State of Utah

JON M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

Department of
Environmental Quality

Richard W. Sprott
Executive Director

DIVISION OF AIR QUALITY
Cheryl Heying
Director

DAQ-063-08

MEMORANDUM

TO: Air Quality Board

THROUGH: Cheryl Heying, Executive Secretary

FROM: Kimberly Kreykes, Environmental Planning Consultant

DATE: August 12, 2008

SUBJECT: Five-Year Reviews: R307-107. General Requirements: Unavoidable Breakdown.

Background

Title 63, Chapter 46a of the Utah Code requires all state agencies to review each of their rules at least every fifth year. This review verifies that the rules are still authorized by statute and necessary. We have completed the five-year review for R307-107. General Requirements: Unavoidable Breakdown. R307-107 was proposed for public comment once since the last five-year review. Given the adverse nature of the comments received and lack of consensus on the proposed rule, the Board decided it would allow the proposal to lapse and maintain the existing unavoidable breakdown rule without changes. No other comments were received since the last five-year review.

Staff Recommendation: Staff recommends that the Board approve the attached forms to be filed with the Division of Administrative Rules.

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State of Utah

FIVE-YEAR NOTICE OF REVIEW AND STATEMENT OF CONTINUATION

DAR file no: Date filed:

Utah Admin. Code ref. (R no.): R307-107 Time filed:

1. Agency: Environmental Quality/Air Quality
   Room no.:
   Building:
   Street address 1: 150 N 1950 W
   Street address 2:
   City,state,zip: SALT LAKE CITY, UT 84116-3085
   Mailing address 1: PO BOX 144820
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   Contact person(s):

Name:	Phone:	Fax:	E-mail:	Remove:
Kimberly Kreykes	801-536-4042	801-536-4099	kkreykes@utah.gov	

(Interested persons may inspect this filing at the above address or at DAR between 8:00 a.m. and 5:00 p.m. on business days.)

2. **Title of rule or section (catchline):**
General Requirements: Unavoidable Breakdown

3. **A concise explanation of the particular statutory provisions under which the rule is enacted and how these provisions authorize or require the rule:**
Subsection 19-2-104(1)(a) allows the Air Quality Board to make rules "...regarding the control, abatement, and prevention of air pollution from all sources...," and Subsection 19-2-104(1)(c)(iii) allows the Board to write rules that require persons engaged in operation that result in air pollution to provide access to records relating to emissions that cause or contribute to air pollution. Thus, the Board may make rules such as Rule R307-107 that reduce the incidence of breakdowns that contribute to air pollution, and reduce the emissions that occur during breakdowns.

4. **A summary of written comments received during and since the last five-year review of the rule from interested persons supporting or opposing the rule:** R307-107 was proposed for public comment once since the last five-year review, DAR No 27427. Comments where received on the proposed rulemaking, most of which were adverse to the proposal. Given the adverse nature of the comments and lack of consensus on the proposed rule, the Board decided it would allow the proposal to lapse and maintain the existing unavoidable breakdown rule without changes. No other comments were received since the last five-year review. Comments received on the 2004 proposed amendment are as follows. COMMENT 1: All excess emissions constitute violations. Affirmative Defense is available only for penalties, not for injunctive relief. A state's decision not to pursue enforcement action does not bar the EPA or citizen enforcement of the applicable requirements (EPA, Utah Chapter Sierra Club, Wasatch Clean Air Coalition). COMMENT 2: The incentive to use appropriate scheduling/practices to avoid excess emissions during scheduled maintenance should not

