Chemical Industry Council of Illinois

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R23-18
AMENDMENTS TO 35 ILL. ADM. CODE	)	(Rulemaking – Air)
PARTS 201, 202, AND 212	)	

PRE-FILED TESTIMONY OF LISA FREDE FOR THE CHEMICAL INDUSTRY COUNCIL OF ILLINOIS

The Business of Chemistry in Illinois

My name is Lisa Frede. I am the Director of Regulatory Affairs for the Chemical Industry Council of Illinois (CICI). CICI is a state-wide non-profit business trade organization that represents the interests of the chemical industry in the state of Illinois. CICI has 219 members representing over 683 facilities in Illinois. CICI members employ over 46,206 people in Illinois with an average annual wage of $114,083. There are 184,900 direct jobs and 1,807,766 jobs dependent on the business of chemistry in the state of Illinois. The state of Illinois is the fourth largest chemical producing state and the chemical industry is second largest industry in Illinois.

Industries in Illinois among the most dependent on the business of chemistry include construction (275,206 jobs), agriculture (15,721 jobs), consumer goods (315,919 jobs), services (175,987 jobs), manufacturing (432,425 jobs) and mining and utilities (29,641 jobs). The products of chemistry, include life-saving medicines and plastics and synthetic rubber used in medical equipment and supplies support Illinois' health care industry which employ 581,181 workers and cares for the state's 12.4 million residents. The total wages for all industries dependent on chemistry in Illinois is $80.5 billion with almost $4 billion being paid in state income taxes. The chemical industry invests $656 million across Illinois to build and update equipment and facilities. In addition, wholesalers and distributors of the products of chemistry employ 7,836 people at 877 locations thoughout Illinois. In all, the business of chemistry in Illinois generated $39.1 billion worth of chemistry products. Chemical exports from Illinois totaled $9.5 billion, 80% higher than in 2007, making the state's chemical industry Illinois' largest exporter.

The startup, shutdown, and malfunction provisions are important to our members. I would like to inform the Board on a few of CICI member companies who rely on the SMB provision to run their processes.

CICI Member Company A

CICI Company A is a nation-wide producer of chemicals that are used in multiple industries. The company uses selective catalytic reduction to control process emissions from their processes.

Selective catalytic reduction (SCR) is effective at converting nitrogen oxides, also referred to as NO_x, in the presence of a catalyst into diatomic nitrogen (N_2), and water (H_2O). A reductant, typically anhydrous ammonia (NH_3), aqueous ammonia (NH_4OH), or a urea ($CO(NH_2)_2$) solution is injected into flue gas or exhaust gas and reacts with the catalyst. As the reaction drives toward completion, nitrogen (N_2), and carbon dioxide (CO_2), in the case of urea use, are produced.

Commercial selective catalytic reduction systems are typically found on large utility boilers, industrial boilers, municipal solid waste boilers, and chemical production units. SCRs have been shown to reduce NOx by 70-95%.

Temperature is SCR's largest limitation. Most all processes have a startup period where temperature is too low for the catalyst to function. When and where ammonia is used, the reductant cannot be added until the SCR catalyst reaches its minimum operating temperature, otherwise the ammonia would react with NO_x to form ammonium nitrates which coats and degrades the catalyst reducing the catalyst’s effectiveness. The generation of ammonium nitrate also creates a safety risk. Likewise, during shutdown, the ammonia cannot be added to the SCR after it drops below its operating minimum operating temperature. The time required to reach minimum operating temperature varies from process to process. In addition to NOx concentrations above the normal operating limit, opacity limits can also be exceeded as a secondary result of the short-term NOx exceedances.

For the above reasons, processes that rely on SCR technology to reduce NO_x emissions need to have a Startup/Shutdown exception for NO_x emission limits and opacity during startup and shutdown or an alternative limit built into the operating permit that addresses higher emissions during startup and shutdown. Without this exception or affirmative defense, each startup and shutdown will result in deviations of NO_x emission limits (hourly and production based) and opacity limits or all the permits in the state of Illinois would have to be updated to address higher NOx emissions or opacity exceedances during startup and shutdown.

This CICI member has a consent decree (CD) with USEPA that the CD's NOx emission limits do not apply during periods of startup, shutdown, and malfunction.

CICI Member Company B

Company B is a national manufacturer of petrochemicals that operates facilities in the state under Clean Air Act Operating Permit Program ("CAAPP") permits. They have boilers, process heaters and processes that are subject to the carbon monoxide (CO) standards in 35 IAC Part 216 (see Subparts B and N) and have SMB provisions in their permits. They, like many others, have been required to install continuous emissions monitoring systems ("CEMS") on units in recent years and have found that emissions exceed the state standards during startup operations – fortunately, the SMB provisions were already in their permit based on engineering knowledge of combustion during SMB operation scenarios. As Illinois EPA's ("Agency") witness testified at the January 19th hearing, these 1972 numerical emissions standards were not established based on data representative of startup operations, as the CEMS and appropriate stack methods were not part of the basis of the standards. However, what was part of the Illinois Pollution Control Board's("Board") basis in 1972 was the "Agency's admirable proposal" to develop numerical standards that were prefaced on the availability of the SMB relief provisions to address specific cases.

Over the decades, Company B and many other companies in the chemical manufacturing and other industries have applied for and have been granted operating permits by the Agency that include SMB conditions that state that the SMB emissions are "authorized" when specified requirements are followed. There is no mention in the permits that the SMB authorization is

subject to enforcement even when the requirements are followed, which is seemingly the Agency's position today. This newly communicated Agency's position sounds like the compliance "goal posts" are being moved. If the Agency is successful in moving the goal posts by this rulemaking, Company B and others will be left with enforcement discretion for fifty-year old standards that were, per the Board's order, established knowing full well that there are "irreducible startup emissions" that "will somewhat exceed the general standards" and compliance addressed with case-specific SMB provisions in operating permits.

