

Laura Almond

From: Laura Almond
Sent: Monday, December 9, 2024 1:11 PM
To: apa.s-envq@legis.la.gov; 'apa.h-natr@legis.la.gov'; 'apa.senatepresident@legis.la.gov'; 'apa.housespeaker@legis.la.gov'
Cc: Aurelia Giacometto (DEQ Secretary); Noah Hoggatt (DEQ); Jill Clark
Subject: Summary Report for Proposed Rule AQ398
Attachments: AQ398 NOI.pdf; AQ398 Response to Comments.pdf

December 9, 2024

The Honorable Eddie J. Lambert, Chairman
c/o Committee Staff
Senate Committee on Environmental Quality

The Honorable Brett F. Geymann, Chairman
House Committee on Natural Resources and Environment
c/o Committee Staff

RE: Summary Report for Proposed Rule AQ398
Repeal of Affirmative Defense Provisions
(LAC 33:III.501.B, 502.A, 507.J, and 535.A)
Proposed on September 20, 2024

Pursuant to the Louisiana Administrative Procedure Act, the Louisiana Department of Environmental Quality is submitting a report regarding the above-referenced proposed rule, which was published in the *Louisiana Register*. Comments were received. No changes have been made to the proposed rule since the report provided for in R.S. 49:966(B) was submitted. Attached are computer files comprising the summary report along with a copy of the notice of intent. The original proposed rule was previously provided to you and is not being resubmitted with this report.

We would appreciate it if you would acknowledge receipt of this message by return email. Please contact Laura Almond at (225) 219-3981 if you have any questions regarding this material.

Sincerely yours,

W. Noah Hoggatt
Executive Counsel

This concludes this transmission.

Laura Almond
Environmental Project Specialist
Louisiana Department of Environmental Quality
Legal Affairs Division

(225) 219-3985

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 RP071. 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 RP071. 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=gs6n6d3WBoKQznrEfvhwWewK19sFC.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

FISCAL AND ECONOMIC IMPACT STATEMENT FOR ADMINISTRATIVE RULES RULE TITLE: Radiation Protection

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENT UNITS (Summary)

There are no anticipated implementation costs or savings to state or local governmental units from the proposed rule change.

This rule change updates the regulations pertaining to dosimetry and makes miscellaneous technical corrections, to update the state regulations to be compatible with changes in the federal regulations.

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

There is no anticipated increase or decrease on revenue collections of state or local governmental units from the proposed rule change.

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

No persons, small businesses, or nongovernmental groups are anticipated to be directly affected by the proposed rule change.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

This proposed rule change will have no impact on competition and employment in the public or private sectors.

Aurelia S. Giacometto
Secretary
24094042

Patrice Thomas
Deputy Fiscal Officer
Legislative Fiscal Officer

NOTICE OF INTENT

Department of Environmental Quality
Office of the Secretary
Legal Affairs Division

Repeal of Affirmative Defense Provisions
(LAC 33:III.501, 502, 507, and 535) (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.

**Title 33
ENVIRONMENTAL QUALITY**

Part III. Air

Chapter 5. Permit Procedures

§501. Scope and Applicability

A. - B.I.c. ...

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

B.I.c. - 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. Reserved.

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. ...

A. - M.
N. Reserved.
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:

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=gs6n6d3WEoKQznrEfwWwKI9sFC.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

FISCAL AND ECONOMIC IMPACT STATEMENT FOR ADMINISTRATIVE RULES
RULE TITLE: Repeal of Affirmative Defense Provisions

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENT 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.

II. 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.

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

IV. 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.

Aurelia S. Giacometto
Secretary
2409#041

Patrice Thomas
Deputy Fiscal Officer
Legislative Fiscal Office

NOTICE OF INTENT
Office of the Governor
Capital Area Groundwater Conservation Commission
Measuring Well Yield (LAC 56:V.709)

Notice is hereby given in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq. and through the authority granted to the Capital Area Groundwater Conservation Commission (R.S. 38:3071-3084) under the authority granted by R.S. 38:3076.A.(7), (8), and R.S. 38:3076.E. that the Capital Area Groundwater Conservation Commission proposes to amend Section 709 of Chapter 7 of Part V of Title 56 to provide how well owners shall provide well yield measurement data to the Commission. This Rule change will amend LAC 56:V.709 by adopting Section 709B and Section 709C.

