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 an attachment to an 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 252:100-9-8(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 federal Clean Air Act (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.

RESPONSE UPDATED JANUARY 7, 2016: The proposed language in Subsection 9-8(c) has been revised to further emphasize that inclusion of any alternative emission limit in a permit would be governed by the air quality rules' permitting provisions, not Subchapter 9. DEQ also confirms that under the revised proposal, the alternative emission limits for startup and shutdown must be at least as stringent as required under the approved SIP. No changes affected the proposal (or response to comments) for Subsections 9-8(b), (d), or (e).

OGE Energy Corp – Submitted as an attachment to an 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.

RESPONSE UPDATED JANUARY 7, 2016: In light of the October Council deliberations and subsequent further staff discussions, AQD has recommended dropping the previously proposed Subsection 9-8(f), which would have set a date for shifting the startup and shutdown mitigating factors from agency rules [in Subsection 9-8(c)] to AQD's Enforcement Policy.

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.

RESPONSE UPDATED JANUARY 7, 2016: In light of the October Council deliberations and subsequent further staff discussions, AQD has recommended dropping the previously proposed Subsection 9-8(f), which would have set a date for

shifting the startup and shutdown mitigating factors from agency rules [in Subsection 9-8(c)] to AQD's Enforcement Policy. Note that the proposal has also been revised to drop the previously proposed Paragraph 9-8(c)(9), which would have required a facility requesting consideration of mitigating factors for excess emissions during startup and shutdown to evaluate/request alternative emission limits for such emissions.

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, and 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.

RESPONSE UPDATED JANUARY 7, 2016: In light of the October Council deliberations and subsequent further staff discussions, AQD has recommended dropping the previously proposed Subsection 9-8(f). The changes in the revised proposal would not otherwise alter the response to 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 an 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."

RESPONSE UPDATED JANUARY 7, 2016: In light of the October Council deliberations and subsequent further staff discussions, AQD has recommended dropping the previously proposed Subsection 9-8(f). (See also updated responses to OG&E's comments.) The changes in the revised proposal would not otherwise alter the response to this comment.

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."

RESPONSE UPDATED JANUARY 7, 2016: In light of the October Council deliberations and subsequent further staff discussions, AQD has recommended dropping the previously proposed Paragraph 9-8(c)(9).

Oral Comments

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

RESPONSE: See above

COMMENTS RECEIVED PRIOR TO AND DURING THE *JANUARY 20, 2016* AIR QUALITY ADVISORY COUNCIL MEETING

Written Comments

U.S. Environmental Protection Agency, Region 6 – From Mr. Guy Donaldson, Chief, Air Planning Section, submitted as an attachment to an email received on January 14, 2016.

11. **COMMENT:** EPA provided both general and specific comments in support of the proposed changes, which are very similar to those provided in October (see above). EPA expressed support for 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 noted that the proposed language of Subsections 9-8(b) and (e) make clear that the mitigating factors are restricted to State enforcement proceedings.

EPA expressed support for the changes to the Subsection 9-8(c) proposal, and requests that DEQ confirm in the record that the alternative emission limits for startup and shutdown must be at least as stringent as required under approved SIP provisions.

EPA further emphasized that such alternative emission limits should be federally enforceable. EPA requested that DEQ include confirmation in the record that first, Subsections 9-8(b) and (c) do not affect the State's ability to seek penalties in court for excess emission violations, and that second, if a facility establishes that it meets all the mitigating factors in the Subchapter 9 provisions, DEQ could still decide to assess an administrative penalty. EPA suggested that the language in the proposal further clarify that any request for administrative penalty relief can be denied by the Department.

Besides reiterating these points, EPA's primary comments focus on actions outside rule promulgation process, but relevant to the subsequent SIP update. EPA stated specifically that the State should withdraw the 1994 version of Subchapter 9 from the Oklahoma SIP. They also suggested that if today's proposed changes are adopted, their concerns would seem to be satisfied, the mitigation provisions could continue in effect as "state-only" requirements, and Subchapter 9 should therefore not be submitted for inclusion in Oklahoma's SIP.

RESPONSE: AQD appreciates the support, and confirms first 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. Staff does not believe that further clarification on this point is necessary or appropriate.

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 "…any such alternative provision may not establish an emission limitation less stringent than an applicable emission limitation in the EPA-approved state implementation plan." Note that the proposed language in Subsection 9-8(c) has been revised to further emphasize that inclusion of any alternative emission limit in a permit would be governed by the air quality rules' permitting provisions, not Subchapter 9. Staff does not believe that further clarification in Subchapter 9 is necessary or appropriate. If the governing requirements in 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 are opened for review during future rulemaking, AQD may consider adding appropriate clarifying language.