Based on the language in the 2015 SSM SIP Call, USEPA provided the Agency a means and substantial clarifying guidance to not only address the SIP call, but also to simultaneously address incomplete numerical emission standards (i.e., they were not established based on SSM conditions) by establishing alternate emission limitations. As the Agency's witness testified at the January 19 hearing, there was no Agency outreach conducted with the regulated community to obtain input on the need. When questioned by IERG regarding the use of an information collection request (ICR) to establish needs, such as was performed for revisions to the NOx rules under 35 IAC Part 217, the Agency's witness claimed that the ICR was unsuccessful, as the NOx rules were not SIP-approved by USEPA. Company B and many other companies in the Metro-East and Chicago nonattainment areas received an information request from Ms. Jackie Sims of the Agency (Regulatory Unit Manager, Air Quality Planning Section, Bureau of Air) in August of 2016. Inconsistent with the Agency testimony, that information request was not sent in advance of, but rather in response to USEPA's 2011 disapproval of the Agency's NOx RACT provisions. The information request gave an aggressive, two-week period for response. This same approach could have rapidly been used by the Agency to inform this rulemaking. The Agency's witness discussed at length the numerous times between 2015 and 2022 that they requested from USEPA additional guidance on how to develop approvable alternate emission standards, and yet they seemingly never conducted any outreach with which to formulate specific needs to bring to USEPA. Other states are faced with the same situations here, and they are not simply leaving industry holding the bag.

For example, the State of Ohio is continuing to work with and engage stakeholders and USEPA Region V to amend the discrepancies that USEPA noted in the Federal Register Notice June 12, 2015 page 33966 and tailor a workable solution for their state-specific needs, as documented in attached items.

CICI Company C

CICI Company C is what we term the 'ultimate upcycler' that uses petroleum coke,[1] a by-product of the refining process, as their main raw material. Petroleum coke is a by-product of the coker process in the oil industry. In its raw form, it is also called "green coke" or green petroleum coke. Calcined petroleum coke is an important industrial commodity that links the oil and the metallurgical industries as it provides a source of carbon for various metallurgical applications including the manufacture of anodes for the aluminum pot liners and for graphite electrodes. Most of the calcining of petroleum coke is carried out in rotary kilns.

Through the application of heat via the kilns, Company C produces an array of products that go into aluminum production, titanium pigment, and a number of products for electric vehicles, as well other everyday products. Because of this application, the heat of the kilns require a slow startup to ensure equal distribution of heat. The startup time can take up to 20 hours to reach the optimal temperature before the petroleum coke can be added.

Company C was granted a permit by the Illinois EPA ("Agency") via a stipulation and settlement agreement. Section 4.2(4)(a)(i)(A) of the permit sets forth that pursuant to 35 IAC 201.149, 201.261, and 201.262, Company C is authorized to operate kiln 1 and kiln 2 and their associated pyroscrubbers in violation of the applicable requirements of Condition 4.2(2)(a)(i)(A), 4.2(2)(b)(i)(A), and 4.2(2)(d)(i)(A) during start-up. The start-up time shall be no more than 24 hours. For this purpose, the start-up time is defined as the duration from when green coke feed is introduced to the kiln until the temperature at the pyroscrubber inlet achieves the minimum operating temperature indicated in the CAM plan. In Section 4.2(2)(f)(i)(E) of the permit sets

[1] Petroleum coke, abbreviated coke or petcoke, is a final carbon-rich solid material that derives from oil refining, and is one type of the group of fuels referred to as cokes.

forth that except during start-up and malfunction/breakdown conditions of either Line #1 (Kiln #1) or Line #2 (Kiln #2), the Permittee must maintain a 3-hour rolling average minimum temperature of 1800°F at its pyroscrubbers, measured at the thermocouples located at the inlet to each pyroscrubber. Section 4.2(4)(b)(i)(C)-(D) of the permit sets forth that for baghouse maintenance lasting up to thirty minutes, emissions from Cooler 1 may be vented through Pyroscrubber 1, and emissions from Cooler 2 may be vented through Pyroscrubber 2.

CICI Company C has a 2023 agreement with USEPA to operate in violation of certain SMB provisions at their facility.

Overall, the chemical industry in Illinois have cut their core TRI emissions 87% since 1988 with the SMB provisions in place.

Support of Industry Trade Associations

CICI strongly supports the testimony submitted by Illinois Environmental Regulatory Group (IERG) regarding the background on the Illinois Pollution Control Board's 1972 decision on Malfunctions, Breakdowns and Startups (Rule 105), compliance issues, concerns with enforcement discretion, alternatives, the lack of stakeholder outreach, and timing of the comment deadline.

CICI members are opposed to IEPA's proposed revisions to startup, shutdown, malfunction, and breakdown. With the SIP Call deadline approaching, we understand that there is a short timeline for Illinois to submit their SIP revisions by the August 2023 to USEPA, but lack of timing should not be a justification to not address the stakeholders' concerns in Illinois. CICI members expect due diligence from the regulatory agency. CICI would like to offer its continued support and interest in the development and implementation of solutions related to the SIP Call proposed rule.

Respectfully submitted,

Lisa Frede

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Director of Regulatory Affairs

Chemical Industry Council of Illinois

OHIO ENVIRONMENTAL PROTECTION AGENCY
DIVISION OF AIR POLLUTION CONTROL

Ohio Administrative Code Rules 3745-14-11, 3745-15-01, 3745-15-06, and 3745-17-07 – Startup, Shutdown or Malfunction and Scheduled Maintenance Rules

Interested Party Review
July 8, 2022

Comments of the Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Oil and Gas Association, and the American Petroleum Institute-Ohio on Ohio EPA's Draft Rule Language for the Scheduled Maintenance and Malfunction Rules

I. Introduction

The Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Oil and Gas Association, and the American Petroleum Institute-Ohio (the "Trade Associations") respectfully submit the following comments regarding Ohio EPA's June 2022 Interested Party Review draft amendments to Ohio's startup, shutdown, and malfunction (SSM) rules in response to U.S. EPA's SSM SIP Call and to fulfill the agency's 5-year review requirement.

