

**TITLE 252. DEPARTMENT OF ENVIRONMENTAL QUALITY
CHAPTER 100. AIR POLLUTION CONTROL**

SUBCHAPTER 9. EXCESS EMISSION REPORTING REQUIREMENTS

252:100-9-1. Purpose [AMENDED]

This subchapter sets forth requirements for the reporting of excess emissions and establishes ~~affirmative defense provisions~~ mitigating factors for facility owners and operators requesting relief in an administrative penalty action brought by the Department for periods of excess emissions.

252:100-9-1.1. Applicability [AMENDED]

This subchapter applies to the owners and operators of air contaminant sources that are subject to emission limitations in OAC 252:100, an enforceable permit, an administrative order or a judicial order. Fugitive VOC emissions covered by an existing leak detection and repair (LDAR) program that is required by a federal or state regulation should be reported in accordance with the applicable LDAR program.

252:100-9-2. Definitions [AMENDED]

The following words and terms, when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise:

"Bypass" means intentionally avoiding the use of air pollution control equipment.

"Excess emissions" means the emission of regulated air pollutants or opacity in excess of an applicable limitation or requirement as specified in the applicable rule(s), enforceable permit, administrative order or judicial order. ~~This term does not include fugitive VOC emissions covered by an existing leak detection and repair program that is required by a federal or state regulation.~~

"Excess emission episode" means a continuous period of excess emissions occurring from one emission unit.

"Excess emission event" means the period of time during which excess emissions occurred, either continuously or intermittently, as a result of the same primary cause. An excess emission event may include one or more excess emission episodes.

"Primary cause" means the fundamental aspect of the cause that can logically be identified. In the event of a series of causes, one leading to another, the fundamental cause is the primary cause.

"Working day" means 8:00 a.m. to 4:30 p.m. each day except Saturday, Sunday, or a legal holiday for state employees as proclaimed by the Governor.

252:100-9-8. ~~Affirmative defenses~~ Mitigation [AMENDED]

(a) **General.** All periods of excess emissions regardless of cause are violations of the Act and rules promulgated thereunder, the Oklahoma Clean Air Act and rules promulgated thereunder, and applicable permit or other authorization of the DEQ. ~~An affirmative defense is provided to owners and operators for civil or administrative penalty actions for excess emissions during periods of startup, shutdown and malfunction.~~

(b) **Mitigating factors ~~Affirmative defenses for excess emissions during malfunctions.~~** To establish that an incident of excess emissions resulted from malfunction ~~the affirmative defense and request to be relieved of a civil or an administrative penalty in any action initiated by the Department~~ to enforce an applicable requirement, the owner or operator of the facility must meet the requirements of OAC 252:100-9-7 and establish by a preponderance of the evidence:

- (1) The excess emissions were caused by a sudden and not reasonably preventable breakdown of air pollution control equipment or process equipment, or the failure of a process to operate in the normal or usual manner.
- (2) The excess emissions did not stem from any activity or event that could have been planned for or reasonably foreseen and avoided.
- (3) Repairs were made as expeditiously as possible.
- (4) The amount and duration of the excess emissions, including any bypass, were minimized to the extent practicable during periods of such emissions.
- (5) Reasonable steps were taken to minimize the impact of the excess emissions on ambient air quality.
- (6) The reason(s) any monitoring systems were not kept in operation, if applicable.
- (7) The owner or operator's actions during the period of excess emissions were documented by contemporaneous operating logs or other relevant evidence.
- (8) The excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance.
- (9) To the maximum extent practicable, the air pollution control equipment or process equipment was maintained and operated in a manner consistent with good practice for minimizing emissions; provided, however, that this provision shall not be construed to automatically require the shutdown of process equipment to minimize emissions.

(c) ~~Affirmative defenses~~ **Alternative emission limits and mitigating factors for excess emissions during startup and shutdown.** A federally enforceable alternative emission limit or means of compliance may be developed for inclusion in the facility's permit for periods of startup and shutdown under OAC 252:100-8-6(a)(1)(C) or 100-7-15 and/or 100-7-18, provided the alternative does not establish an emission limitation less stringent than an applicable emission limitation in the EPA-approved state implementation plan. Emissions in compliance with any such provision shall not be considered excess emissions for state enforcement purposes. To establish the affirmative defense and to be relieved of a civil or request relief from an administrative penalty in any action initiated by the Department to enforce an applicable requirement during periods of startup and shutdown, the owner or operator of the facility must meet the requirements of OAC 252:100-9-7 and establish by a preponderance of the evidence:

- (1) The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through reasonable planning and design.
- (2) The excess emissions were not part of a recurring pattern indicative of inadequate operation or maintenance.
- (3) If the excess emissions were caused by a bypass, the bypass was unavoidable to prevent loss of life, personal injury or severe property damage.
- (4) The frequency and duration of operation in startup and shutdown periods were minimized to the extent practicable.
- (5) Reasonable steps were taken to minimize the impact of excess emissions on ambient air quality.
- (6) The reason(s) any monitoring systems were not kept in operation, if applicable.
- (7) The owner or operator's actions during the period of excess emissions were documented by contemporaneous operating logs or other relevant evidence.
- (8) The facility was operated in a manner consistent with good practice for minimizing emissions; provided, however, that this provision shall not be construed to require the use

or installation of additional or redundant pollution control equipment not otherwise required and that this provision shall not be construed to automatically require the shutdown of process equipment to minimize emissions.

(9) The facility commits to develop and request an enforceable alternative emission limit or means of compliance under OAC 252:100-8-5(e)(7) or 100-7-15 for inclusion in the facility's permit for periods of startup and shutdown, or demonstrate either that such alternative is not necessary for future events, or that increased emissions during startup and shutdown are not reasonably conducive to estimation in advance.

(d) ~~**Affirmative defenses prohibited**~~ **Prohibited relief.** ~~The affirmative defense~~ Any relief allowed under the provisions of this section shall not be available for:

(1) Claims for injunctive relief.

(2) SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception.

(3) Excess emissions that cause an exceedance of the NAAQS or PSD increments.

(4) Failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63.

(5) Violations of requirements that derive from 40 CFR Parts 60, 61 and 63.

(e) ~~**Affirmative defense**~~ **Mitigation determination.** In making any determination whether to grant administrative penalty relief to a source established an affirmative defense under this section, the Director shall consider the information within the notification required in OAC 252:100-9-7 and any other information the Director deems necessary and relevant, which may include, but is not limited to, physical inspection of the facility and review of documentation pertaining to the maintenance and operation of emission units and air pollution control equipment. This section should shall not be construed as limiting to preclude EPA or citizens' authority under the Act federal court jurisdiction under Section 113 of the Act to assess civil penalties or other forms of relief for periods of excess emissions, to prevent EPA or the courts from considering the statutory factors for the assessment of civil penalties under Section 113, 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 Act.

(f) **Expiration of startup and shutdown mitigating provisions.** OAC 252:100-9-8(c) shall expire on November 22, 2018. Periods of excess emissions attributable to startup and shutdown that occur after this date shall be reported pursuant to the requirements of this chapter and will be considered under the Department's normal enforcement policies and rules.