Title 56
PUBLIC WORKS
Part V. Capital Area Ground Water Conservation Commission
Chapter 7. Rules and Regulations for Metering and/or Recording the Yield of Water Wells
§709. Records
A. The well owner shall be required to keep records of well yield and shall, on request, furnish data concerning such records to the representatives of the Capital Area Groundwater Conservation Commission [R.S. 38:3076A(8)].
B. For the data from well owners with district provided monitoring/auditing equipment, this data is provided automatically through the supervisory control and data acquisition (SCADA) system.
C. Well owners which do not have district-provided monitoring/auditing equipment, shall provide flow measurement data from each well from the month prior by the fifteenth of each month to the district staff utilizing a comma separated value (CSV) format and delivered to the district via secure file transfer protocol (SFTP), which format and delivery method may be modified over time by the commission to accommodate new technologies.
AUTHORITY NOTE: Promulgated in accordance with R.S. 38:3076(14) and 38:3079. Amended in accordance with R.S. 38:3076.A.(7), (8), and R.S. 38:3076.E.
HISTORICAL NOTE: Promulgated by the Office of the Governor, Capital Area Ground Water Conservation Commission, LR 3:307 (July 1977), promulgated LR 33:2647 (December 2007), amended LR 50:

**Comment Summary Response & Concise Statement –
Repeal of Affirmative Defense Provisions
LAC 33:III.501.B, 502.A, 507.J, and 535.A
Log Number AQ398**

COMMENT 1: The basis and rationale for this Proposed Rule are to comply with federal regulations. These provisions are proposed for removal because they are inconsistent with the enforcement structure of the Clean Air Act; State permitting authorities whose Part 70 programs contain impermissible affirmative defense provisions must remove such provisions from their EPA-approved Part 70 programs.

If not repealed, these provisions would continue illegal loopholes in the State Part 70 program that gifted an affirmative defense to sources – gifted industry a free pass to pollute without consequences. Sources could continue to assert this affirmative defense provision and avoid liability and even accountability for violations of the Clean Air Act. Such illegal loopholes can have devastating effects on nearby communities' quality of life, health, safety, and welfare.

While qualifying emergency circumstance events seem to especially occur after natural disasters, such as hurricanes and tornadoes, some industries in Louisiana have frequently raised such affirmative defenses for more common weather events; events the industry's weatherization plan should be able to handle without permit violations.

All businesses operating in Louisiana should be well prepared for and invest in the proper weatherization plans. Louisiana has always had more frequent, more intense weather events, including large amounts of rainfall in a short time-frame, and extreme temperature changes. In Louisiana, It is not uncommon to experience temperatures at or above 100 degrees plus an extreme heat index or to experience temperatures below ten degrees plus wind chill factor. A summer squall with over twelve inches of rain within half an hour has never been uncommon along Louisiana's coast.

Forecasted weather events are neither sudden nor unforeseeable. Community alerts of extreme conditions are sent via television, radio, and parish communication systems, including social media and the local emergency planning committee's (LEPC) listserv notifications. Most industry in

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Louisiana participate in and receive notifications from the local parish LEPC.

One recent example of industry seeking an affirmative defense waiver to pollute without consequence occurred in 2024 in Chalmette, Louisiana, St Bernard Parish; an area designated nonattainment for sulfur dioxide.

The community was alerted to the forecasted hours-long below-freezing temperatures and the expected effect on infrastructure. This was not a natural disaster. When the temperatures were below freezing for hours, the industry's winterization plan failed. A post-event review identified an air permit violation: over 4500 pounds of sulfur dioxide released over 7 hours. Forty-two days later, the industry wrote a letter of notification of "force majeure" and "requests for enforcement discretion." The letter also stated its intention to claim the upset provision affirmative defense pursuant LAC 33:III.507.J because "the freezing weather was a sudden and reasonably unforeseeable event". The industry reported the root cause of the incident was the freezing of the pipe, a "considered "act of God" and non-preventable."