The Ohio Chemistry Technology Council represents the interests of over 80 chemistry industry-related companies doing business in Ohio. The Ohio Chamber of Commerce represents the interests of thousands of member companies, including manufacturers, utilities, and small businesses, in addition to hosting the Ohio Small Business Council. The Ohio Manufacturers' Association represents the interests of approximately 1,300 member companies to protect and grow Ohio manufacturing. The Ohio Oil and Gas Association (OOGA) is a statewide trade association formed in 1947 representing both independent conventional producers and large independent horizontal operators exploring Ohio's shale play. OOGA membership also consists of midstream and downstream companies all playing an important role in the exploration, production, processing, transportation and refining of Ohio's oil and natural gas. The American Petroleum Institute-Ohio (API Ohio) is a state affiliate office of the American Petroleum Institute (API). The API represents all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. The Trade Associations' members are regulated by Ohio's Clean Air Act State Implementation Plan (SIP) and have a direct and substantial interest in the SIP's SSM provisions and the rule changes in question.

The Trade Associations generally support Ohio EPA's response to the SSM SIP Call and endorse the agency's efforts to improve its malfunction reporting rule. However, among other changes, the Trade Associations recommend modifying the proposed definition of "malfunction" to remove the exclusion for equipment failures caused only in

part by poor maintenance or careless operation. They recommend that the trigger for malfunction reporting be further refined to allow good-faith estimates of the magnitude of emissions, which can be difficult to determine during a malfunction, and to avoid an unnecessary concession of the validity of EPA's legal position in the SSM SIP Call. They recommend that the newly defined term "malfunction" be used consistently in Ohio Adm.Code 3745-15-06 where "breakdown" or "failure" are currently used. They recommend that the malfunction reporting rule be revised to make clear that the reporting of a malfunction is not "proof" of any violation. They recommend that written reports not be required for malfunctions lasting forty-eight hours or less, and that owner/operators continue to be afforded two weeks to prepare such reports. And they recommend that the scheduled maintenance rule allow owners or operators to continue operating when shutting down would be unsafe. The Trade Associations also suggest a variety of non-substantive revisions to the draft rules to make the rules clearer and more consistent. A narrative description of many of the Trade Associations' proposed changes follows. A red-line version showing the recommended changes is also attached.

The Trade Associations note that the legal validity of the 2015 SSM SIP Call Rule is currently subject to judicial review before the U.S. Court of Appeals for the District of Columbia Circuit in a case that has been fully briefed and is currently awaiting decision. By commenting on Ohio's proposed rule, the Trade Associations are not conceding any prior arguments put forth in that litigation or associated comments.

II. Proposed Amendments to Ohio Adm.Code 3745-15-01

The Trade Associations generally support Ohio EPA's draft proposed definition of "malfunction." However, the Trade Associations continue to believe that Ohio EPA's proposal to exclude "[e]quipment failures * * * caused *in part* * * * by poor maintenance or careless operation" from the definition of malfunction is impractical. Requiring Ohio EPA to determine whether poor maintenance or careless operation played *any* role in causing a malfunction would force Ohio EPA and owners/operators into evidentiary battles over causation. The "in part" exclusion is also unnecessary. The definition of "malfunction" includes a requirement that the failure not be "reasonably preventable." If "poor maintenance or careless operation" helped cause an equipment failure in part, but the failure still was "not reasonably preventable" for other reasons, then Ohio EPA should still consider the failure a malfunction. Modifying the language to "in <u>substantial</u> part" would improve the language, but the Trade Associations recommend removing it from the definition of "malfunction" entirely, and instead use the words "attributable to" to better distinguish failures that are due to poor maintenance or careless operation from those that are not.

In addition, the Trade Associations recommend that Ohio EPA add to the list of equipment for which a breakdown might qualify as a "malfunction." Much of the process equipment, air pollution control equipment, and monitoring equipment used these days is computerized. A malfunction is just as likely to be caused by problems with a hard drive or a computer program as by mechanical failures. Accordingly, the Trade Associations recommend that Ohio EPA add the phrase "electronic software or hardware" to the list of equipment that may fail.

Next, the Trade Associations recommend modifications to the proposed language in Rule 3745-15-01 that describes the trigger for malfunction reporting. In our past comments, the Trade Associations recommended that Ohio EPA remove any implication that the owner/operator must determine it has violated the law to satisfy the malfunction reporting obligations. This would include language, coerced by U.S. EPA, that would concede that Ohio EPA's emissions limitations apply during malfunctions. Instead of requiring reporting of malfunctions that cause exceedances of applicable emission limitations – which assumes that otherwise applicable emission limitations are applicable during malfunctions -- the Trade Associations recommend that the reporting trigger be "emissions * * * in excess of the amount allowed by an applicable emission limitation, standard, or permit term in the absence of a malfunction." This is consistent with malfunction reporting under Ohio Adm.Code 3745-15-06 over the past 50 years. It expresses the same general reporting criteria, while leaving unstated whether such emission limitations, standards, or permit terms *are* applicable during a malfunction. That question is answered elsewhere in the pre-existing legal particulars of the compliance obligation in question, and does not need to be addressed in the malfunction reporting rule. Next, the Trade Associations have noted in the past that an operator is unlikely to "immediately" know, or perhaps ever know, the amount of emissions from the source in question during a malfunction, in the units of measure, testing protocol and frequency, and compliance averaging time (where applicable) specified in the underlying applicable requirement. Accordingly, the Trade Associations recommended that Ohio EPA adopt a reporting trigger that provides only for good-faith, informed judgment calls on the part of the operator. In particular, the Trade Associations recommend that the owner or operator be required to report if the failure "is <u>likely</u> to cause, or has <u>likely</u> caused, emissions <u>reasonably estimated</u> to be in excess of the amount allowed by an applicable emission limitation, standard, or permit term in the absence of a malfunction." Finally, the Trade Associations recommend that Ohio EPA add certain examples of failures that Ohio EPA would consider to be malfunctions, namely "failures caused by power outages, sabotage, or acts of God."

