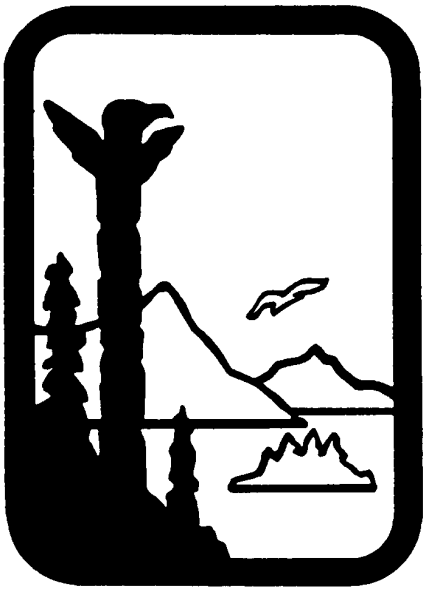
ALASKA DEPARTMENT OF

ENVIRONMENTAL CONSERVATION



18 AAC 50 Air Quality Control

Responsiveness Summary

SSM SIP Call Revisions

October 20, 2016

Introduction

The proposed revision to 18 AAC 50 updated the air quality regulations to amend 18 AAC 50.240(b) to address changes in requirements for excess emissions and amend 18 AAC 50.030 to update the adoption date of the State Air Quality Control Plan. Additionally, the Alaska Department of Environmental Conservation (ADEC) proposed to request that the U.S. Environmental Protection Agency (EPA) remove 18 AAC 50.240 from the approved State Implementation Plan.

ADEC proposed to adopt regulation changes in Title 18, Chapter 50 of the Alaska Administrative Code, dealing with excess emissions as follows:

(1) amend 18 AAC 50.240(b) to address changes in requirements for excess emissions.
(2) amend 18 AAC 50.030 to update the adoption date of the State Air Quality Control Plan.

In addition, ADEC is proposing to request that the U.S. Environmental Protection Agency (EPA) remove 18 AAC 50.240 from the approved State Implementation Plan (SIP).

Opportunities for Public Participation

The proposed regulation changes to 18 AAC 50 were described in ADEC's public notice issued September 7, 2016, which was published in the Alaska Dispatch News on September 9-10, 2016, and posted on the public notice web pages of the State of Alaska, the Department of Environmental Conservation, and the Division of Air Quality beginning on September 8, 2016. Public comments were due by October 14, 2016. The EPA requires states to hold a public hearing regarding regulation changes if a hearing is requested. DEC tentatively scheduled a public hearing for October 11, 2016. ADEC's public notice, dated September 7, 2016, required that ADEC receive a request for a public hearing by 5:00 p.m. on October 6, 2016, for the public hearing to proceed. ADEC received no requests to hold a public hearing; therefore, ADEC cancelled the hearing by posting a public notice of cancellation on the State, Department, and Air Permits Programs public notice web pages on October 7, 2016.

Commenters

Comments were received from:

- Sierra Club (See Appendix I)

Comments by Category

Fiscal Impacts Comments: There were no comments regarding fiscal impacts of the proposed regulations changes.

Non-fiscal Impact Comments:

- Sierra Club's comment from page 2:

  "The easiest and cleanest way for Alaska to comply with the SIP Call and the Act is to remove the provision from the SIP, as it is proposing to do here. Removing the unlawful provision will ensure that the normal SIP limits that are designed to protect air quality and comply with the Act's requirements would apply during all times."

  - *The Department agrees that the easiest way to address the SSM SIP call is to remove the 18 AAC 50 regulations from the approved SIP. The proposed action allows the Department to continue to apply the state regulations as intended without impeding EPA's ability to apply the requirements of the Clean Air Act as they deem necessary.*

The Department declined to make changes requested by commenters due to the reasons noted below:

- Sierra Club comments from page 3:

  "ADEC proposes to modify 18 AAC 50.240 in the state rules and add language that the provision applies only to ADEC enforcement action. Enforcement discretion provisions are consistent with the Act and EPA guidance as long as they are not overly broad and would not interfere with enforcement by the EPA or by other parties through a citizen suit. 80 Fed. Reg. at 33980. The Act grants EPA explicit enforcement authority under section 113, and to citizens under section 304. Thus, whether or not the state decides to bring an enforcement action, the EPA and citizens have independent statutory authority to enforce violations of the Act.

  ...

  The state's proposal may be overly broad because the provision limits its own discretion in seeking penalties once it makes a finding that excess emissions violations are unavoidable. Additionally, the provision could potentially be read to imply that EPA and citizens cannot bring such action. To ensure such confusion does not occur, consistency with the law, and EPA approval, ADEC should include explicit language that these provisions do not affect or apply to enforcement by EPA or citizens."