Clearly, no industry should be allowed to release pollution with impunity. Without consequences and incentive to invest in improvements, industry will continue to harm our communities, adversely affecting our most vulnerable residents who reside on the other side of the fence line.

We all need to do our part to be part of the solution. We are dependent on Louisiana DEQ to protect the environment we live in, the air we are forced to breathe. We need the EPA and Louisiana DEQ to step up and do their part. The repeal of the affirmative defense provisions is another good first step towards protecting our environment.

FOR/AGAINST: No arguments necessary; comment does not suggest amendment or change.

RESPONSE 1: LDEQ appreciates the support.

COMMENT 2: [T]he Associations support LDEQ's compliance with federal regulation and EPA's mandates.

No arguments necessary; comment does not suggest amendment or change.

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RESPONSE 2: LDEQ appreciates the support.

COMMENT 3: *The Emergency/Upset Defense is based on EPA's Part 70 requirements and longstanding court precedent for applicable emissions standards.*

Technology based standards have been developed to reduce air pollution to appropriate statutory levels as required by the Clean Air Act ("CAA"). Although these statutes are stringent, they do not require achievement of the impossible. Instead, under both programs, the EPA is required to establish *achievable* technology based emission standards. Under well-established statutory interpretations, new sources are held to a higher standard than existing sources, and control of toxic pollutants is generally much more stringent than for conventional pollutants.

For instance, New Source Performance Standards ("NSPS"), 12 "Maximum Achievable Control Technology" ("MACT" or National Emissions Standards for Hazardous Air Pollutants or "NESHAP")), the Prevention of Significant Deterioration ("PSD") program, and Reasonably Available Control Technology ("RACT") standards all proscribe standards that must be "achievable." Louisiana's previously-federally approved "emergency" defense that is part of its Part 70 program applies only to technology based standards. It does not provide an affirmative defense to risk based limitations. Without inclusion of this affirmative defense provision in its permitting programs, LDEQ would in effect be applying standards more stringent than those authorized by the governing statutes and rules that are the basis for its State Implementation Plan and federally applicable NSPS, NESHAP, PSD, or Nonattainment New Source Review rules.

FOR: Removing affirmative defense provisions from Louisiana's air quality regulations would result in LDEQ implementing standards more stringent than those set forth in federally applicable requirements and their underlying statutes.

AGAINST: EPA is requiring permitting authorities whose part 70 programs contain affirmative defense provisions to remove such provisions from their EPA-approved programs.

RESPONSE 3: 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) (see "Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program" at 88 FR

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47029). This rulemaking requires permitting authorities whose part 70 programs contain affirmative defense provisions to remove such provisions from their EPA-approved programs.

EPA has the authority under Section 502(i) of the Clean Air Act and 40 CFR 70.10 to issue notices of deficiency, apply sanctions, and potentially withdraw approval of part 70 programs under appropriate circumstances if a permitting authority fails to submit required program revisions to EPA.

COMMENT 4: *The EPA's original Part 70 emergency defense provisions were based on longstanding precedent established by U.S. Circuit Courts of Appeals for measuring a source's compliance with technology based standards.*

When promulgating the rules used to establish the Part 70 Operating Permit Program, the EPA included the emergency upset provisions that it has now deleted. At that time, the Preamble to the proposed Part 70 rules indicated that EPA considered cases that supported and detracted from the affirmative defense provisions.

In developing the prior affirmative defense provisions in the Part 70 rules, EPA thus carefully reviewed these authorities and concluded that it was appropriate to include an emergency affirmative defense provision in Part 70 to "account for the inherent fallibility of technology" in technology based standards. EPA stressed that such a defense is appropriate for technology based standards, but not health or risk based standards. Affirmative defenses for emergencies should be retained to the extent they are necessary to meet achievable, technology-based emission limits.

FOR: Affirmative defense provisions should be retained for situations beyond the control of the owner or operator that cause a source to exceed a technology-based emissions limitation, as EPA originally held that such provisions were appropriate and legally defensible.

AGAINST: Notwithstanding EPA's prior position, EPA is now requiring permitting authorities whose part 70 programs contain affirmative defense provisions to remove such provisions from their EPA-approved programs.