III. Proposed Amendments to Ohio Adm.Code 3745-15-06

A. Scheduled Maintenance

The Trade Associations generally support Ohio EPA's draft amendments to Ohio Adm.Code 3745-15-06(A). The draft rule change would remove the "Director's discretion" provision that U.S. EPA has deemed unacceptable from the SIP and add mandatory, self-executing "work practice" standards to follow when it is necessary to bypass air pollution control equipment for maintenance.

In the first sentence of the Rule, Ohio EPA should correct the phrase "Scheduled maintenance of air pollution sources" by amending it to say "Scheduled maintenance of air pollution control equipment," which is the clear focus of the Rule (as the remainder of the Rule's text makes clear).

In subparagraph (A)(1), the existing language contradicts Ohio EPA's proposed definition of "malfunction" in Ohio Adm.Code 3745-15-01. Currently, if an owner/operator schedules maintenance to prevent a failure of air pollution control equipment that would

otherwise occur within two weeks, Ohio Adm.Code 3745-15-06(A)(1) requires the owner/operator to treat that outage as a malfunction. But Ohio EPA has proposed to define "malfunction" as a "sudden, infrequent, and not reasonably preventable failure of air pollution control equipment." Proposed Ohio Adm.Code 3745-15-01(P) (emphasis added). An air pollution control equipment failure that is foreseen and prevented is not a "malfunction" under Ohio EPA's proposed (and appropriate) definition. The Trade Associations recommend modifying subparagraph (A)(1) to make clear that maintenance of air pollution control equipment to *prevent* a malfunction is subject to the requirements for scheduled maintenance.

Under subparagraph (A)(3), Ohio EPA's should modify the existing language to clarify that the Director is not being asked to "authorize the shutdown of the air pollution control equipment" but, rather, to "authorize the continued operation of the sources despite the shutdown of the air pollution control equipment * * * ." Additionally, in subparagraph (A)(3)(c), Ohio EPA should ask sources only to estimate "[t]he nature and estimated quantity of regulated air pollutants" likely to occur during the scheduled maintenance. Source owner/operators are unlikely to think to provide estimates for the emission of unregulated air pollutants, and Ohio EPA has no regulatory basis for needing such information. Additionally, in subparagraph (A)(3)(e), Ohio EPA should amend "impossible or impractical" to read "impossible, impractical, or unsafe" to mirror Ohio EPA's proposed amendments to subparagraph (A)(3).

The Trade Associations recommend that Ohio EPA delete subparagraph (A)(4). Ohio EPA does not need to reassert the Director's ability to "take appropriate action" if any owner or operator fails to follow paragraph (A)'s requirements. R.C. 3704.03(R) and 3704.06 give Ohio EPA's Director clear authority to respond to violations of the agency's rules. Moreover, subparagraph (A)(4) is largely redundant of paragraph (C), which as written applies both to scheduled maintenance of air pollution control equipment under paragraph (A) and malfunctions under paragraph (B).

In subparagraph (A)(5), Ohio EPA should amend "impossible or impractical" to read "impossible, impractical, or unsafe," for the same reasons Ohio EPA already proposed that same amendment to subparagraph (A)(3).

Additionally, Ohio EPA should modify proposed subparagraph (A)(7) to refer to "deviations" rather than "exceedance[s]." The work practice standards that Ohio EPA has proposed adding to paragraph (A) would apply in lieu of any otherwise applicable SIP emission limits or control requirements. Compliance with those work practice standards would not be a "deviation" from any emission limit, and it should not be a deviation from any permit term or condition, unless the owner/operator has failed to comply with the notification requirements in paragraph (A). Moreover, "deviation" is a defined and well-understood term, "malfunctions" have always been and will continue to be reported as Title V "deviations," and it is universally recognized that a "deviation" is not necessarily a "violation."

B. Malfunctions

In paragraph (B), the introductory paragraph's description of the rule's scope is incorrect. The new proposed definition of "malfunction" refers to more than just "sources." Ohio EPA should remove the word "sources" from paragraph (B) and state that "Malfunctions shall be reported * * * ."

In the first sentence of subparagraph (B)(1), the introductory phrase that begins "In the event that" is no longer necessary if Ohio EPA adopts its proposed definition of "malfunction." Ohio EPA should replace that introductory phrase with "If a malfunction occurs * * * ." Similarly, the phrase "failure or breakdown" should be replaced by "malfunction," both in this subparagraph and throughout the malfunction reporting rule. In the same paragraph, the Trade Associations support Ohio EPA's proposed language that "Giving notice is not an admission of a violation of any specific emissions limitation" (though "emissions limitation" should be "emission limitation," to be consistent with the phrase used in the remainder of the Rule). Also, the words "standard, or permit term" should be added after "emission limitation" to match the proposed definition of "malfunction." The Trade Associations recommend that the rule clearly provides that providing notice of a malfunction also is not "proof" of a violation of any emission limitation. Finally, the Trade Associations recommend a modification (in this subparagraph and other subparagraphs of paragraph (B)) to the language requiring a written report for malfunctions that last longer than twenty-four hours. The current rule language requires a written report only if a malfunction lasts longer than seventy-two hours, and Ohio EPA has not indicated that the existing rule language has deprived the agency of necessary or important information regarding otherwise short malfunctions. As a compromise, and to shield owner/operators from unnecessary paperwork (during what are typically crisis circumstances at the plant), the Trade Associations urge that Ohio EPA require written reports only for malfunctions that last more than forty-eight hours. Moreover, given the difficulty that owner/operators often face in gathering the necessary information to include in the written reports, the Trade Associations urge Ohio EPA to retain the existing language providing two weeks to submit the written report.

