NOTICE OF INTENT

Department of Environmental Quality

Office of the Secretary

Legal Affairs Division

Repeal of Affirmative Defense Provisions

(LAC 33:III.501.B, 502.A, 507.J, and 535.A) (AQ398)

Under the authority of the Environmental Quality Act, R.S. 30:2001 et seq., and in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., the secretary gives notice that rulemaking procedures have been initiated to amend the Air regulations, LAC 33:III.501.B,502.A, 507.J, and 535.A (AQ398).

This Rule will remove affirmative defense provisions from LAC 33:III.507.J and from Part 70 General Condition N of LAC 33:III.535.A and relocate the definition of “upset” from LAC 33:III.507.J.1 to LAC 33:III.502.A. On July 21, 2023, EPA removed affirmative defense provisions from its Title V Operating Permit Program regulations (i.e., 40 CFR Parts 70 and 71).\* These provisions established an affirmative defense that sources could have asserted in enforcement cases brought for noncompliance with technology-based emission limitations in operating permits, provided that the exceedances occurred due to qualifying emergency circumstances. According to EPA, these provisions have never been required elements of state operating permit programs and were removed because they are inconsistent with the agency’s current interpretation of the enforcement structure of the Clean Air Act in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit.

State permitting authorities whose Part 70 programs contain impermissible affirmative defense provisions must remove such provisions from their EPA-approved Part 70 programs. EPA expects such states to submit to the agency either a program revision, or a request for an extension of time, by August 21, 2024. The basis and rationale for this Rule are to remove affirmative defense provisions from Louisiana's air quality regulations to comply with federal regulations. This Rule meets an exception listed in R.S. 30:2019(D)(2) and R.S. 49:963.B(3); therefore, no report regarding environmental/health benefits and social/economic costs is required.

**Family Impact Statement**

This Rule has no known impact on family formation, stability, and autonomy as described in R.S. 49:972.

**Poverty Impact Statement**

This Rule has no known impact on poverty as described in R.S. 49:973.

**Small Business Analysis**

This Rule has no known impact on small business as described in R.S. 49:974.1 - 974.8.

**Provider Impact Statement**

This Rule has no known impact on providers as described in HCR 170 of 2014.

**Public Comments**

All interested persons are invited to submit written comments on the proposed regulation. Persons commenting should reference this proposed regulation by AQ398. Such comments must be received no later than November 6, 2024, at 4:30 p.m., and should be sent to William Little, Attorney Supervisor, Office of the Secretary, Legal Affairs Division, P.O. Box 4302, Baton Rouge, LA 70821-4302, by fax (225) 219-4068, or by E-mail to DEQ.Reg.Dev.Comments@la.gov. Copies of the proposed regulation can be purchased by contacting the LDEQ Public Records Center at (225) 219-3168. Check or money order is required in advance for each copy of AQ398. The proposed regulation is available on the Internet at https://deq.louisiana.gov/page/monthly-regulation-changes-2024%20.

**Public Hearing**

A public hearing will be held at the on October 30, 2024, at 1:30 p.m. in the Galvez Building, Oliver Pollock Conference Room, 602 N. Fifth Street, Baton Rouge, LA 70802. Interested persons are invited to attend in person or via Zoom at https://deqlouisiana.zoom.us/j/93713913864?pwd=gs6n6d3WEoKQzntrEfwhvWewKI9sFC.1 or by telephone by dialing (646) 255-1997 using the meeting ID 937 1391 3864, passcode 6150003. Should individuals with a disability need an accommodation in order to participate, contact Doug Bordelon at the address given below or at (225) 219-1325.

The proposed regulation is available for inspection at the following LDEQ office locations from 8 a.m. until 4:30 p.m.: 602 N. Fifth Street, Baton Rouge, LA 70802; 508 Downing Pines Road, West Monroe, LA 71292; State Office Building, 1525 Fairfield Avenue, Shreveport, LA 71101; 1301 Gadwall Street, Lake Charles, LA 70615; 111 New Center Drive, Lafayette, LA 70508; 110 Barataria Street, Lockport, LA 70374; 201 Evans Road, Bldg. 4, Suite 420, New Orleans, LA 70123.