RESPONSE 4: See Response 3.

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COMMENT 5: **The D.C. Circuit’s decision in *NRDC v. EPA* does not require the repeal of affirmative defenses for enforcement proceedings under Part 70 operating permits.**

EPA erroneously employed a broad interpretation of the District of Columbia Circuit’s decision in *Natural Resources Defense Council v. E.P.A.* Numerous circuit courts have held that affirmative defenses for emergency conditions are permissible for SIPs implementing Clean Air Act requirements. EPA’s Final Rule, and the rulemaking here, are not compelled by the *NRDC* decision. In fact, the *NRDC* decision, read with the decisions of other circuits in *Luminant*, *Montana Sulfur*, and *Arizona PSC*, leaves significant room for EPA to allow states to retain approved SIPs and Part 70 programs that incorporate an emergency/upset defense.

It is abundantly clear that the D.C. Circuit held that affirmative defenses, that are not allowable in a civil suit, are available in an administrative process. Interestingly, the EPA argued in *NRDC* that the “affirmative defense simply fleshes out the statutory requirement that penalties be applied only when appropriate.” Yet in its 2016 and 2022 Proposals, the EPA argues that penalties are inappropriate where the violation is caused by a *bona fide* emergency. Indeed, according to the D.C. Circuit, the EPA Administrator may remit *any* administrative penalty; thus, if the EPA believes that it is appropriate to remit administrative penalties associated with emergencies, the EPA should have retained associated affirmative defenses. Moreover, the EPA argued to the Court that it is inappropriate to assess penalties due to events that are out of the control of the facility.

Even so, the EPA has now completely scrapped all affirmative defenses found in Part 70, whether civil or administrative. *NRDC*, as well as the *Luminant*, *Montana Sulphur*, and *Arizona PSC* cases clearly illustrate that other viable options exist. In particular, the state-federal partnership inherent to the SIP processes requires that EPA avoid removal of such affirmative defenses that exist within approved SIPs and EPA should give deference to a state’s judgment in these situations, including the LDEQ. Moreover, on March 1, 2024, the D.C. Circuit made abundantly clear in *Env’tl Comm. of the Fla. Elec. Power Coordinating Gp., Inc. v. EPA* that in the context of startup, shutdown, and malfunction provisions “a complete affirmative defense to an action brought for non-compliance” with an emission rule, provided the source complies with certain conditions, is permissible under a SIP, so long as it does not

* indicates a fast-track regulation

interfere with relief that may be granted by a federal court under the CAA. Based on these rulings, LDEQ should not be required to remove its affirmative defenses from Louisiana's SIP, and EPA's interpretation of the "logic and reasoning" of the D.C. Circuit's decision *NRDC* is inconsistent with the plain language of that decision.

FOR: EPA misinterpreted *Natural Resources Defense Council v. EPA* and failed to consider other relevant circuit court decisions in concluding that affirmative defense provisions are impermissible.

AGAINST: Affirmative defense provisions are inconsistent with EPA's current interpretation of the enforcement structure of the Clean Air Act.

RESPONSE 5: Affirmative defense provisions are inconsistent with EPA's current interpretation of the enforcement structure of the Clean Air Act (88 FR 47030). See Response 3.

COMMENT 6: The Associations support LDEQ's proposal to define "upset" under LAC 33:III.502.A. The Proposed Rule defines upset as follows:

§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.

Under the Louisiana PSD regulations, upsets are still exempted from the Department's permitting requirements as provided in LAC 33:III.501.B.1.c, and EPA's requirement for states to remove emergency/upset affirmative defenses do not affect this permitting exemption. Thus, the Proposed Rule appropriately

* indicates a fast-track regulation

includes a definition of "upset" to support other permitted uses of the term.

FOR/AGAINST: No arguments necessary; comment does not suggest amendment or change.

RESPONSE 6: LDEQ appreciates the support.