In proposed subparagraph (B)(1)(g)(i) (current subparagraph (B)(1)(d)(i)), the rule language requires a malfunction report to include a statement demonstrating that "Shutdown or reduction of source operation during the breakdown period will be or would have been impossible or impractical * * * ." However, the rule requires a malfunction report even if the source shuts down or reduces source operation after a malfunction. Accordingly, the Trade Associations advise adding "(if applicable)" to the end of the subparagraph. Additionally, as with paragraph (A), "impossible or impractical" should be amended to read "impossible, impractical, or unsafe."

In proposed subparagraph (B)(1)(g)(ii) (current subparagraph (B)(1)(d)(ii)), the rule language requires a malfunction report to include a statement demonstrating that the malfunction's duration will be or was reasonable "based on installation or repair time, delivery dates of equipment, replacement parts, or materials, or current unavailability of essential equipment, parts, or materials." The Trade Associations would add the words "or personnel" to the end of that subparagraph to reflect that employee unavailability (due, for example, to temporarily unfilled positions, travel, or illness) may affect a source's

ability to conduct timely installations or repairs. The Trade Associations' recent experiences during and after the COVID-19 pandemic have driven home how disruptive an employee's or contractor's illness, or temporary difficulties filling vacancies, can be.

C. Director's Evaluation

Under current law, Ohio Adm.Code 3745-15-06(C) provides a means for the Director to review and evaluate any report submitted pursuant to Ohio Adm.Code 3745-15-06(A) or (B) or Ohio Adm.Code 3745-17-07(A)(3)(c) or (B)(11)(f) and "take appropriate action" if an owner or operator has not complied with those paragraphs' requirements. U.S. EPA included paragraph (C) in its SSM SIP Call because "it is the regulatory mechanism by which exemptions are granted in" Ohio Adm.Code 3745-15-06(A)(3) and 3745-17-07 and because U.S. EPA believed paragraph (C) gave Ohio EPA's Director insufficiently bounded discretion to "excuse excess emissions." 78 Fed. Reg. 12,460, 12,519 (Feb. 22, 2013) (proposed rule); *see also* 80 Fed. Reg. 33,840, 33,967 (June 12, 2015) (final rule). In response, Ohio EPA has proposed to remove paragraph (C) from the SIP.

The Trade Associations recommend that paragraph (C) be amended to make clear that it applies both to requests to continue operating during scheduled maintenance of air pollution control equipment under paragraph (A) and notifications and reporting of malfunctions under paragraph (B). The Trade Associations also recommend replacing the undefined word "breakdown," wherever it appears, with "malfunction," and the word "shutdown" with "maintenance." To reflect Ohio EPA's proposed amendment to paragraph (A) to allow continued operation of sources during scheduled maintenance where shutting down the source would be "unsafe," and the Trade Associations' proposed amendment to paragraph (B) to add similar language, the Trade Associations would amend paragraph (C) to state (in relevant part) that "The director shall take appropriate action upon a determination that * * * shutdown of the source or operation * * * was or has become practicable <u>and safe</u> * * * ." The Trade Associations would clarify the ambiguous reference to "the emissions" in the final clause of paragraph (C), so that the Rule would more clearly reference "the emissions <u>attributable to the continued operation during scheduled maintenance or the malfunction</u> * * * ."

IV. Proposed Amendments to Ohio Adm.Code 3745-17-07

Ohio EPA's proposal to limit the availability of the malfunction/shutdown exception to the opacity limits for stack emissions and fugitive dust, so that the exception would not apply to malfunctions that cause a nuisance under Ohio Adm.Code 3745-15-07, is impractical. The nuisance rule has nothing to do with the SSM SIP Call, and there is no way for a source owner or operator to know what is or is not a public nuisance until after a case-by-case adjudication. It also serves no useful purpose. If a malfunction of an air contaminant source or air pollution control equipment (or the shutdown of air pollution control equipment) causes visible particulate emissions that constitute a nuisance, then Ohio EPA can resolve that nuisance simply by enforcing Ohio Adm.Code 3745-15-07. Lastly, to the extent that Ohio EPA included the referenced language in response to the SSM SIP Call, Ohio Adm.Code 3745-15-07 is no longer in Ohio's SIP. Accordingly, Ohio EPA should delete the portions of the proposed amendments to Ohio Adm.Code 3745-17-07 that reference Ohio Adm.Code 3745-15-07.

V. Conclusion

The Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Oil and Gas Association, and the American Petroleum Institute-Ohio appreciate the opportunity to comment on Ohio EPA's Interested Party Review draft rulemaking in response to both U.S. EPA's finding of "substantial inadequacy" and SIP Call and Ohio EPA's 5-year review obligation to amend provisions applying to excess emissions during SSM periods. Ohio EPA's proposed amendments to Ohio Adm.Code 3745-15-01, 3745-15-06, and 3745-17-07 offer several additional improvements over existing law and over prior drafts of Ohio EPA's amendments. And the Trade Associations believe the changes recommended above, and illustrated in the attached red-lines, will result in a clearer, streamlined, more efficient, and more easily understood regulatory scheme for operation during scheduled air pollution control equipment maintenance and malfunctions. The Trade Associations look forward to the opportunity to work with Ohio EPA as it finalizes this rulemaking.

Very truly yours,

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OHIO ENVIRONMENTAL PROTECTION AGENCY
DIVISION OF AIR POLLUTION CONTROL

Ohio Administrative Code Rules 3745-14-11, 3745-15-01, 3745-15-06, and 3745-17-07 – Startup, Shutdown or Malfunction and Scheduled Maintenance Rules

Interested Party Review
August 02, 2022

Supplemental Comments of the Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Oil and Gas Association, and the American Petroleum Institute-Ohio on Ohio EPA's Draft Rule Language for the Scheduled Maintenance and Malfunction Rules

The Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Oil and Gas Association, and the American Petroleum Institute-Ohio (the "Trade Associations") respectfully submit the following supplemental comments regarding Ohio EPA's corrected Interested Party Review draft amendments to Ohio Adm.Code 3745-17-07 in response to U.S. EPA's SSM SIP Call and to fulfill the agency's 5-year review requirement.