Aurelia S. Giacometto

Secretary

**Title 33**

**ENVIRONMENTAL QUALITY**

**Part III. Air**

**Chapter 5. Permit Procedures**

**§501. Scope and Applicability**

A. — B.1.c. …

d. any *upset*, as defined in LAC 33:III.~~507.J.1~~502.A; however, the permitting authority shall be advised of such occurrences without delay, in accordance with all applicable upset or emergency provisions of Louisiana Air Quality regulations and of LAC 33:I.Chapter 39; or

B.1.e. — D.7. …

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2011 and 2054.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of Air Quality and Nuclear Energy, Air Quality Division, LR 13:741 (December 1987), amended by the Office of Air Quality and Radiation Protection, Air Quality Division, LR 16:613 (July 1990), LR 17:478 (May 1991), LR 19:1420 (November 1993), LR 20:1281 (November 1994), LR 20:1375 (December 1994), LR 23:1677 (December 1997), amended by the Office of the Secretary, LR 25:660 (April 1999), amended by the Office of Environmental Assessment, Environmental Planning Division, LR 26:2445 (November 2000), LR 28:997 (May 2002), amended by the Office of Environmental Assessment, LR 31:1063 (May 2005), amended by the Office of the Secretary, Legal Affairs Division, LR 31:2436 (October 2005), LR 32:1842 (October 2006), LR 33:2082 (October 2007), LR 33:2626 (December 2007), LR 35:461 (March 2009), LR 35:2351 (November 2009), LR 37:1145, 1148 (April 2011), LR 37:1391 (May 2011), LR 37:3221, 3233 (November 2011), repromulgated LR 37:3507 (December 2011), amended by the Office of the Secretary, Legal Division, LR 43:520 (March 2017), amended by the Office of the Secretary, Legal Affairs and Criminal Investigation Division, LR 43:2149 (November 2017), amended by the Office of the Secretary, Legal Affairs Division LR 50:

**§502. Definitions**

A. …

\* \* \*

*Upset*—any situation arising from sudden and reasonably unforeseeable events beyond the control of the owner or operator, including acts of God, which situation requires immediate corrective action to restore normal operation and that causes the source to exceed a technology-based emissions limitation under the permit due to unavoidable increases in emissions attributable to the situation. An upset shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2054.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of Air Quality and Radiation Protection, Air Quality Division, LR 19:1420 (November 1993), amended by the Office of Environmental Assessment, Environmental Planning Division, LR 26:2445 (November 2000), LR 28:1950 (September 2002), amended by the Office of the Secretary, Legal Affairs Division, LR 36:2553 (November 2010), LR 37:1148 (April 2011), LR 37:1391 (May 2011), amended by the Office of the Secretary, Legal Division, LR 41:2608 (December 2015), LR 42:564 (April 2016), amended by the Office of the Secretary, Legal Affairs and Criminal Investigations Division, LR 44:749 (April 2018), amended by the Office of the Secretary, Legal Affairs Division, LR 50:

**§507. Part 70 Operating Permits Program**

A. — I.4.b. …

J. ~~Upset Provisions~~Reserved.

~~1. For the purposes of this Subsection, an~~ *~~upset~~* ~~is any situation arising from sudden and reasonably unforeseeable events beyond the control of the owner or operator, including acts of God, which situation requires immediate corrective action to restore normal operation and that causes the source to exceed a technology-based emissions limitation under the permit due to unavoidable increases in emissions attributable to the situation. An upset shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.~~

~~2. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based emissions limitations provided the owner or operator demonstrates through properly signed, contemporaneous operating logs or other relevant evidence that:~~

~~a. an upset occurred and that the owner or operator can identify the cause(s) of the upset;~~

~~b. the permitted facility was at the time being properly operated;~~

~~c. during the period of the upset the operator took all reasonable steps to minimize levels of emissions that exceeded the emissions standards and other requirements in the permit; and~~

~~d. the owner or operator notified the permitting authority in accordance with LAC 33:I.Chapter 39.~~

~~3. In any enforcement proceeding, the owner and operator seeking to establish the occurrence of an upset has the burden of proof.~~

