UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

January 12, 2016

Doug McVay, Chief
Office of Air Resources
RI Department of Environmental Management
235 Promenade Street
Providence, RI 02908

Dear Mr. McVay,

On October 27, 2015 the Rhode Island Department of Environmental Management (RI DEM) sent us draft revisions to Air Pollution Control Regulation No.16, "Operation of Air Pollution Control Systems," with a request for our review in advance of the formal state rulemaking process.

As you know, on May 22, 2015, the EPA Administrator signed a final action reinstating and updating EPA's Startup, Shutdown, and Malfunction (SSM) policy applicable to State Implementation Plans (SIPs) and issuing SIP Calls to 36 states to amend provisions in state SIPs that apply to excess emissions during SSM periods. Rhode Island's Regulation No. 16 was included in the SIP Calls. The final notice was published in the Federal Register on June 12, 2015 (www.gpo.gov/fdsys/pkg/FR-2015-06-12/pdf/2015-12905.pdf). This action was in response to a Petition for Rulemaking filed by the Sierra Club and WildEarth Guardians. States have 18 months (until November 22, 2016) to submit SIP revisions to EPA. For more information, please see: www.epa.gov/airquality/urbanair/sipstatus/emissions.html.

We have reviewed your draft revisions to Regulation No. 16 and conclude that, as written, section 16.3 "Malfunctions" is not approvable as a SIP revision due to a court case (NRDC v EPA, 2014) that was decided after our initial SSM SIP Call proposal in February 2013 (78 FR 12460, February 22, 2013). As a result of the court decision, we issued a supplemental notice of proposed rulemaking (SNPR) on September 17, 2014 (www.gpo.gov/fdsys/granule/FR-2014-09-17/2014-21830).
In this SNPR, we rescinded our previous proposal that would have allowed narrowly drawn affirmative defense provisions in SIPs applicable to malfunction events. As explained in the SNPR, EPA has concluded that there is no legal basis for affirmative defenses in SIP provisions, including affirmative defenses applicable to malfunction events.

Rhode Island was included in the SSM SIP Call because SIP-approved Regulation No. 16 contains a provision that would allow the State to grant a variance from emission limits in the event that a malfunction of an air pollution control system, expected to last longer than 24 hours, causes emissions violations. As explained in our February 2013 proposal, we found that this provision allows for exemptions from emission limitations through the state's exercise of insufficiently bounded discretionary authority. We commend you for removing the reference to "variance" in your draft

revisions to Regulation No. 16 and appreciate your efforts to provide more specific requirements for sources wishing to demonstrate to your Office of Air Resources that a malfunction that has or might result in a violation was due to unavoidable increases in emissions attributable to the malfunction. However, draft Section 16.3 can now be interpreted as providing an affirmative defense for malfunctions, which, as mentioned above, is inconsistent with requirements of the Clean Air Act.

Therefore, we recommend that your revised rule not include Section 16.3. Alternatively, it may be possible to revise Section 16.3 such that it only applies to the state and not to EPA, citizens, or any other person or entity who may elect to take enforcement action due to malfunction of a source's air pollution control system. That alternative approach also would have to include language making it clear that the State would not be precluded from taking an enforcement action even if the conditions had been met, but that the State could use its discretion not to take an enforcement action in a particular instance. Although such an approach is possible, we do not recommend it, since it could create confusion for sources. However, if Rhode Island wants to pursue this approach, we are willing to work with you to develop approvable language.

If you have any questions, please contact Alison Simcox at 617-918-1684.

Sincerely,

Anne Arnold

Anne Arnold, Manager
Air Quality Planning Unit