The Commenters offered modest edits to the Ohio Adm.Code 3745-17-07 rule changes that Ohio EPA proposed on June 8, 2022. Ohio EPA's acceptance of those edits would result in a lawful and reasonable amendment to the rule. The drastically different July 12, 2022 "corrected" version of Ohio EPA's IPR rule changes to Ohio Adm.Code 3745-17-07, which proposes to eliminate the existing exemption to the visible particulate emission limitations during malfunctions and shutdowns of air pollution control equipment and replace it with a federally enforceable 20% opacity limit, would be unreasonable, and terrible public policy. The Commenters object to the draft rule changes to Ohio Adm.Code 3745-17-07(A)(3)(c) and (B)(11)(f), and recommend more rational and reasonable rule change options as set forth in the comments below.

As noted in the Trade Associations' original comments, the legal validity of the 2015 SSM SIP Call Rule is currently subject to judicial review before the U.S. Court of Appeals for the District of Columbia Circuit in a case that has been fully briefed and is currently awaiting decision. By commenting on Ohio's proposed rule, the Trade Associations are not conceding any prior arguments put forth in that litigation or associated comments. For purposes of these comments alone, the Trade Associations are assuming the SSM SIP Call, which the Commenters believe to be contrary to law and arbitrary and capricious, is affirmed in its entirety in the pending appeals and such affirmance is also upheld by the Supreme Court in the event certiorari is granted. If the D.C. Circuit (and the Supreme Court, if applicable) do not uphold the SSM SIP Call in its entirety, Ohio EPA should reconsider any rule changes that it has premised on the validity of the SSM SIP Call.

I. Ohio's opacity restrictions in context.

When Ohio first promulgated its opacity restrictions, they were commonly referred to as "indicator" monitoring, meaning that they were a convenient but inconclusive "indicator" of substandard performance of particulate matter (PM) emission controls that likely warranted further investigation of mass PM emission rates or the operation and maintenance of PM controls. Those opacity restrictions were an inexact surrogate for PM mass emission rates, *see Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 400-401 (1973), and were never correlated to quantitative PM emission reductions or PM National Ambient Air Quality Standards (NAAQS) attainment. Continuous opacity monitors were not required or in use at the time, and the rule-based compliance test method was then, and is now, Reference Method 9 in Appendix A of 40 CFR Part 60. Ohio's original PM SIP had uniform region-wide mass emission limitations that were technology-based and substantially more stringent than necessary for the purpose of attaining the then-existing PM NAAQS for total suspended particulates. They mirrored the PM emission limitations in EPA's earliest Part 60 New Source Performance Standards, EPA's example PM emission limitations in 40 CFR Part 51, and the PM emission limitations typically found in other States' SIPs.

In early litigation over the Ohio PM SIP, EPA assured the U.S. Court of Appeals for the Sixth Circuit that an exemption for emissions during startups, shutdowns, and malfunctions was necessary. *See Buckeye Power v. EPA*, 525 F.2d 80, 81-82 (6th Cir. 1975) ("since the protested [PM SIP] approval, the federal Administrator has concluded that Ohio's emission regulation should be revised to allow exceptions for emissions during start-ups, shutdowns, and malfunctions. … The federal Administrator's pronouncements on these points are definite and apparently conclusive, since he indicates that he will make them all conditions for continued approval of the Ohio plan."). EPA publications at the time explained, moreover, that opacity standards were simply "a necessary *supplement* to mass emission standards. Opacity standards help assure that sources and emission control systems continue to be properly maintained and operated *so as to comply with mass emission standards*." (Emphasis added.) *EPA Response to Remand Ordered by U.S. Court of Appeals for the District of Columbia in Portland Cement Association v. Ruckelshaus (486 F.2d 375, June 29, 1973)*, Publication No. EPA-450/2-74-023, at 26 (Nov. 1974) (*available at* https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000WW27.TXT).

The SSM SIP Call reflects a 180-degree change from EPA's original position on malfunction exemptions for opacity standards. But even now, EPA concedes that the primary reason for opacity limits in SIPs is to provide a familiar and readily available means of *monitoring* approximate PM emission control performance. The preamble to EPA's SSM SIP Call describes opacity standards as "a useful tool to indicate overall operation and maintenance of a source and its emission control devices … ." 80 Fed. Reg. 33,840, 33,908 (Jun 12, 2015). EPA agrees, moreover, that "the precise correlation between opacity and PM mass emissions is not always known for a specific source under all operating conditions … ." (*Id.*) And although opacity is a "surrogate for PM emissions" (*id.*), EPA concedes there is only "*commonly* [not always] a *positive* [not direct] correlation between PM and opacity … ." (*Id.* (emphasis and inserts added).)

Ohio EPA must also keep in mind that it does not need to make its opacity standards more stringent to attain or maintain the PM NAAQS. EPA has not determined that Ohio's PM SIP is "substantially inadequate" to attain and maintain the PM NAAQS. Rather, the SSM SIP call finds the malfunction/shutdown exemption in Ohio Adm.Code 3745-17-07 to be "substantially

inadequate" to meet EPA's new policy regarding the meaning of "on a continuous basis" in the definition of "emission limitation" in section 302(k) of the Clean Air Act. The overall control strategy in Ohio's current approved PM SIP has successfully attained the PM NAAQS everywhere in the State and does not need to be made more stringent.

Given this, it would be arbitrary simply to eliminate Ohio's more than 40-year-old malfunction/shutdown exemption and create a never-intended or justified performance obligation more infeasible of attainment than any other provision in the Ohio SIP. Ohio's opacity restrictions have their useful role in Ohio's SIP, but they were never designed, intended, technically supported, or scientifically justified to be applied and enforced under operating conditions excluded from their applicability and compliance testing metrics and protocols. And eliminating the existing malfunction exemptions in those opacity standards is not necessary to maintain the existing PM NAAQS.

