



ARKANSAS
Department of Environmental Quality

August 15, 2016

Ms. Gina McCarthy

Administrator

Environmental Protection Agency

Attention: Docket ID No. EPA-HQ-OAR-2016-0186

RE: Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program

Ms. McCarthy:

The Arkansas Department of Environmental Quality (ADEQ) offers the following comments on the Environmental Protection Agency's (EPA's) proposed "Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Programs" (Proposed Rule).

Background

The Proposed Rule would remove affirmative defense provisions for emergencies located at 40 CFR 70.6 and 71.6 in response to court decisions in *Natural Resources Defense Council (NRDC) v. EPA*¹ and *Sierra Club v. Johnson*². If finalized, Arkansas will be required to revise its Title V program and implementing regulation to remove affirmative defense provisions or to amend such provisions so that the affirmative defense is only available for alleged noncompliance with permit requirements arising solely from State law. EPA proposes to require states to remove any affirmative defenses from their approved part 70 operating permit programs and submit program revisions to EPA within 12 months after the final rule's effective date.

¹ 749 F.3d 1055 (D.C. Cir. 2014)

² 551 F.3d 1019 (D.C. Cir. 2008)

Legality

The Proposed Rule provides three separate legal bases for this rulemaking, all three of which are flawed and inappropriate. EPA promulgated the Proposed Rule (1) based on a circuit court case holding, which does not apply to the part 70 or part 71 programs; (2) a SIP Call, which is subject to legal challenge; and (3) EPA's own rulemakings pertaining to affirmative defenses in unrelated parts of the Clean Air Act (CAA). All three of these grounds for authority are ultimately tied to EPA's interpretation of the holding of *NRDC v. EPA*, which is the subject of litigation.

First, EPA cites to a decision of the United States District Court for the D.C. Circuit in *NRDC v. EPA*, which does not apply to the provisions affected by this rulemaking.³ This decision simply held that "EPA cannot rely on its gap-filling authority to supplement the [CAA]'s provisions when Congress has not left the agency a gap to fill."⁴ Specifically, this court's holding pertained to an affirmative defense against a technology-based emission standard for certain hazardous air pollutants.⁵ This opinion affected neither SSM provisions in state SIPs, nor affirmative defenses in Part 70 and Part 71. This Proposed Rule goes well beyond the scope of the holding of *NRDC v. EPA*. EPA overreaches by extending the rationale beyond the provisions directly affected by the D.C. Circuit's decision in *NRDC v. EPA* to this unrelated CAA program.

Second, EPA is citing to its own SSM SIP call rulemaking⁶ for legal support even though that action is subject to an ongoing legal challenge. EPA promulgated a SIP Call for SSM provisions identified in various states, including Arkansas. EPA concluded that "the logic of the court in *NRDC v. EPA* extends beyond CAA section 112." However, the D.C. Circuit made it clear that it was not addressing whether SIPs can include such affirmative defenses and recognized a Fifth Circuit decision that upheld an affirmative defense to emission limitations adopted by Texas under section 110 of the CAA.⁷ As a result of EPA's overreaching application of the D.C. Circuit's limited ruling in *NRDC v. EPA*, eighteen states, including the State of Arkansas, and numerous affected entities challenged the rulemaking in a case still pending before the D.C. Circuit.⁸ The legal validity of the SSM SIP Call, upon which EPA is partially basing its authority in this rulemaking, is very much in question.

Third, EPA cites to its own rulemakings in other program areas including the NSPS and NESHAP. The rulemakings are another extension of the logic in *NRDC Council v. EPA*, which remains in litigation in *Coke v. EPA* (81 FR 38645 at 38649).

As a result of the substantial basis EPA has placed in its as-yet-untested extension of the holding in the SSM SIP Call, EPA should await a court decision ruling on this reasoning prior to finalization of the Proposed Rule. Specifically, EPA should delay finalization of this rulemaking until there is a final decision in the case of *Coke v. EPA*.

³ 749 F.3d 1055, 1063 (D.C. Cir. 2014)

⁴ *Id.* at 1064

⁵ *Id.* at 1057-1058

⁶ State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIP; Finding of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Final Rule (80 FR 33840)

⁷ 749 F.3d 1055, 1063 (D.C. Cir. 2014) at n.2.

⁸ *Walter Coke, Inc., et al. v. EPA*, No. 15-1166

Timing

EPA proposes a 12-month deadline from finalization of the Proposed Rule for states to remove Title V affirmative defense provisions from state regulations and to submit program revisions to EPA. Such an endeavor is not feasible for the State of Arkansas to accomplish in such a tight time period. To comply with this rule, ADEQ would need to revise Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation No. 26 Regulations of the Arkansas Operating Air Permit Program and revise the currently approved Arkansas part 70 operating permit program.

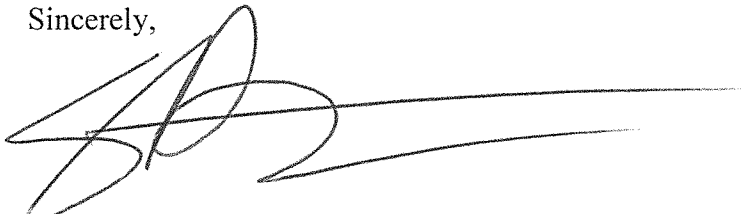
The rulemaking process for air quality regulations in Arkansas typically takes between 8 and 18 months, depending on whether or not the rulemaking is controversial. This process involves outreach to stakeholders during the drafting process, Governor's approval prior to initiation of the rulemaking, filing with the APC&EC two weeks prior to initiation, 30 day-public notice prior to the start of the public comment period, a public hearing and 10-day minimum comment period following the public hearing, completion of a responsive summary and changes necessary to address issues raised during the public comment period, further review by the Governor should the proposed amendments to regulations change in response to comments, review by two legislative committees with which the regulatory packet must be filed one month in advance, and finally adoption by the APC&EC.

Given the processes required for rulemaking in Arkansas, a 12-month deadline to submit program revisions to EPA is not feasible. Furthermore, EPA's SSM policy included in the SSM SIP Call, of which the Proposed Rule is an outgrowth, is currently being litigated in *Coke v. EPA*. Given this challenge to the SSM SIP Call, it is likely that the Proposed Rule, once finalized, will also be challenged. As such, development of regulatory and programmatic changes to comply with this likely controversial rule will require more time than a noncontroversial rulemaking. Therefore, ADEQ recommends that the deadline for submission of program revisions should be extended to a minimum of 18 months with possible extensions of up to two years.

Conclusion

ADEQ appreciates the opportunity to comment on the Proposed Rule and urges EPA to consider our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stuart Spencer', with a long horizontal line extending to the right.

Stuart Spencer
Associate Director, Office of Air Quality
ADEQ