COMMENT 7: To be clear, nothing in the Proposed Rule limits the Department's enforcement discretion related to events beyond the control of the facility that result in deviations of technology-based standards. As noted above, this is a permissible enforcement mechanism under many Clean Air Act programs. Indeed, EPA's Final Rule requiring removal of affirmative defenses recognizes the enforcement discretion of permitting authorities under the Clean Air Act, stating that it is the agency's decision whether to pursue an enforcement action based on the specific circumstances of a violation. Significantly, the EPA Final Rule states in its response to comments on this issue:

[...] any entity that may bring an action to enforce title V permit provisions has enforcement discretion that they may exercise as they deem appropriate in any given circumstance. For example, if the excess emissions caused by an emergency occurred despite proper operation of the facility, and despite the permittee taking all reasonable steps to minimize such emissions, EPA or other relevant entities may well decide that no enforcement action is warranted in a specific case. In the event that an entity decides to bring an enforcement action, it may, nonetheless, take into account the emergency circumstances in deciding what remedies to seek.

Thus, under the EPA Final Rule, LDEQ may continue to use its case-by-case enforcement discretion "to determine whether to initiate enforcement, as appropriate" where sources are unable to comply with emissions standards as a result of an emergency. As previously addressed in these comments, when a facility is a prudent, non-negligent party, basic fairness requires absolution, or at least, mitigation, where no fault can be found.

FOR/AGAINST: No arguments necessary; comment does not suggest amendment or change.

RESPONSE 7: LDEQ concurs that the proposed rule does not limit the department's enforcement discretion related to events beyond the control of the owner or operator that result in exceedances of technology-based standards.

* indicates a fast-track regulation

**Comment Summary Response & Concise Statement –
Repeal of Affirmative Defense Provisions
LAC 33:III.501.B, 502.A, 507.J, and 535.A
Log Number AQ398**

<u>COMMENT #</u>	<u>SUGGESTED BY</u>
1	Suzanne Kneale
2 - 7	Daniel Bosch, Kean Miller LLP, on behalf of the Louisiana Chemical Association (LCA) and the Louisiana Mid-Continent Oil and Gas Association (LMOGA)

Comments reflected in this document are repeated verbatim from the written submittals.

Total Commenters: 2
Total Comments: 7

Laura Almond

From: Microsoft Outlook
To: apa.s-envq@legis.la.gov; 'apa.h-natr@legis.la.gov'; 'apa.senatepresident@legis.la.gov';
'apa.housespeaker@legis.la.gov'
Sent: Monday, December 9, 2024 1:12 PM
Subject: Relayed: Summary Report for Proposed Rule AQ399

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

apa.s-envq@legis.la.gov (apa.s-envq@legis.la.gov)

'apa.h-natr@legis.la.gov' (apa.h-natr@legis.la.gov)

'apa.senatepresident@legis.la.gov' (apa.senatepresident@legis.la.gov)

'apa.housespeaker@legis.la.gov' (apa.housespeaker@legis.la.gov)

Subject: Summary Report for Proposed Rule AQ399



Summary Report
for Proposed Ru...

Laura Almond

From: APA - House Natural Res <apa.h-natr@legis.la.gov>
Sent: Monday, December 9, 2024 1:11 PM
To: Laura Almond
Subject: Request received

EXTERNAL EMAIL: Please do not click on links or attachments unless you know the content is safe.

ELECTRONIC RECEIPT BY COMMITTEE

Your Administrative Procedure Act (APA) submission has been received by the Committee on Natural Resources, Louisiana House.

(Please do not respond to this automatically generated response.)

If your communication is unrelated to an APA required submission, it has been deleted.

If you would like to contact your state legislator, click here <https://www.legis.la.gov/legis/HowDoI2.aspx?p=3#11> to determine the name of your state representative and state senator and to find their contact information.

If you would like to contact members of a particular committee, click here for House Committees <https://www.legis.la.gov/legis/Committees.aspx?c=H> and here for Senate Committees <https://www.legis.la.gov/legis/Committees.aspx?c=S>. The name and contact information of all committee members is available at these sites.

Laura Almond

From: APA - Senate Environment <apa.s-envq@legis.la.gov>
Sent: Monday, December 9, 2024 1:11 PM
To: Laura Almond
Cc: APA - Senate Environment
Subject: Request received

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ELECTRONIC RECEIPT BY COMMITTEE

Your Administrative Procedure Act (APA) submission has been received by the Committee on Environment, Louisiana Senate.