  - *The Federal Register cited by the commentator specifies that "states should not adopt overly broad enforcement discretion provisions <u>for inclusion in their SIPs.</u>" As noted earlier, the Alaska is removing these items from Alaska's SIP; therefore, the commentator's concern is misplaced. Since the regulation is not longer in the SIP, one can not read it to apply to the SIP.*

- Sierra Club's comments from page 3:

  "Additionally, ADEC did not include all the criteria recommended by EPA in Section 1.10(A) (Upsets) or 1.10(C) (Unplanned Maintenance)."

  - *The Department is removing 18 AAC 50.240 from the EPA approved SIP. Therefore the regulations will be solely state regulations, and it is not necessary for the Department to add additional criteria that EPA might recommend for enforcement discretion decisions under the SIP. EPA will be free to apply their own criteria to any enforcement actions they choose to undertake. EPA oversight of Alaska's implementation of its SIP, as well as EPA's ability to directly enforce Alaska's SIP, will ensure that Alaska adequately enforces its regulations and deters noncompliance.*

Appendix I

Sierra Club Comment

October 14, 2016

Submitted via email to rebecca.smith@alaska.gov

October 14, 2016

RE: Sierra Club Comments on Alaska's Proposal to Revise 18 AAC 50.240(b), Excess Emissions Regulations and Removal of 18 AAC 50.240 from SIP

I. INTRODUCTION

Sierra Club appreciates the opportunity to provide these comments concerning Alaska's proposal to amend its State Implementation Plan (SIP) in response to EPA's SSM SIP Call.

Power plants and other facilities can emit massive amounts of particulate matter and other pollutants during periods of startup, shutdown, or malfunction. Indeed, as part of its SSM SIP Call rulemaking, EPA recognized the practical consequences of SSM exemptions, noting "one malfunction that was estimated to emit 11,000 pounds of [sulfur dioxide] SO2 over a 9-hour period when the applicable limit was 3,200 pounds per day." Memorandum dated Feb. 4, 2013, to EPA Docket No. EPA-HQ-OAR-2012-0322 at 23, *available at* https://www3.epa.gov/airquality/urbanair/sipstatus/docs/ssm_memo_021213.pdf. These large SSM pollution exceedances can occur many times each year. After reviewing data from numerous power plants as part of the Mercury and Air Toxics rulemaking, EPA found that the "average" electric generating unit (EGU) had between 9 and 10 startup events per year between 2011 and 2012, and that many EGUs had "over 100 startup events in 2011 and over 80 in 2012." Assessment of startup period at coal-fired electric generating units – Revised, at p. 4 (Nov. 2014). Given the huge emissions possible during startup and shutdown, reducing startup and shutdown emissions from fuel-burning sources, including power plants, should be a priority for ADEC.

II. EPA's SSM SIP CALL

EPA's SSM SIP Call requires 36 states, including Alaska, to remove from their SIPs exemptions and affirmative defenses that allow industrial facilities to pollute the air without consequences when those facilities start up, shut down, or experience malfunctions. 80 Fed. Reg. 33,840 (June 12, 2015). EPA found that SIPs with provisions that exempt emissions during such events—like Alaska's current SIP— are substantially inadequate to meet Clean Air Act requirements. *Id*. In addition to requiring the 36 states whose SIPs contain these exemptions or affirmative defense provisions to remove these provisions from their SIPs, the SIP Call also revises EPA's policy for SIP provisions addressing excess emissions during SSM events. *Id*. The SIP Call allows states 18 months to submit revised SIPs to EPA, which is the maximum time allowable under the statute. *Id*. at 33,848; 42 U.S.C. § 7410(k)(5).

The SIP Call increases protections for communities against harmful air pollution from industrial facilities. EPA expects that "revision of the existing deficient SIP provisions has the potential to decrease emissions significantly in comparison to existing provisions,… encourage sources to reduce emissions during startup and shutdown and to take steps to avoid malfunctions, should provide increased incentive for sources to be properly designed, operated and maintained in order to reduce emissions at all times, … [and] has the potential to result in significant emission control and air quality improvements." *Id*. at 33,955-56. Importantly, beyond the legal deficiencies in the provisions, "the results of automatic and discretionary exemptions in SIP provisions, and of other provisions that interfere with effective enforcement of SIPs, are real-world consequences that adversely affect public health. *Id.* at 33,850.

