

## ***MDEQ Proposes New Startup, Shutdown and Malfunction Rules***

The Michigan Department of Environmental Quality (MDEQ) Air Quality Division (AQD) has proposed new regulations to provide protections to emission sources that experience excess emissions due to startup, shutdown and malfunction conditions. These rules would replace similar regulations that were rescinded earlier this year as a result of objections from the United States Environmental Protection Agency (EPA).

MDEQ has proposed a new Rule 915 to provide emission sources with a protocol for providing evidence to MDEQ that emission exceedances resulted from a malfunction, startup or shutdown condition. Proposed Rule 916 would provide emission sources with an affirmative defense against state enforcement actions for excess emissions that arise during certain startup and shutdown episodes if practices to reduce the emissions are followed by the source. Proposed Rule 915 would specify information that may be submitted by sources for MDEQ to consider when determining the appropriate enforcement response to excess emissions during a malfunction, but would not provide an affirmative defense to an enforcement action.

### **Malfunction Protections**

Proposed Rule 915(1) would require MDEQ to consider evidence that excess emissions resulted from a malfunction in determining whether an enforcement action should be taken.

Rule 113(d) would be revised to define “malfunction” as:

[A]ny 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.

Proposed Rule 915(2) would allow MDEQ to “use enforcement discretion” in resolving any violations that result from startup, shutdown or malfunction. Rule 915(3) specifies information that a source may submit to MDEQ for its consideration in determining that an emission exceedance resulted from a malfunction, including information to demonstrate that:

- the emissions were a result of a sudden and unavoidable breakdown of equipment;
- the equipment was maintained and operated in a manner consistent with good practice;
- repairs were made in an expeditious fashion;

- the amount and duration of excess emissions were minimized;
- all reasonably possible steps were taken to minimize the impact of the excess emission on air quality;
- the excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance;
- the malfunction was infrequent and not reasonably preventable;
- the person responsible for operating the source has a malfunction abatement plan consistent with MDEQ requirements;
- the excess emissions were reported to MDEQ as required in proposed Rule 915(3)(i) and/or existing Rule 912;
- actions taken during the excess emission were documented; and
- the information has been certified by the source.

Proposed Rule 915 would not prohibit MDEQ from taking an enforcement action (i.e. seeking fines and penalties) against a facility that experienced excess emissions during a malfunction and submitted all the information outlined above. Instead, MDEQ would have authority to exercise its discretion to seek (or not to seek) fines and penalties against a source based on the information presented.

EPA had previously objected to former Rule 913, which had provided an affirmative defense for sources that experienced a malfunction and met criteria similar to those now contained in proposed Rule 915. EPA argued successfully in litigation on this issue that such an affirmative defense is not consistent with the requirements of the Clean Air Act and that only the “enforcement discretion” approach is appropriate. [Cite to prior MECU article on SSM litigation.] Accordingly, MDEQ rescinded Rule 913 and the related Rule 914 (outlining startup and shutdown conditions) earlier this year and has now proposed Rules 915 and 916 to replace them consistent with the Clean Air Act.

### **Protections for Startup and Shutdown**

In contrast to proposed Rule 915, proposed Rule 916 would provide an affirmative defense for sources that experience excess emissions during startup and shutdown if all of the following conditions are met:

- the source has complied with the reporting requirements of Rule 912;
- the periods of excess emissions were short and infrequent and could not have been prevented through careful planning and design;
- the excess emission were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- if a bypass (intentional diversion of emissions from control equipment) was used, the bypass was unavoidable to prevent loss of life, personal injury or severe property damage;
- the facility was operated at all times in a manner consistent with good practice;
- the frequency and duration of startup or shutdown emissions were minimized;
- all reasonably possible steps were taken to minimize the impact of excess emissions on air quality;
- all emission monitoring systems were kept in operation, if possible;
- the actions during the startup or shutdown were documented;
- the excess emissions were reported to MDEQ as required in proposed Rule 916(1)(i) and/or existing Rule 912; and

- the information has been certified by the source.

Under proposed Rule 916, the state would be precluded from seeking fines or penalties against a source that experienced excess emissions and satisfied all the foregoing conditions. This defense does not apply if the excess emissions from the source cause an exceedance of National Ambient Air Quality Standards or any applicable Prevention of Significant Deterioration increment. If the cause of the excess emissions was a malfunction that occurred during routine startup or shutdown, then those emissions are subject to Rule 915 absent any intervening acts or superseding causes.

If a source is subject to New Source Performance Standards or National Emission Standards for Hazardous Air Pollutants promulgated by EPA and the applicable EPA regulations contain startup, shutdown and/or malfunction provisions, then those EPA regulations shall apply.

Proposed Rules 915 and 916 would not preclude MDEQ from seeking an injunction (a court order to do or refrain from doing something) against any source that has violated any requirement.

MDEQ will hold/held a public hearing on their proposed rules on December 3, 2001 in the 3<sup>rd</sup> Floor Conference Room, North Tower, Constitution Hall, 525 W. Allegan Street, Lansing, Michigan. Written comments on the proposed rules will be /were accepted by MDEQ until 5:00 p.m., December 3, 2001.

The Michigan Manufacturers Association plans to submit comments that support these proposed regulations, with the understanding that these rules will provide the maximum protection that will be opposed by EPA for sources that experience startup, shutdown or malfunction conditions. For further information, contact Michael Johnston, Director of Regulatory Affairs, Michigan Manufacturers Association, 620 S. Capitol Avenue, Lansing, MI 48933, phone (517) 457-8554.

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