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If you would like to contact members of a particular committee, click here for House Committees <https://www.legis.la.gov/legis/Committees.aspx?c=H> and here for Senate Committees

<https://www.legis.la.gov/legis/Committees.aspx?c=S>. The name and contact information of all committee members is available at these sites.

Laura Almond

From: APA - House Speaker <apa.housespeaker@legis.la.gov>
Sent: Monday, December 9, 2024 1:11 PM
To: Laura Almond
Subject: Request received

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ELECTRONIC RECEIPT FROM THE OFFICE OF THE SPEAKER

Your Administrative Procedure Act (APA) submission has been received by the Office of the Speaker, Louisiana House of Representatives.

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If you would like to contact your state legislator, click here <https://www.legis.la.gov/legis/HowDoI2.aspx?p=3#11> to determine the name of your state representative and state senator and to find their contact information.

If you would like to contact members of a particular committee, click here for House Committees

<https://www.legis.la.gov/legis/Committees.aspx?c=H> and here for Senate Committees

<https://www.legis.la.gov/legis/Committees.aspx?c=S>. The name and contact information of all committee members is available at these sites.

Laura Almond

From: APA - Senate President <APA.senatepresident@legis.la.gov>
Sent: Monday, December 9, 2024 1:11 PM
To: Laura Almond
Subject: Request received

EXTERNAL EMAIL: Please do not click on links or attachments unless you know the content is safe.

ELECTRONIC RECEIPT FROM THE OFFICE OF THE PRESIDENT

Your Administrative Procedure Act (APA) submission has been received by the Office of the President, Louisiana Senate.

(Please do not respond to this automatically generated response.)

If your communication is unrelated to an APA required submission, it has been deleted.

If you would like to contact your state legislator, click here <https://www.legis.la.gov/legis/HowDoI2.aspx?p=3#11> to determine the name of your state representative and state senator and to find their contact information.

If you would like to contact members of a particular committee, click here for House Committees <https://www.legis.la.gov/legis/Committees.aspx?c=H> and here for Senate Committees <https://www.legis.la.gov/legis/Committees.aspx?c=S>. The name and contact information of all committee members is available at these sites.

Laura Almond

From: Microsoft Outlook
To: Jill Clark
Sent: Monday, December 9, 2024 1:11 PM
Subject: Delivered: Summary Report for Proposed Rule AQ398

Your message has been delivered to the following recipients:

Jill Clark (Jill.Clark@la.gov)

Subject: Summary Report for Proposed Rule AQ398



Summary Report
for Proposed Ru...

Laura Almond

From: Microsoft Outlook
To: apa.s-envq@legis.la.gov; 'apa.h-natr@legis.la.gov'; 'apa.senatepresident@legis.la.gov';
'apa.housespeaker@legis.la.gov'
Sent: Monday, December 9, 2024 1:11 PM
Subject: Relayed: Summary Report for Proposed Rule AQ398

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'apa.senatepresident@legis.la.gov' ('apa.senatepresident@legis.la.gov')

'apa.housespeaker@legis.la.gov' ('apa.housespeaker@legis.la.gov')

Subject: Summary Report for Proposed Rule AQ398



Summary Report
for Proposed Ru...

Laura Almond

From: Microsoft Outlook
To: Aurelia Giacometto (DEQ Secretary)
Sent: Monday, December 9, 2024 1:11 PM
Subject: Delivered: Summary Report for Proposed Rule AQ398

Your message has been delivered to the following recipients:

[Aurelia Giacometto \(DEQ Secretary\) \(Aurelia.Giacometto@LA.GOV\)](mailto:Aurelia.Giacometto@LA.GOV)

Subject: Summary Report for Proposed Rule AQ398



Summary Report
for Proposed Ru...

Laura Almond

From: Microsoft Outlook
To: Noah Hoggatt (DEQ)
Sent: Monday, December 9, 2024 1:11 PM
Subject: Delivered: Summary Report for Proposed Rule AQ398

Your message has been delivered to the following recipients:

Noah Hoggatt (DEQ) (Noah.Hoggatt@la.gov)

Subject: Summary Report for Proposed Rule AQ398



Summary Report
for Proposed Ru...