II. The Trade Associations' Proposed Alternatives to Ohio EPA's Draft Amendments

The Commenters would vigorously object to Ohio EPA's promulgation and federalization of a new 20% opacity limit applicable during malfunction/shutdown conditions. Retaining the existing more than forty-year-old malfunction/shutdown exemption in Ohio Adm.Code 3745-17-07(A)(3)(c) and (B)(11)(f), and simply removing it from the SIP, would be a better option than repealing the exemption altogether and substituting a 20% opacity limit in its place. Removing the exemption from the SIP would remedy the "substantial inadequacy" claimed by EPA in the SSM SIP Call, while preserving the existing exemption under Ohio law.

In addition to retaining the current malfunction/shutdown exemption in Ohio Adm.Code 3745-17-07 as Ohio law, Ohio EPA should add to the SIP a more stringent hourly opacity limit of 60% opacity during malfunction/shutdown conditions. This could be done by amending the end of Ohio Adm.Code 3745-17-07(A)(1)(b) to state:

> (A) Visible particulate emission limitations for stack emissions:
>
> (1) General limitations:
>
> (a) Except as otherwise specified in paragraphs (A)(1)(b), (A)(2) and (A)(3) of this rule, visible particulate emissions from any stack shall not exceed twenty per cent opacity, as a six-minute average.
>
> (b) Except as otherwise specified in paragraphs (A)(2) and (A)(3) of this rule, visible particulate emissions from any stack may exceed twenty per cent opacity, as a six-minute average, for not more than six consecutive minutes in any sixty minutes, but shall not exceed sixty per cent opacity, as a six-minute average, at any other time except during periods of malfunction or shutdown. During periods of malfunction or shutdown, visible particulate emissions from any stack may not exceed sixty per cent opacity as a sixty-minute average.

This would be comparable in overall stringency to the opacity level allowed at all times during normal operations in some approved SIPs. For example, Indiana's SIP (326 IAC 5-1-2) and Georgia's SIP (GA R&R 391-3-1-02(2)(b)) allow 40% opacity. The sixty-minute averaging time is consistent with the sixty-minute intervals in which the current SIP allows up to 60% opacity for a six consecutive minute period. A more stringent malfunction/shutdown opacity limit of 60% over a sixty minute period would be more in line with technological feasibility and less likely to arbitrarily prohibit circumstances beyond the reasonable control of source owners and operators that do not jeopardize attainment and maintenance of the PM NAAQS. It would also avoid subjecting malfunction and shutdown events to unreasonably short 6-minute average compliance averaging time, which is arbitrary overkill unconnected to NAAQS attainment and maintenance.

Additionally, there are circumstances under which SIP opacity restrictions simply are not needed. For example, in the SSM SIP Call preamble, EPA states:

> If a source is subject to a sufficiently stringent PM limitation and has opted to install, calibrate, maintain and operate a PM CEMS to measure PM emissions, then it is reasonable for the EPA to conclude that an opacity emission limitation is not needed for that particular source for those purposes. The direct measurement of PM, in conjunction with an appropriately stringent PM emission limitation that applies continuously, is an appropriate means to assure adequate control of PM emissions on a continuous basis. States evaluating how best to replace impermissible SSM exemptions from opacity standards may wish to consider a similar approach, conditioned upon the use of PM CEMS and a sufficiently stringent PM emission limitation.

80 Fed. Reg. at 33,891-92. Ohio EPA should add this exclusion, and potentially other similar or appropriate exclusions, in Ohio Adm.Code 3745-17-07(A)(3) and the SIP.

Finally, we recommend that Ohio EPA add to Ohio Adm. Code 3745-17-07, as a SIP revision if necessary, an optional provision for case-by-case approval of source-specific startup, shutdown, and/or malfunction opacity emission limitations. Such a provision would be similar to the mechanism for Equivalent Visible Emission Limitations in Ohio Adm. Code 3745-17-07(C), but would require a demonstration of PM NAAQS protection in lieu of mass particulate emission limitation equivalency. Ohio EPA could be informed by EPA's SSM provisions under 40 C.F.R. Parts 60 and 63, but with an appropriate emission limitation for SSM conditions in lieu of an outright exemption.

Because these new restrictions on the opacity of PM emissions during malfunction/shutdown conditions, as (erroneously and arbitrarily) commanded by the SSM SIP Call, will be more stringent than the status quo, they will not be subject to any "anti-backsliding" provisions in sections 110(k)(3), 110 (l), or 193 of the Clean Air Act. The status quo is that the current approved Ohio SIP exempts malfunction/shutdown conditions from *any* restriction on the opacity of PM emissions during malfunction/shutdown conditions. Any new restriction in the Ohio SIP on opacity emissions during malfunction/shutdown conditions would be more stringent than, not a relaxation of, the current law.

III. Conclusion

The Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Oil and Gas Association, and the American Petroleum Institute-Ohio appreciate the opportunity to comment on Ohio EPA's corrected Interested Party Review draft amendments to Ohio Adm.Code 3745-17-07 in response to both U.S. EPA's finding of "substantial inadequacy" and SIP Call and Ohio EPA's 5-year review obligation. The Trade Associations encourage Ohio EPA not to impose more stringent opacity standards for malfunction/shutdown periods than are absolutely necessary to comply with the SSM SIP Call and, at a minimum, to preserve the existing, long-running malfunction/shutdown exemption under Ohio law.

Very truly yours,

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DIVISION OF AIR POLLUTION CONTROL

Ohio Administrative Code Rules 3745-14-11, 3745-15-01, 3745-15-06, and 3745-17-07 – Startup, Shutdown or Malfunction and Scheduled Maintenance Rules

Proposed Rules
January 18, 2023

Comments of the Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Oil and Gas Association, and the American Petroleum Institute-Ohio on Ohio EPA's Draft Rule Language for the Scheduled Maintenance and Malfunction Rules

I. Introduction

The Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Oil and Gas Association, and the American Petroleum Institute-Ohio (the "Trade Associations") respectfully submit the following comments regarding Ohio EPA's December 2022 Proposed amendments to Ohio's startup, shutdown, and malfunction (SSM) rules in response to U.S. EPA's SSM SIP Call and to fulfill the agency's 5-year review requirement.

