UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
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DALLAS, TX 75202-2733

JUL 07 2016

Ed Mertha
Air Quality Regulation Development Coordinator
Environmental Health Department
City of Albuquerque
P.O. Box 1293
Albuquerque, NM 87103

Dear Mr. Mertha:

Thank you for the opportunity to review and comment on proposed revisions to the excess emissions provisions of the New Mexico State Implementation Plan (SIP) for Albuquerque-Bernalillo County found at 20.11.49 New Mexico Administrative Code (NMAC). It is our understanding that the proposed revisions are in response to EPA's Startup, Shutdown, and Malfunction (SSM) SIP Call. See 80 FR 33840, June 12, 2015. We would also like to acknowledge the Environmental Health Department's (EHD) diligent efforts to address the SSM SIP Call.

Proposed revisions to sections 20.11.49.16(A) – (C) NMAC would remove the current affirmative defense provisions for excess emissions associated with the startup, shutdown, malfunction, or emergency events, and replace them with an enforcement discretion approch when evaluating supplemental reports for excess emissions. The EPA has noted that the use of enforcement discretion by state agency personnel may be an appropriate approach to address excess emissions during SSM events. See 80 FR 33980, June 12, 2015.

As a result of above-described proposed revisions, sections 20.11.49.15(B).15 NMAC; 20.11.49.16(D) NMAC; 20.11.49.16(E) NMAC; 20.11.49.18 NMAC; and a portion of 20.11.49.6 NMAC are rendered inoperative or superfluous. These sections are also proposed to be removed from the existing SIP for Albuquerque-Bernalillo County. Removal of these sections from the SIP is consistent with EPA's findings for Albuquerque-Bernalillo County in the SSM SIP Call. See 80 FR 33968, June 12, 2015.

According to Item 15 of AQCB Petition No. 2016-3, the EHD does not intend to submit the revised version of 20.11.49 NMAC to the EPA as a revision to the SIP for Albuquerque-Bernalillo County. We support this approach and note that "state-only" enforcement discretion related rules do not have to be submitted to the EPA for review and inclusion into the SIP. Therefore, it is our understanding that EHD intends to withdraw the existing 20.11.49 NMAC in its entirety from the SIP, and retain the revised 20.11.49 NMAC in its entirety outside the SIP as a "state-only" rule. We believe it is preferable for "state-only" enforcement discretion rules to be outside the EPA-approved SIP in order to minimize any potential for confusion about the applicability of such provisions.

Our specific comments on the proposed revisions are as follows:

1. The submittal letter from your agency should clearly state that the EHD is withdrawing 20.11.49 NMAC from the SIP, and retaining the revised 20.11.49 in its entirety outside of the SIP.

2. Due to the fact that EHD is proposing to remove 20.11.49 NMAC from the New Mexico SIP for Albuquerque-Bernalillo County, a demonstration under Clean Air Act (CAA) section 110(l) is a necessary component of your SIP submittal to the EPA. See 80 FR 33975, June 12, 2015.

3. The EPA is supportive of the statement in 20.11.49.14 NMAC that "*the emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action.*" This statement is consistent with EPA's interpretation of the CAA, and its longstanding policy statements concerning excess emissions since 1982.

4. The EPA is supportive of the statement in 20.2.49.16 NMAC that this rule "*shall not be construed to preclude EPA or federal court jurisdiction under section 113 of the federal act to assess civil penalties ..., or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304 of the federal act.*" This statement is consistent with sections 113 and 304 of the CAA.

5. The EPA is supportive of adoption of enforcement discretion approach as the June 14, 2016 (81 FR 38645) publication also calls for removal of the affirmative defense provisions for upsets/emergencies found in the regulations for state and federal operating permit programs.

Should you have any questions regarding this letter, please feel free to contact me at (214) 665-7242.

Sincerely,

Guy Donaldson
Chief
Air Planning Section