DEQ will continue to work with EPA Region 6 staff regarding the most appropriate approach for SIP updates related to SSM, and expects, at a minimum, to withdraw the

1994 version of Subchapter 9 as a corrective SIP revision under the June 2015 National SIP Call (80 FR 33840). DEQ expects to seek input from the Air Quality Advisory Council and provide an opportunity for public review before finalizing a decision on a SIP submittal.

Sierra Club – From Ms. Laurie Williams, Staff Attorney, submitted as an attachment to an email received on January 20, 2016.

12. **COMMENT:** Sierra Club had two primary comments. The first comment stated that they found the proposed revisions to Section 9-8, Subsections (a), (b), (d) and (e) to be generally acceptable, because they make clear that the mitigating factors apply only to state administrative actions, and do not apply to actions by federal courts, EPA, or citizens. However, Sierra Club asserted that Section 9-8 should be removed from Oklahoma's SIP and maintained at most as a state-only rule. The commenter provided a copy of a letter dated 11/12/2015 from EPA to the Colorado Department of Public Health and Environment, Air Pollution Control Division, to support this assertion. The second comment is that the proposed revision to Subsection 9-8(c), as it relates to alternative emission limits for startup and shutdown emissions, is not adequate to comply with the Clean Air Act. The comments assert that 1) alternative emissions limits must themselves be developed through the SIP provision process, not merely through the permitting process for a facility, 2) the proposed rule fails to narrowly limit the use of alternative emissions standards, and 3) the proposed rule changes fail to make it adequately clear that, when establishing limits, the state must consider the collective impact of new limits on the NAAQS, PSD increments, and any other ambient standards such as toxics or other standards.

RESPONSE: As stated in the response to EPA's January comments, DEQ will continue to work with Region 6 staff regarding the most appropriate approach for SIP updates related to SSM, and expects, at a minimum, to withdraw the 1994 version of Subchapter 9 as a corrective SIP revision under the June 2015 National SIP Call (80 FR 33840). DEQ expects to seek input from the Air Quality Advisory Council and provide an opportunity for public review before finalizing a decision on a SIP submittal.

Regarding Sierra Club's comment related to development of alternative emission limits for startup and shutdown emissions, DEQ stresses again that Subchapter 9 sets out reporting requirements that apply to an excess emissions event. The proposed language in Subsection 9-8(c) has been revised to further emphasize that inclusion of any alternative emission limit in a permit would be governed by the air quality rules' permitting provisions, not Subchapter 9. The proposal does include informational language to recognize the Department's authority to include alternative emission

limits for startup and shutdown in permits, *provided* "…any such alternative provision may not establish an emission limitation less stringent than an applicable emission limitation in the EPA-approved state implementation plan." Staff does not believe that further clarification in Subchapter 9 is necessary or appropriate. If the governing requirements in Subchapter 7 (Permits for Minor Facilities), Subchapter 8 (Permits for Part 70 Sources and Major New Source Review (NSR) Sources) are opened for review during future rulemaking, AQD may consider adding appropriate clarifying language. If the Department believes that any pollutant/industry-specific requirements contained in other subchapters (i.e., "SIP limits") should be adjusted to accommodate startup and shutdown emissions, such a change would go through the regular agency rulemaking and SIP submittal procedures.

Oral Comments

13. **Mr. Johnson Bridgewater**, Oklahoma Chapter of Sierra Club, highlighted points from Sierra Club's (Ms. Williams') written comments.

RESPONSE: See above.

Mr. Donald K. Shandy, Crowe & Dunlevy, Attorneys and Counselors at Law

14. **COMMENT:** Mr. Shandy spoke in support of moving forward with the rule as proposed, and that it be submitted to EPA for inclusion in Oklahoma's SIP. Mr. Shandy also suggested inserting an additional phrase[1] (regarding reporting of excess emissions that are subject to LDAR provisions) to the end of the proposed last sentence in Section 9-1.1. In addition, Mr. Shandy stated that he disagrees with Sierra Club's position, as highlighted by Mr. Bridgewater, regarding Subsection 9-8(c), and that the subsection as proposed is accurate and appropriate.

RESPONSE: AQD appreciates Mr. Shandy's stated support for the proposal. As stated in response to other comments, DEQ will continue to work with Region 6 staff regarding the most appropriate approach for SIP updates related to SSM, and expects to seek input from the Air Quality Advisory Council and provide an opportunity for public review before finalizing a decision on a SIP submittal. Staff does not believe that the suggested addition to Section 9-1.1 is necessary or appropriate.

[1] "'…except, however, should excess emissions not be appropriately reported in accordance with an applicable LDAR program, the provisions of this subchapter shall apply,' or something to that effect."