Because facilities subject to the Clean Air Act can emit massive amounts of particulate matter, sulfur dioxide, nitrogen oxide, and other harmful air pollution during periods of start-up, shutdown, and malfunction, it is imperative that Alaska include strong SIP provisions governing emissions during these periods to protect fence-line and other communities. Indeed, EPA expects that "revision of the existing deficient SIP provisions has the potential to decrease emissions significantly in comparison to existing provisions" because these required revisions will "encourage sources to reduce emissions during startup and shutdown and to take steps to avoid malfunctions, . . . [and] should provide increased incentive for sources to be properly designed, operated and maintained in order to reduce emissions at *all* times." 80 Fed. Reg. at 33,955-56 (emphasis added). SSM exemptions, like those in the current Alaska SIP, have "real-world consequences that adversely affect public health," and removing those exemptions "has the potential to result in significant emission control and air quality improvement." *Id*. at 33,850, 33,956.

Excessive pollution during SSM events from large facilities has devastating impacts on surrounding communities, which are often low-income communities and/or communities of color. Indeed, SSM loopholes—whether incorporated in SIP provisions or in operating permits—undermine the emission limits found in SIPs and operating permits, threaten states' abilities to achieve and maintain compliance with NAAQS, and endanger public health and public welfare. These provisions also undermine other requirements of the Act, including Prevention of Significant Deterioration increments, nonattainment plans, and visibility requirements. In addition, SSM loopholes create a disparity among states, where some states provide facilities with an unfair economic advantage through SSM loopholes as compared to facilities located in states that do not have SSM loopholes. This creates precisely a "race to the bottom" incentive structure that the Clean Air Act is designed to prevent.

III. COMMENTS ON ADEC'S PROPOSAL

As ADEC correctly recognizes, EPA's SSM SIP Call found that 18 AAC 50.240 is substantially inadequate to meet Clean Air Act requirements. 80 Fed. Reg. at 33973. The easiest and cleanest way for Alaska to comply with the SIP Call and the Act is to remove the provision from the SIP, as it is proposing to do here. Removing the unlawful provision will ensure that the normal SIP limits that are designed to protect air quality and comply with the Act's requirements would apply during all times. As EPA has made clear, it should be technically feasible for most sources to "meet the same emission limitation" during *both* "steady-state" and startup/shutdown periods. 80 Fed. Reg. at 33,915

ADEC proposes to modify 18 AAC 50.240 in the state rules and add language that the provision applies only to ADEC enforcement action. Enforcement discretion provisions are consistent with the Act and EPA guidance as long as they are not overly broad and would not interfere with enforcement by the EPA or by other parties through a citizen suit. 80 Fed. Reg. at 33980. The Act grants EPA explicit enforcement authority under section 113, and to citizens under section 304. Thus, whether or not the state decides to bring an enforcement action, the EPA and citizens have independent statutory authority to enforce violations of the Act. *Id*. at 33,981. Additionally, "[p]otential for enforcement by the EPA or through a citizen suit provides an important safeguard in the event that the state lacks resources or ability to enforce violations and provides additional deterrence." *Id*. Thus, the state can cabin its own discretion to bring enforcement action for excess emission events, but it cannot limit EPA or citizen suit enforcement in any manner. *Id*. Additionally, states cannot adopt "overly broad" enforcement discretion provisions because such provisions conflict with section 110(a)(2) of the Act, which requires states to have adequate enforcement authority. *Id*.

ADEC's proposed enforcement discretion provision states that:

> (b) Excess emissions violations that the department determines to be unavoidable under this section are not subject to penalty by the department. This section does not limit the department's power to enjoin the emission or require corrective action.

The state's proposal may be overly broad because the provision limits its own discretion in seeking penalties once it makes a finding that excess emissions violations are unavoidable. Additionally, the provision could potentially be read to imply that EPA and citizens cannot bring such action. To ensure such confusion does not occur, consistency with the law, and EPA approval, ADEC should include explicit language that these provisions do not affect or apply to enforcement by EPA or citizens.

Additionally, ADEC did not include all the criteria recommended by EPA in Section 1.10(A) (Upsets) or 1.10(C) (Unplanned Maintenance). EPA recommended the following criteria be included in enforcement discretion provisions:

> (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;
>
> (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 were utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;
>
> (3) The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
>
> (4) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality; and
>
> (5) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation or maintenance.

Id. at 33981. ADEC should consider adding these additional criteria to ensure a thorough and robust decision-making process in enforcement actions.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact me with any questions or to discuss the matters raised in these comments.

Sincerely,
/s/Andrea Issod
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