be diminished by providing an Affirmative Defense (EPA). COMMENT 3: R307-107 (the Rule) includes a provision regarding the exercise of enforcement discretion by the executive secretary of the board. However, the Executive Secretary's or Board's decision does not bind the EPA or citizens. Further more, the Executive Secretary is allowed to make a determination of weather the propose criteria have been met. EPA is clear that the determination of the appropriateness of the appropriateness of the Affirmative Defense must be made "in a judicial or administrative proceeding," which affords the public procedural due process right (EPA, Western Resource Advocates and Utah Chapter Sierra Club). COMMENT 4: The draft rule uses the concept of "good industry practice." This is not an appropriate standard measuring of owner/operator actions, as good industry practice might not always be adequate to meet the requirements of the Clean Air Act (EPA). COMMENT 5: It is not appropriate under the Clean Air Act to provide an Affirmative Defense for excess emissions during maintenance activities. Scheduled maintenance should be addressed in the AO or Permit, or though the variance process (EPA, Utah Chapter Sierra Club, Wasatch Clean Air Coalition, Environmental Integrity Project). COMMENT 6: To protect the integrity of federal performance standards, any Affirmative Defense rule must not apply to performance standards of the SIP provisions that are derived from federally promulgated performance standards (EPA, Environmental Integrity Project). COMMENT 7: The reference to other rules, approval orders, and permits is overly broad. Any allusion to other rules, approval orders, or permits needs to be narrowed considerably (EPA, Wasatch Clean Air Coalition, Environmental Integrity Project). COMMENT 8: To assure protection on the NAAQS, the Affirmative Defense provision for startup/ shutdown/ malfunction (s/s/m) should also contain provision that limit the Affirmative Defense to areas and pollutants where a single source or small group of sources does not have the potential to cause an exceedance of the NAAQS of PSD increments (EPA, Utah Chapter Sierra Club, Western Resource Advocates). COMMENT 9: The Rule should specifically extend the 2 hour exclusion to all excess emissions (BYU, Environmental Integrity Project). COMMENT 10: Many of the criteria for qualifying for Affirmative Defense are too weak and do not conform to the intent and wording of the criteria in the EPA's September 1999 Policy (EPA, Utah Chapter Sierra Club, Wasatch Clean Air Coalition, Environmental Integrity Project, Western Resource Advocates). COMMENT 11: Reporting should be required of a certain magnitude of excess emissions of less then two hours duration or of excess emissions of two hours or more (Utah Chapter Sierra Club). COMMENT 12: An electronic reporting system, should be impleimted so that facilities report their emissions electronically, eliminating the need for paper files, and then reports could be made available to the public through a website (Environmental Integrity Project, Western Resource Advocates and Utah Chapter Sierra Club). COMMENT 13: The existing state rules are sufficient to deal with emissions and emission reporting issues associated with s/s/m in a manner that is consistent both with the Heat Air Conservation Act and the Clean Air Act. Given the adverse nature of the EPA's comments on the UDAQ's proposed Affirmative Defense Rule (ADR), Utah should maintain the existing Unavoidable Breakdown Rule (UBR) without changes (PacificCorp, Utah Industrial Environmental Coalition). COMMENT 14: Imposing additional excess emission and reporting rules beyond the current requirements is not consistent with the Utah Air Conservation Act or the Clean Air Act and thus exceeds the scope of authority granted to the Board to promulgate rules. A state AD/UBR should not govern where a more specific federal provision applies (PacificCorp, Utah Industrial Environmental Coalition, IPP). COMMENT 15: The EPA Policy is neither statue nor regulation and the UDAQ and the Board should not consider it as such in deciding

