DEPARTMENT OF ENVIRONMENTAL QUALITY
CHAPTER 100 AIR POLLUTION CONTROL RULES
SUMMARY OF COMMENTS AND STAFF RESPONSES
FOR PROPOSED REVISION TO SUBCHAPTER 9
EXCESS EMISSION REPORTING REQUIREMENTS

COMMENTS RECEIVED PRIOR TO AND DURING THE *OCTOBER 14, 2015*
AIR QUALITY ADVISORY COUNCIL MEETING

Written Comments

U.S. Environmental Protection Agency, Region 6 – Submitted as attachment to email received on October 12, 2015 from Mr. Guy Donaldson, Chief, Air Planning Section.

1. **COMMENT:** EPA provided both general and specific comments in support of the proposed changes. EPA supports Subsection 9-8(d) as proposed, because it specifically identifies the circumstances where affording potential mitigation is prohibited, and Subsection 9-8(e) as proposed, because it clearly states that Section 9-8 does not affect the jurisdiction of EPA, citizens, and the courts under §§ 113 and 304 of the CAA. EPA stated their understanding that under Subsection 9-8(c) as proposed, the alternative emission limits for startup and shutdown must be at least as stringent as required under the approved SIP. Comment number 6 was a request that DEQ include confirmation in the record first, that Subsections 9-8(b) and (c) do not affect the State's ability to seek penalties in court for excess emission violations, and second, that if a facility establishes it meets all the mitigating factors in Section 9-8, DEQ could still decide to assess an administrative penalty.

   RESPONSE: AQD appreciates the support, and confirms that Subsections 9-8(b) and (c) do not affect the State's ability or authority to seek penalties in court for excess emission violations, and second, that if a facility establishes it meets all the mitigating factors in Section 9-8, DEQ maintains the authority to assess an administrative penalty. DEQ also confirms EPA's understanding regarding the proposed language in Subsection 9-8(c) that references the Department's authority to include alternative emission limits for startup and shutdown in permits, "… provided the alternative does not establish an emission limitation less stringent than an applicable emission limitation in the EPA-approved state implementation plan." Authority for establishing such alternative limits does not derive from Subchapter 9, but from Subchapter 7 (Permits for Minor Facilities), Subchapter 8 (Permits for Part 70 Sources and Major New Source Review (NSR) Sources), and/or pollutant/industry-specific requirements contained in other subchapters. None of these provisions exempt startup and shutdown emissions from an otherwise applicable limitation.

OGE Energy Corp – Submitted as attachment to email received on October 12, 2015 from Ms. Usha-Maria Turner, Director, Corporate Environmental.

2. **COMMENT:** OG&E expressed concerns over eliminating the affirmative defense, particularly for excess emissions related to startup and shutdown, and stated that the affirmative defense should remain available until EPA approves the changes as SIP provisions.

   RESPONSE: Factoring in the in-depth discussion and responses to comments in EPA's SIP Call Federal Register Notice, along with Region 6's specific comments, and the current Air Quality rule, staff believes it is appropriate to remove the term "affirmative defense" from Subchapter 9. EPA's national action was predicated in part on a concern that allowing an affirmative defense for SSM may imply that some state, federal and/or citizen enforcement remedies are *precluded* if certain facts are established. Considering the structure and wording of Subchapter 9, the terms "mitigation" and "mitigating factors" more accurately reflect the rule as currently implemented, and are therefore more appropriate and less confusing than affirmative defense. Staff sees no advantage to delaying the effective date of this change.

3. **COMMENT:** OG&E stated that the penalty mitigation should remain in effect following EPA approval.

   RESPONSE: Under the proposed revision to Subsection 9-8(b), consideration of mitigating factors in administrative penalty assessments for excess emissions during malfunctions would remain essentially unchanged. Likewise, the process for considering mitigating factors in administrative penalty assessments for excess emissions during startup and shutdown would not substantially change under the proposed revision to Subsection 9-8(c). The proposed Subsection 9-8(f) would eventually shift the startup and shutdown mitigating factors from agency rules to AQD's Enforcement Policy, but this change is not expected to alter the penalty mitigation process in a practical way.

4. **COMMENT:** OG&E recommended removing the date in Subsection 9-8(f) for expiration of the startup and shutdown provisions in Subsection 9-8(c). OG&E expressed concern that the inclusion of a date could create a "SIP-gap," and would burden the agency's resources by creating a deadline for impacted facilities to seek permit revisions to accommodate startup and shutdown emissions.

