



Division of Environment
Bureau of Air

REGULATORY IMPACT STATEMENT CONSISTING OF:

I. ENVIRONMENTAL BENEFIT STATEMENT
AND
II. ECONOMIC IMPACT STATEMENT

Pursuant to K.S.A. 77-416

**PROPOSED REVISED PERMANENT AIR QUALITY REGULATION:
K.A.R. 28-19-11**

August 2016

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Background of Proposed Amendments

The CAA (section 110(k)(5)) provides a mechanism commonly called a "SIP call" for correcting state implementation plans that the Administrator finds to be substantially inadequate to meet CAA requirements.

Exemptions from emission limits during periods of startup, shutdown and malfunction (SSM) exist in a number of state rules, some of which were adopted and approved into SIPs by the EPA many years ago.

Recent court decisions have held that under the CAA, such exemptions are not allowed in SIPs. Other court decisions have remanded similar exemptions in National Emissions Standards for Hazardous Air Pollutants (NESHAP), which the EPA is also correcting in separate actions.

On February 12, 2013, the EPA proposed to:

- deny the request in the Petition that EPA prohibit affirmative defenses in SIPs.
- grant the Petitioner's claim for 36 of the 39 states identified in the Petition, by proposing to determine that these 36 states have approved SIPs that include one or more SSM provision that is inconsistent with the CAA. EPA proposed a "SIP Call" for each of those 36 states.
- deny the request in the Petition that EPA discontinue reliance on interpretive letters from states to clarify any potential ambiguity in the state's SIP submission.

Subsequent to the February 2013 proposal, on April 18, 2014, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). The court evaluated the legal validity of an affirmative defense provision in

the EPA's NESHAP for the manufacturers of Portland cement. In the court's opinion, affirmative defense provisions in the EPA's own regulations cannot be applicable to violations of CAA requirements. The EPA extended the logic of the court's decision to SIP provisions and revised its SSM policy on approvability of affirmative defense provisions in SIPs.

The EPA issued a supplemental proposal in September 2014 to reflect the court's opinion that affirmative defense provisions cannot be applicable to violations of CAA requirements. In the supplemental proposal, the EPA revised what it proposed in February 2013 with respect to affirmative defense provisions and it proposed SIP calls for affirmative defense provisions in additional states.

On May 22, 2015, the U.S. Environmental Protection Agency (EPA) issued a final action to ensure states have plans in place that are fully consistent with the Clean Air Act and recent court decisions concerning startup, shutdown and malfunction (SSM) operations. Air pollution emitted during these periods may adversely affect the health of people in neighboring and downwind communities.

This action responds to a petition for rulemaking filed by the Sierra Club by addressing outdated provisions in State Implementation Plans (SIPs), improving national consistency and providing clarity for the treatment of emissions that occur during startup, shutdown and malfunction (SSM).

This final action specifically: responds to the Sierra Club Petition; 2. clarifies the EPA's SSM Policy to assure consistency with the Clean Air Act and recent court decisions; and 3. finalizes the Administrator's findings that the SSM provisions in the SIPs of 36 states (applicable in 45 statewide and local jurisdictions and no tribal areas) do

not meet the requirements of the Clean Air Act (CAA) and accordingly issues a “SIP call” for each of those states.

In issuing the SIP call action, the EPA directs the affected states to correct specific SSM provisions in their SIPs. The Clean Air Act allows a maximum of 18 months from the issuance of the final action to submit a SIP revision. The SIP submission deadline for each of the 36 states subject to the SIP call action is November 22, 2016.

This Regulatory Impact Statement, consisting of an Environmental Benefit Statement and Economic Impact Statement, is submitted in support of the proposed amendments.

Regulation Description

The proposed revised K.A.R. 28-19-11, once a final regulation and incorporated in a State Implementation Plan Revision submittal to EPA, removes the authority of KDHE to declare an SSM event “not a violation”. Therefore, while KDHE can still choose to not pursue an enforcement action for an SSM event, the owner or operator of the emission source that experienced the SSM event could still be susceptible to enforcement by the EPA or citizen lawsuits.

I. Environmental Benefit Statement

1) Need for proposed amendments and environmental benefit likely to accrue.

a) Need

These amendments are mandatory in order to comply with the EPA SIP Call and avoid a Federal Implementation Plan that would be placed on the State by the EPA if the State does not comply.

b) Environmental benefit

Emissions from startup, shutdown and malfunction events should not significantly change as a result of amendments to this regulation. These amendments only lessen the amount of protection from enforcement that the department can provide emission sources.

2) When applicable, a summary of the research indicating the level of risk to the public health or the environment being removed or controlled by the proposed rules and regulations or amendment.

Not applicable. These amendments will have a negligible effect on air emissions in the State.

3) If specific contaminants are to be controlled by the proposed regulations or amendment, a description indicating the level at which the contaminants are considered harmful according to current available research.

These amendments do not control specific contaminants. These amendments only remove the authority of the department to protect sources experiencing SSM events from EPA enforcement or citizen lawsuits.

II. Economic Benefit Statement

1) Are the proposed regulations or amendments mandated by federal law as a requirement for participating in or implementing a federally subsidized or assisted program?

No. This is not relevant to this proposed regulation in any fashion.

2) Do the proposed amendments exceed the requirements of applicable Federal law?

No. The proposed revised K.A.R. 28-19-11 does not exceed requirements of applicable federal law.

3) Description of costs to agencies, to the general public and to persons who are affected by, or are subject to, the regulations:

a) Capital and annual costs of compliance with the proposed amendments and the persons who will bear those costs.

The proposed amendments impose no new capital costs to the implementing agency or to the general public.

b) Initial and annual costs of implementing and enforcing the proposed amendments, including the estimated amount of paperwork, and the state agencies, other governmental agencies or other persons or entities who will bear the costs.

There are no initial or annual costs associated with the implementation and enforcement of the proposed amendments.

c) Costs which would likely accrue if the proposed regulations are not adopted, the persons who will bear the costs and those who will be affected by the failure to adopt the regulations.

The costs that would likely accrue if the proposed regulations are not adopted would be those associated with the requirements established by a Federal Implementation Plan put into place by the EPA. A Federal Implementation Plan could require more reporting of SSM events than the department's proposed amendments, therefore likely increasing costs to the department and industry.

d) A detailed statement of the data and methodology used in estimating the costs used in the statement.

Not applicable.

e) Description of any less costly or less intrusive methods that were considered by the agency and why such methods were rejected in favor of the proposed regulations.

No less costly or intrusive method was identified in the process of developing the proposed amendments.

f) Consultation with League of Kansas Municipalities, Kansas Association of Counties, and Kansas Association of School Boards.

Copies of the regulation, the regulatory impact statement, and the notice of hearing will be provided electronically to these organizations at the time of publication of the Notice of Hearing in the *Kansas Register*.