The Ohio Chemistry Technology Council represents the interests of over 80 chemistry industry-related companies doing business in Ohio. The Ohio Chamber of Commerce represents the interests of thousands of member companies, including manufacturers, utilities, and small businesses, in addition to hosting the Ohio Small Business Council. The Ohio Manufacturers' Association represents the interests of approximately 1,300 member companies to protect and grow Ohio manufacturing. The Ohio Oil and Gas Association (OOGA) is a statewide trade association formed in 1947 representing both independent conventional producers and large independent horizontal operators exploring Ohio's shale play. OOGA membership also consists of midstream and downstream companies all playing an important role in the exploration, production, processing, transportation and refining of Ohio's oil and natural gas. The American Petroleum Institute-Ohio (API Ohio) is a state affiliate office of the American Petroleum Institute (API). The API represents all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. The Trade Associations' members are regulated by Ohio's Clean Air Act State Implementation Plan (SIP) and have a direct and substantial interest in the SIP's SSM provisions and the rule changes in question.

The Trade Associations note that a review of the legal validity of the 2015 SSM SIP Call Rule is still pending before the U.S. Court of Appeals for the District of Columbia Circuit. By commenting on Ohio's proposed rule, the Trade Associations are not conceding any prior arguments put forth in that litigation or associated comments.

II. Support for and Comment on Proposed Amendments

The Trade Associations support Ohio EPA's proposed definition of "malfunction" in Ohio Adm.Code 3745-15-01, and thank Ohio EPA for its consideration of the Trade Associations' prior comments on, and suggested improvements to, that definition. The Trade Associations also generally support Ohio EPA's proposed amendments to Ohio EPA's scheduled maintenance rule (Ohio Adm.Code 3745-15-06(A)) and malfunction reporting rule (Ohio Adm.Code 3745-15-06(B)). However, the Trade Associations continue to recommend a modification to the language requiring a written report for malfunctions that last longer than twenty-four hours. The current rule language requires a written report only if a malfunction lasts longer than seventy-two hours, and Ohio EPA has not indicated that the existing rule language has deprived the agency of necessary or important information regarding otherwise short malfunctions. As a compromise, and to shield owner/operators from unnecessary paperwork (during what are typically crisis circumstances at the plant), the Trade Associations again urge that Ohio EPA require written reports only for malfunctions that last more than forty-eight hours. Moreover, given the difficulty that owner/operators often face in gathering the necessary information to include in the written reports, the Trade Associations urge Ohio EPA to retain the existing language providing two weeks to submit the written report.

In the Rule Synopsis that Ohio EPA released on November 29, 2022, Ohio EPA announced that it did not intend to submit its new proposed definition of "malfunction" for inclusion in Ohio's State Implementation Plan ("SIP"). Ohio EPA also announced that it intended to ask to remove Ohio Adm.Code 3745-15-06(A)(3) and (C) from Ohio's SIP. Subsequently, Ohio EPA asked the public to comment on whether Ohio EPA should also remove paragraph (B) (the malfunction reporting rule) and paragraph (D) (the paragraph authorizing Ohio EPA's director to require a preventive maintenance and malfunction abatement plan under certain circumstances) from the SIP.

The Trade Associations believe it would be preferable to include both the new definition of "malfunction" *and* the malfunction reporting rule in the SIP. What is paramount, however, is that Ohio EPA and U.S. EPA not include the malfunction reporting rule in Ohio's SIP *without* the proposed "malfunction" definition. Keeping the malfunction reporting rule *in*, but leaving the new definition of "malfunction" *out*, will result in confusion and potential disagreement regarding the reporting obligation, and might lead U.S. EPA to argue for its own definition of "malfunction." Ohio companies should not be exposed to potentially different Ohio EPA and U.S. EPA definitions of "malfunction" for purposes of reporting under the Ohio SIP. The Trade Associations note that malfunction reporting overlaps with multiple other reporting obligations under the Clean Air Act, including Title V deviation reporting, Compliance Assurance Monitoring (CAM) program excursion reporting, and section 112(r) release reporting, in addition to EPCRA release reporting. Ohio EPA should not create needless uncertainty under its malfunction reporting rule by disassociating the rule from the definition that makes its application clear. In short, Ohio EPA should include both the malfunction reporting rule and the definition of "malfunction" in the SIP, or it should include neither of them in the SIP. And under no circumstances should a malfunction report require or depend upon any legal conclusion or admission of liability.

Finally, the Trade Associations support Ohio EPA's proposal to maintain the existing malfunction/shutdown exceptions to the opacity limits for stack emissions and fugitive dust in Ohio Adm.Code 3745-15-07, but remove them from Ohio's SIP. As noted above, the Trade Associations disagree with EPA's contention that such exceptions are inconsistent with the Clean Air Act. Unless and until the D.C. Circuit reverses U.S. EPA's finding that such exceptions are substantially inadequate to meet federal Clean Air Act requirements, however, it is reasonable to continue providing the malfunction/shutdown exceptions under state law only.

III. Conclusion

The Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Oil and Gas Association, and the American Petroleum Institute-Ohio appreciate the opportunity to comment on Ohio EPA's proposed rulemaking in response to both U.S. EPA's finding of "substantial inadequacy" and SIP Call and Ohio EPA's 5-year review obligation to amend provisions applying to excess emissions during SSM periods. Ohio EPA's proposed amendments to Ohio Adm.Code 3745-15-01, 3745-15-06, and 3745-17-07 offer several additional improvements over existing law and over prior drafts of Ohio EPA's amendments, and the Trade Associations urge Ohio EPA to finalize those amendments as proposed, with the exception of Ohio EPA's proposal to require written malfunction reports for relatively brief, one-day malfunctions (and to require those reports in one week rather than two weeks).

Very truly yours,

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