   RESPONSE: Following discussions at the October 23, 2015 AQAC meeting among and between the Council members, AQD staff, and members of the public, the Council accepted the staff's recommendation that the proposed language in

Subsection 9-8(f) be changed so that the expiration of the Subsection 9-8(c) provisions would read "… November 22, 2018 or upon the effective date of federal approval of the provisions of Subchapter 9 in the State Implementation Plan (SIP), whichever is later." However, it should be noted that inclusion of an expiration date for startup and shutdown provisions in the proposed Subsection 9-8(f) would not add new nor remove existing requirements or protections for facilities with increased emissions during startup and shutdown. The affirmative defense in existing Subchapter 9 provisions provides facilities with an opportunity to justify a partial or total waiver of administrative penalties assessment by DEQ for an excess emissions violation, but cannot provide an automatic shield from those penalties, nor other enforcement actions brought by the State, EPA or third parties. Upon the expiration of Subsection 9-8(c), the startup and shutdown mitigating factors would shift from agency rules to AQD's Enforcement Policy, bringing DEQ in line with EPA's SSM Policy Guidance. The language changes in Subsection 9-8(c), including the addition of new paragraph 9-8(c)(9) would emphasize that anticipated emissions during startup and shutdown should be accounted for in a facility's permitted emissions. Proposed paragraph 9-8(c)(9) does not require facilities to obtain a permit revision, nor set a timeframe, either before or after the expiration of Subsection 9-8(c), by which such a request must be made.

5. **COMMENT:** OG&E requested that an "off ramp" be included in case a court was to stay or vacate the rule or the SIP Call.

RESPONSE: AQD staff believes it would not be appropriate to make a change in line with the commenter's recommendation. Over previous years, AQD has dealt appropriately with various court actions to minimize disruptions and burdens on both permitted facilities and agency resources, in most cases without an "off ramp" built into a specific rule. Furthermore, staff is unaware of appropriate language for a provision that would suffice in the case of a court stay or vacatur of the National SIP Call, that would maintain the purpose and stated scope of the proposal – particularly considering the status of SIP-approved excess emissions reporting requirements. Note however, that the change to the proposed Subsection 9-8(f), discussed in the preceding response, may alleviate some of the concerns expressed in this comment.

6. **COMMENT:** OG&E recommended that the rule provide a simpler and less burdensome method for including alternative emissions limits for startup and shutdown in permits, and to omit the term "federally enforceable."

RESPONSE: AQD staff believes it would not be possible or appropriate to make the recommended changes in Subchapter 9, considering existing Air Quality permitting

rules, as well as Department-wide permit processing rules in OAC 252:4 Rules of Practice and Procedure.

7. **COMMENT:** OG&E stated that mitigating factors should not be limited to administrative penalty assessments.

RESPONSE: DEQ's Legal staff carefully considered the existing Air Quality rules and governing statutes, along with the in-depth discussion and responses to comment in EPA's SIP Call Federal Register Notice, and EPA Region 6's specific comments, and concluded that the mitigating provisions of Subchapter 9 must be limited to administrative penalty assessments in order to avoid interfering with the jurisdiction of the courts.

Crowe & Dunlevy – Email with attachment received on October 12, 2015 from Mr. Donald K. Shandy, Crowe & Dunlevy, Attorneys and Counselors at Law.

8. **COMMENT:** Mr. Shandy provided recommended specific language changes for the proposal that would:

a. Retain the affirmative defense and other provisions as they currently exist until EPA approves the changes as SIP provisions, rather than including the date for the startup and shutdown provisions to shift from rules to AQD's Enforcement Policy.
b. Provide an "off ramp" in the event a court were to stay or vacate the rule or the SIP Call.
c. Provide a Tier I method for including alternative emissions limits for startup and shutdown in permits, and to omit the term "federally enforceable."
d. Not limit the applicability of the mitigating factors to administrative penalty assessments.

RESPONSE: Most of the changes recommended by Mr. Shandy are specific language changes similar to OG&E's comments and are therefore addressed by the previous responses to OG&E's comments. In summary, AQD believes that, factoring in the in-depth discussion and responses to comment in the SIP Call Federal Register Notice, along with Region 6's specific comments and the Air Quality permitting rules, it would not be possible or appropriate to make the recommended changes and maintain the purpose and stated scope of the proposal. However, following discussions at the October 23, 2015 AQAC meeting among and between the Council members, AQD staff, and members of the public, staff recommended that the proposed expiration of the Subsection 9-8(c) provisions be changed to read "…

November 22, 2018 or upon the effective date of federal approval of the provisions of Subchapter 9 in the State Implementation Plan (SIP), whichever is later."

9. **COMMENT:** Mr. Shandy recommended a change to proposed new Paragraph 9-8(c)(9) to make the AQ rules references more consistent with the rules references in the proposed new first sentence in Subsection 9-8(c).

RESPONSE: The two sets of rules references have been made consistent as "OAC 252:100-8-5(e)(7), 100-8-6(a)(1)(C), 100-7-15, and/or 100-7-18."

Oral Comments

Ms. Usha-Maria Turner, Director, Corporate Environmental OGE Energy Corp reiterated and clarified OG&E's written comments.

RESPONSE: See above