~~4. The provisions of this Subsection are in addition to any emergency or upset provisions contained in any applicable requirement.~~

~~5. The provisions of this Subsection do not apply to acid rain emission limitations.~~

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2011, 2023, 2024, and 2054.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of Air Quality and Nuclear Energy, Air Quality Division, LR 13:741 (December 1987), amended by the Office of Air Quality and Radiation Protection, Air Quality Division, LR 19:1420 (November 1993), LR 20:1375 (December 1994), amended by the Office of Environmental Assessment, Environmental Planning Division, LR 26:2447 (November 2000), LR 27:2229 (December 2001), LR 28:994 (May 2002), LR 29:698 (May 2003), LR 30:1008 (May 2004), amended by the Office of Environmental Assessment, LR 31:1061 (May 2005), LR 31:1568 (July 2005), amended by the Office of the Secretary, Legal Affairs Division, LR 31:2437 (October 2005), LR 32:808 (May 2006), LR 33:1619 (August 2007), LR 33:2083 (October 2007), LR 33:2630 (December 2007), LR 34:1391 (July 2008), LR 35:1107 (June 2009), LR 36:2272 (October 2010), LR 37:2990 (October 2011), LR 38:1229 (May 2012), amended by the Office of the Secretary, Legal Division, LR 39:1276 (May 2013), LR 40:1334 (July 2014), LR 41:1274 (July 2015), LR 42:1085 (July 2016), amended by the Office of the Secretary, Legal Affairs and Criminal Investigations Division, LR 44:746 (April 2018), LR 46:893 (July 2020), LR 47:355 (March 2021), LR 48:488 (March 2022), amended by the Office of the Secretary, Legal Affairs Division, LR 50:

**§535. Part 70 General Conditions**

A. …

| **40 CFR Part 70 General Conditions** |
| --- |
| A. — M. … |
| N. ~~If the permittee seeks to reserve a claim of an affirmative defense as provided in LAC 33:III.507.J.2, the permittee shall, in addition to complying with any emergency or upset provisions in any applicable regulation, notify the permitting authority within two working days of the time when emission limitations were exceeded due to the occurrence of an~~ *~~upset~~*~~, as defined in LAC 33:III.507.J.1. In the event of such an upset, which results in excess emissions, the permittee shall demonstrate through properly signed, contemporaneous operating logs, or other relevant evidence that:~~Reserved.  ~~1. an upset occurred and the cause was identified;~~  ~~2. the permitted facility was being operated properly at the time;~~  ~~3. during the period of the upset, the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standard or requirement of the permit; and~~  ~~4. the permittee notified the permitting authority in accordance with LAC 33:I.Chapter 39.~~ |
| O. — W. … |

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2011, 2023, 2024, and 2054.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, Legal Affairs Division, LR 35:658 (April 2009), amended by the Office of the Secretary, Legal Affairs Division, LR 50:

**FISCAL AND ECONOMIC IMPACT STATEMENT**

**FOR ADMINISTRATIVE RULES**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Person Preparing Statement: | Bryan D. Johnston |  | Dept.: | Environmental Quality |
| Phone: | (225) 219-3450 |  | Office: | Environmental Services |
| Return Address: | 602 North Fifth Street |  | Rule Title: | Repeal of Affirmative Defense |
|  | Baton Rouge, LA 70802 |  |  | Provisions (LAC 33:III.501.B, 502.A, 507.J, and 535.A) |
|  |  |  | Date Rule Takes Effect: | Upon Promulgation |

SUMMARY

(Use complete sentences)

In accordance with Section 961 of Title 49 of the Louisiana Revised Statutes, there is hereby submitted a fiscal and economic impact statement on the rule proposed for adoption, repeal or amendment. THE FOLLOWING STATEMENTS SUMMARIZE ATTACHED WORKSHEETS, I THROUGH IV AND WILL BE PUBLISHED IN THE LOUISIANA REGISTER WITH THE PROPOSED AGENCY RULE.

1. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

There are no estimated implementation costs or savings to state or local governmental units as a result of the proposed rule change.