whether to adopt the Rule. Because the EPA Policy was enacted without formal legislative or rulemaking procedures, it is arguable that the EPA Policy exceeds the authority of existing federal regulations (PacificCorp, Utah Industrial Environmental Coalition). COMMENT 16: Clarity is necessary whether an asserted Affirmative Defense will truly be determined objectively or whether the Executive Secretary will subjectively decide whether the defense has been established (PacificCorp). COMMENT 17: R307-107-1(1) "scheduled" should be removed from "scheduled maintenance", as some maintenance is scheduled in the sense of planning those periods when a unit may be brought off line to perform intended maintenance activities (PacificCorp, Utah Industrial Environmental Coalition, Kennecott). COMMENT 18: If opacity must be included in the Rule, then the reporting requirements should be modified to more clearly state that compliance with this portion of the requirement is not required where NAAQS and PSD increments are not set for a given excess emission (PacificCorp, IPP). COMMENT 19: The word "sudden" is ambiguous in the context of operating extensive and complex equipment such as a power plant (PacificCorp, IPP). COMMENT 20: R307-107-2(1) states that the Rule applies to all sources except where s/s/m standards "are identified in a specific rule, approval order or permit." The approval orders and/or operating permits for each of PacifiCorp's existing generation facilities in Utah contain s/s/m standards that will render R307-107 inapplicable to those facilities as long as approval order and/or operating permits remain in place (PacificCorp). COMMENT 21: The words "could" and "avoided" in R307-107-2(2) place an impossible burden on sources because it implies and ability to act or avoid independent of the level of money, time or other resources that might enable that ability (PacificCorp). COMMENT 22: Clarification is needed as to when the three hour time limit to report an emission exceedance lasting two or more hours must be reported. Questions have also been raised as to the necessity of the three hour time limit to report excess emission. The Rule should specify a time limit that is more realistic, both in the ability of the agency to receive and act on the notification, and of the source to prepare the necessary information in a time period that is not rushed just for the sake of being rushed(PacificCorp, Utah Industrial Environmental Coalition, Kennecott, IPP, Silver Eagle, Graymont Western, Utah Petroleum Association). COMMENT 23: A clarification is needed with the language of the Rule to be more specific: "two or more hours" or "more then two hours" (PacificCorp, Utah Industrial Environmental Coalition, Kennecott, IPP, Silver Eagle, Graymont Western, Utah Petroleum Association). COMMENT 24: Clarification is needed as to the proposed deadline for filing for an Affirmative Defense and form that the filing must take (PacificCorp, Utah Industrial Environmental Coalition). COMMENT 25: The timeframe for initial verbal reporting and written reporting should be consistent with surrounding Region 8 states (Utah Petroleum Association). COMMENT 26: EPA is obligated to issue a SIP Call detailing any deficiencies that it perceives in Utah's Unavoidable Breakdown Rule. EPA's objection to Utah's existing UBR and Utah's proposed ADR are arbitrary and capricious given similar federal provisions (Utah Industrial Environmental Coalition, IPP). COMMENT 27: Contrary to the EPA's claim, providing a limited and clearly defined exception from noncompliance actually provides a compliance incentive (Utah Industrial Environmental Coalition). COMMENT 28: A demonstration of Affirmative Defense or Unavoidable Breakdown should be available without requiring litigation (Utah Industrial Environmental Coalition). COMMENT 29: The idea of "unavoidable" should be inserted in to the definition of malfunction so long as the rule states that the determination of whether a malfunction is reasonably unavoidable will be based in the application of the criteria specified in the rule (Utah Industrial Environmental Coalition).

COMMENT 30: "Good Industry Practices" is needed to establish a standard for evaluating whether and owner/operator qualifies for an Affirmative Defense (Utah Industrial Environmental Coalition). COMMENT 31: Elimination of the Affirmative Defense in those instances where NAAQS or PSD increments could potentially be exceeded creates a vague and arbitrary standard (Utah Industrial Environmental Coalition, Kennecott). COMMENT 32: The Rule needs to specifically allow for due process and an s/s/m plan (Utah Petroleum Association). COMMENT 33: There will be no increase or decrease in emissions resulting from this proposed rule change (IPP). COMMENT 34: The Rule needs to be revised to include an option for sources to develop and follow a facility-specific s/s/m plan (IPP). COMMENT 35: The criteria for asserting an Affirmative Defense are too general, and may be subject to unreasonable interpretation unless specific, measured criteria are agreed to in advance (IPP). COMMENT 36: The Rule would be awkward and nonsensical if is did not specify that it is the Executive Secretary who is charged with evaluating an Affirmative Defense (Utah Industrial Environmental Coalition).

5. A reasoned justification for continuation of the rule, including reasons why the agency disagrees with comments in opposition to the rule, if any:
Typically, startups and shutdowns in industrial operations cause more emissions of air pollutants than are emitted during normal operations. Breakdowns in processing equipment can cause excess emissions. The rule is needed to ensure that excess emissions are promptly reported so that the Division of Air Quality can take action to protect public health, and require that the operator do everything possible to reduce excess emissions and thus should be continued.

6. Indexing information - keywords (maximum of four, in lower case):
air pollution, breakdown*, excess emissions*

7. Attach an RTF document containing the text of this rule change (filename):
There is currently a document associated with this filing. Rule Text

To the agency: Information requested on this form is required by Section 63-46a-9. Incomplete forms will be returned to the agency for completion, possibly delaying the effective date.

AGENCY AUTHORIZATION

Agency head or designee, and title:	Date (mm/dd/yyyy):
Non Printable	08-28-08