shutdown and malfunctions.

Rules R 336.1915 and R 336.1916 address excess emissions occurring during startup, shutdown or malfunction. Rule R 336.1915 contains Michigan's procedure for utilizing enforcement discretion for excess emissions resulting from malfunction, startup or shutdown.

Enforcement Discretion Approach

EPA's February 15, 1983, policy sets forth the criteria that should be considered in determining whether enforcement discretion should be exercised in cases of malfunction. The criteria are listed below, as are the sections of Michigan's rule which address the criteria:

1. To the maximum extent practicable the air pollution control equipment, process equipment, or processes were maintained and operated in a manner consistent with good practice for minimizing emissions. (336.1915(3)(b))

2. 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. (336.1915(3)(d))

3. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions. (336.1915(3)(e))

4. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality. (336.1915(3)(f))

5. The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance. (336.1915(3)(g))

In addition, Michigan's rule requires the following:

1. The excess emissions must be the result of a sudden and unavoidable breakdown of process or control equipment, beyond the reasonable control of the person operating the facility;

2. The excess emissions caused by a bypass of control equipment were unavoidable to prevent loss of life, personal injury, or severe property damage;

3. The malfunction was an infrequent event and was not reasonably preventable;

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

5. The source has a malfunction abatement plan as set forth in Michigan's rules;

6. The excess emissions were reported to MDEQ as specified in their rules and, if requested by the MDEQ, the source must submit a written report that includes known causes, corrective actions taken, and preventive measures to be taken to minimize or eliminate the chance of recurrence;

7. The actions during the period of excess emissions were documented by contemporaneous operating logs or other relevant evidence; and

8. Any information submitted to MDEQ under the rule must be properly certified.

All of these provisions are appropriate and consistent with the EPA policy documents listed above.

For excess emissions occurring during startup or shutdown of process equipment, EPA's February 15, 1983, policy requires that the excess emissions occur infrequently, over a short period; that the excess could not have been prevented through careful planning and design; and that bypassing of control equipment was unavoidable to prevent loss of life, personal injury, or severe property damage. Michigan includes these requirements under section 336.1915(4). In addition, sources must meet requirements comparable to those detailed above for malfunctions.

All of these provisions are appropriate and consistent with the EPA policy documents listed above.

It should be noted that Michigan's rule clearly states that emission units subject to section 111 or 112 of the Act are subject to the startup, shutdown, or malfunction provisions contained in section 111 or 112. The rule also emphasizes that nothing in the rule limits the authority of MDEQ to seek injunctive relief.

Affirmative Defense Approach

Rule R 336.1916 contains Michigan's affirmative defense provisions for excess emissions resulting from startup or shutdown. As stated in EPA's September 20, 1999, policy memorandum, an acceptable affirmative defense provision may only apply to actions for penalties, but not to actions for injunctive relief. This restriction insures that State and Federal authorities remain able to protect air quality standards and PSD increments. Michigan's rule contains these restrictions in R 336.1916(1) and (4). Furthermore, the affirmative defense approach 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. Michigan addresses this requirement in R 336.1916(2).

In addition, for periods of excess emissions arising during startup and shutdown, EPA's September 20, 1999, policy sets forth criteria which are part of the defendant's burden of proof. The criteria are listed below as are the sections of Michigan's rule which address the criteria:

1. The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design. (336.1916(1)(a))

2. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance. (336.1916(1)(b))

3. If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage. (336.1916(1)(c))

4. At all times, the facility was operated in a manner consistent with good practice for minimizing emissions. (336.1916(1)(d))

5. The frequency and duration of operation in startup or shutdown mode