The proposed rule change will remove affirmative defense provisions from the Louisiana Administrative Code. On July 21, 2023, the U.S. Environmental Protection Agency (EPA) removed affirmative defense provisions from its Title V Operating Permit Program regulations. According to EPA, these provisions have never been required elements of state operating permit programs and were removed because they are inconsistent with the agency’s current interpretation of the enforcement structure of the Clean Air Act in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit. State permitting authorities whose Part 70 programs contain impermissible affirmative defense provisions must align their programs with the EPA’s updated guidelines.

1. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

There is no estimated increase or decrease in revenues to state or local governmental units as a result of the proposed rule change.

1. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS, SMALL BUSINESSES, OR NON-GOVERNMENTAL GROUPS (Summary)

Owners and operators of Part 70 sources will be directly affected by the proposed action, as they will no longer be able to claim affirmative defense. There is no anticipated increase in costs, workload adjustments or additional paperwork, as a result of the proposed action.

1. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

There is no estimated effect on competition or employment in the public or private sector as a result of the proposed rule change.

|  |  |  |
| --- | --- | --- |
|  |  |  |
| Signature of Head or Designee |  | Legislative Fiscal Officer or Designee |
| Aurelia S. Giacometto, Secretary |  |  |
| Typed Name & Title of Agency Head or Designee |  |  |
|  |  |  |
| Date of Signature |  | Date of Signature |

**FISCAL AND ECONOMIC IMPACT STATEMENT**

**FOR ADMINISTRATIVE RULES**

The following information is required in order to assist the Legislative Fiscal Office in its review of the fiscal and economic impact statement and to assist the appropriate legislative oversight subcommittee in its deliberation on the proposed rule.

1. Provide a brief summary of the content of the rule (if proposed for adoption, or repeal) or a brief summary of the change in the rule (if proposed for amendment). Attach a copy of the notice of intent and a copy of the rule proposed for initial adoption or repeal (or, in the case of a rule change, copies of both the current and proposed rules with amended portions indicated).   
     
   The proposed rule change will remove affirmative defense provisions from LAC 33:III.507.J and from Part 70 General Condition N of LAC 33:III.535.A and relocate the definition of “upset” from LAC 33:III.507.J.1 to LAC 33:III.502.A.
2. Summarize the circumstances, which require this action. If the Action is required by federal regulation, attach a copy of the applicable regulation.   
     
   On July 21, 2023, EPA removed affirmative defense provisions from its Title V Operating Permit Program regulations (i.e., 40 CFR Parts 70 and 71). These provisions established an affirmative defense that sources could have asserted in enforcement cases brought for noncompliance with technology-based emission limitations in operating permits, provided that the exceedances occurred due to qualifying emergency circumstances.

According to EPA, these provisions have never been required elements of state operating permit programs and were removed because they are inconsistent with the agency’s current interpretation of the enforcement structure of the Clean Air Act in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit.

State permitting authorities whose Part 70 programs contain impermissible affirmative defense provisions must remove such provisions from their EPA-approved Part 70 programs.

\* See *Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program* (88 FR 47029).

1. Compliance with Act 11 of the 1986 First Extraordinary Session
2. Will the proposed rule change result in any increase in the expenditure of funds? If so, specify amount and source of funding.

No, the proposed rule change will not result in any increase in the expenditure of funds.

(2) If the answer to (1) above is yes, has the Legislature specifically appropriated the funds necessary for the associated expenditure increase?

(a) YES. If yes, attach documentation.

(b) NO. If no, provide justification as to why this rule change should be published at this time

This question is not applicable.

**FISCAL AND ECONOMIC IMPACT STATEMENT**

**WORKSHEET**

I. A. COSTS OR SAVINGS TO STATE AGENCIES RESULTING FROM THE ACTION PROPOSED

1. What is the anticipated increase (decrease) in costs to implement the proposed action?

No costs or savings to state agencies are anticipated as a result of the proposed rule change.

