PENGAD 800-631-6989 AQD EXHIBIT 13

Thank you, Mr. Hearing Officer, Chairman Deichman, and members of the Board. My name is Neal Butt. I am an Environmental Health Scientist with the Air Quality Division, Control Strategies Section. I am here in the matter of the proposed repeal of Section 20.11.90.12 NMAC, entitled *Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance*, and replacement by a new rule, 20.11.49 NMAC, entitled *Excess Emissions*, as well as minor revisions to 20.11.65 NMAC, *Volatile Organic Compounds*, and 20.11.69, *Pathological Waste Destructors* to correct cross-references. The proposed rule responds to two significant issues: The first is EPA's policy which requires states to treat all excess emissions as violations subject only to affirmative defenses for civil penalties in certain circumstances. Secondly, the proposed rule updates the AQD's excess emissions program to conform to EPA guidance in addition to that of excess emission being a violation.

The Department's proposal addresses the excess emission problem by tightening notification requirements, establishing criteria recommended by EPA for affirmative defenses, and requiring root cause and corrective action analysis.

The Department received written comments from the Environmental Protection Agency in Dallas, Region 6, shown as AQD Exhibit # 5a.

The Department has not received any written comments from the public.

Now I would like to begin with a basic background of excess emissions, including: The history of the rule, the magnitude of the problem with excess emissions and the necessity to revise the rule to address these problems. I will also touch briefly on the 'nuts and bolts' of the rule, how it works, with the specific focus on the notification requirements, the affirmative defenses and the root cause analysis.

'EPA strongly supports the State's rule, believes that it is a comprehensive effort, sets the standard, at least in Region 6, if not nationally, and provides a strong basis for reducing the number -- the frequency and severity of excess emission events in New Mexico'(NM Transcript). In light of this, the Department patterned its proposed rule after the State's rule.

The proposed excess emissions rule could potentially affect all of the industrial sources that are regulated in the county, and affects the public, too. There are several reasons we are approaching the Board today to replace the 1971 rule: it does not conform to EPA guidance (shown as AQD Exhibits 8a-8d); non-conformance of the Air Board's excess emissions rule with EPA guidance could expose the Air Board/Division to possible litigation (see examples at AQD Exhibits 11a & 11b); it also creates uncertainty for the regulated community; and it could possibly cause delays in the issuance of Title V and prevention of significant deterioration permits (PSD) because it is not in conformance with the EPA guidance.

EPA could possibly disapprove issuance of Title V permits and PSD permits because of the rule's obsolescence. The old rule does not require sources to investigate and correct their excess emissions, which thwarts our ultimate goal, that of eliminating excess emissions or emissions in excess of permitted amounts.

While EPA's policy states that "All excess emissions are violations of the applicable emission limitation," EPA recognizes that there is a possibility of unavoidable equipment malfunction and allows states to provide an affirmative defense and to exercise enforcement discretion, for malfunctions, startup and shutdown.

In the process of developing this proposal we conducted stakeholder outreach from April 3rd to May 1st, with a stakeholder meeting held on April 23, 2009 (See AQD Exhibit #4). Only minor changes were needed to address stakeholder concerns.

I would like to summarize the current rule to give some context as to why we are here today and why we want to replace it. The rule was first adopted in 1971 (AQD Exhibit 9a). It was amended twice in 1973, replacing the term "Upset" with the term "Abnormal operating conditions", and the term "Secretary" with the term "Director". Also, the language describing careless operation was strengthened by adding the word "Deliberate" (AQD Exhibit # 9b & 9c). The rule was filed in 1977 without any changes. In 1982, the rule changed from a "Section" of Regulation #1, to a "Regulation" (AQD Exhibit # 9e). Other than the aforementioned minor changes and twice being reformatted (1995 & 2002), this rule has not changed since its' inception. The most recent approval by EPA of this rule as part of the SIP was in 1980 (See AQD Exhibit #6)

The current rule states that:

"Operation of any equipment or air pollution control devices or apparatus so as to cause **emissions of air contaminants in excess of limits set by these air pollution control regulations, which is a direct result of breakdown** of equipment or of **abnormal operating conditions**, **or** is a direct result of the **shutdown** of such equipment **or** air pollution control devices or apparatus for scheduled **maintenance is not a violation** of these air pollution control regulations, **provided**:

A. As to **scheduled maintenance**, the **occurrence is reported in advance** to the Director during his working hours and that such **work is performed during periods of non-operation** and when the Air Pollution Potential Index is under 50.