|  |  |  |  |
| --- | --- | --- | --- |
| **COSTS** | **FY 25** | **FY 26** | **FY 27** |
| PERSONAL SERVICES | $0 | $0 | $0 |
| OPERATING EXPENSES | $0 | $0 | $0 |
| PROFESSIONAL SERVICES | $0 | $0 | $0 |
| OTHER CHARGES | $0 | $0 | $0 |
| EQUIPMENT | $0 | $0 | $0 |
| MAJOR REPAIR & CONSTR. | $0 | $0 | $0 |
| **TOTAL** | **$0** | **$0** | **$0** |
| **POSITIONS (#)** | **0** | **0** | **0** |

1. Provide a narrative explanation of the costs or savings shown in "A. 1.", including the increase or reduction in workload or additional paperwork (number of new forms, additional documentation, etc.) anticipated as a result of the implementation of the proposed action. Describe all data, assumptions, and methods used in calculating these costs.

Not applicable.

1. Sources of funding for implementing the proposed rule or rule change.

|  |  |  |  |
| --- | --- | --- | --- |
| **SOURCE** | **FY 25** | **FY 26** | **FY 27** |
| STATE GENERAL FUND | $0 | $0 | $0 |
| AGENCY SELF-GENERATED | $0 | $0 | $0 |
| DEDICATED | $0 | $0 | $0 |
| FEDERAL FUNDS | $0 | $0 | $0 |
| OTHER (Specify) | $0 | $0 | $0 |
| **TOTAL** | **$0** | **$0** | **$0** |

1. Does your agency currently have sufficient funds to implement the proposed action? If not, how and when do you anticipate obtaining such funds?   
     
   No additional funds are required to implement the proposed action.

B. COST OR SAVINGS TO LOCAL GOVERNMENTAL UNITS RESULTING FROM THE ACTION PROPOSED.

1. Provide an estimate of the anticipated impact of the proposed action on local governmental units, including adjustments in workload and paperwork requirements. Describe all data, assumptions and methods used in calculating this impact.   
     
   No impact on local governmental units is anticipated.
2. Indicate the sources of funding of the local governmental unit, which will be affected by these costs or savings.   
     
   There will be no costs or savings to local governmental units, so no funding sources will be affected.

**FISCAL AND ECONOMIC IMPACT STATEMENT**

**WORKSHEET**

II. EFFECT ON REVENUE COLLECTIONS OF STATE AND LOCAL GOVERNMENTAL UNITS

1. What increase (decrease) in revenues can be anticipated from the proposed action?

No increase or decrease in revenues to state and local governmental units is anticipated.

|  |  |  |  |
| --- | --- | --- | --- |
| **REVENUE INCREASE/DECREASE** | **FY 25** | **FY 26** | **FY 27** |
| STATE GENERAL FUND | $0 | $0 | $0 |
| AGENCY SELF-GENERATED | $0 | $0 | $0 |
| DEDICATED | $0 | $0 | $0 |
| FEDERAL FUNDS | $0 | $0 | $0 |
| LOCAL FUNDS | $0 | $0 | $0 |
| **TOTAL** | **$0** | **$0** | **$0** |

\*Specify the particular fund being impacted.

1. Provide a narrative explanation of each increase or decrease in revenues shown in "A." Describe all data, assumptions, and methods used in calculating these increases or decreases.   
     
   No increase or decrease in revenues is anticipated.

III. COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS, SMALL BUSINESSES, OR NONGOVERNMENTAL GROUPS

A. What persons, small businesses, or non-governmental groups would be directly affected by the proposed action? For each, provide an estimate and a narrative description of any effect on costs, including workload adjustments and additional paperwork (number of new forms, additional documentation, etc.), they may have to incur as a result of the proposed action.   
  
Owners and operators of Part 70 sources will be directly affected by the proposed action, as they will no longer be able to claim affirmative defense. There is no anticipated increase in costs, workload adjustments or additional paperwork, as a result of the proposed action.

1. Also provide an estimate and a narrative description of any impact on receipts and/or income resulting from this rule or rule change to these groups.

No impact on receipts or income of the directly affected persons or nongovernmental groups is anticipated.

IV. EFFECTS ON COMPETITION AND EMPLOYMENT

Identify and provide estimates of the impact of the proposed action on competition and employment

in the public and private sectors. Include a summary of any data, assumptions and methods used in making these estimates.   
  
There will be no anticipated effect on competition or employment in the public or private sector.