B. As to **breakdown** of equipment **or abnormal operating conditions**, the **occurrence has been reported** to the Director as soon as practicable, but **no later than two (2) hours after the occurrence**, except that when the Director's office is closed, such report shall be made within two (2) hours after said office reopens for regular business.

C. **Repairs are made with maximum, reasonable effort**, including use of off-shift labor, overtime or work periods of non-operation.

D. The **emission** of air contaminants is **minimized** as much as reasonably possible **during breakdown** of equipment, **abnormal operating conditions or scheduled maintenance**.

E. In the event of **emission of air contaminants of a nature or in quantities, which would endanger public health or safety**, such emission is **stopped entirely or reduced to harmless levels as soon as possible**.

F. **Breakdown** of equipment **or abnormal operating conditions do not occur with such frequency that careless, marginal, unsafe or deliberate abnormal operation is indicated**".

On March 2, 1981, EPA notified AQD in a letter that this rule is not consistent with EPA's guidance [AQD Exhibit 5b].

EPA policy regarding affirmative defenses.
Since 1971, EPA has issued several policy statements regarding the type of enforcement discretion that states can exercise for excess emissions.

These policies are spelled out in memoranda dated 1982, 1983, 1999 and 2001, marked [AQD Exhibits 8a-8d]. The EPA begins their policy statements with the principle that all excess emissions, without exception, are violations of an applicable emission limitation. So states may provide affirmative defenses for civil penalty *only* for malfunctions, startups and shutdowns. Malfunction is defined as "a sudden and unavoidable failure of process or air pollution control equipment which is entirely beyond the control of the owner or operator".

And, again, this affirmative defense applies only to civil penalties, not to injunctive relief or corrective action. There is no defense for routine or predictable emissions during startup and shutdown.

There is no defense for emissions during scheduled maintenance and routine or predictable emissions during startup and shutdown, and scheduled maintenance should be addressed through planning, design and operating procedures.

So these types of routine and predictable emissions should be included in the source's permit, and, certainly, the AQD has and will continue to exercise enforcement discretion for any events that might not be covered by the affirmative defenses that are proposed. EPA specifically gives that right in a policy.

So what are some of the revisions to the current rule? Well, first, it clarifies that all excess emissions are violations; it provides the affirmative defenses for malfunctions and then some startups and shutdowns; it establishes clear and consistent reporting and data requirements; and incorporates EPA's criteria for affirmative defenses.

The replacement rule adopts EPA's criteria nearly verbatim. The Department deviated from the EPA criteria only to the extent necessary to accommodate the structure of the proposed rule.

EPA reviewed a draft of this proposed rule from May 7 to June 19th. Their comments are shown as AQD Exhibit 5a, in which they state that after reviewing the proposed rule, they fully support our consideration for the repeal and replacement of the current excess emissions rule.

Explain how the proposed regulation is designed and will be implemented.

Sections 14{109} and 15{110} contain provisions required by the EPA 1999 policy; Section 16{111, 112, and 113} contains affirmative defenses that are consistent with EPA policy; Section 17{114} establishes the requirements for root cause and corrective action analysis; and Subsection 20.11.49.16.E {115} and Section 18{116} specify how the rule will be implemented.

The title of Section 14{109} is "*Operation Resulting in an Excess Emission*". This section contains two provisions:
1. All excess emissions are violations of the applicable emission limitation and may be subject to an enforcement action.

And the other provision specifies that:

2. During an excess emission, the source and associated air pollution control equipment must be operated in a manner consistent with good air pollution control practices for minimizing emissions.

Both of these provisions are directly from the 1999 EPA policy, and that policy is found in [AQD Exhibit # 8c]. Section 15{110} contains the notification requirements, and this section primarily specifies the deadlines for submitting reports, and it also specifies the information that is to be included in these reports.

The deadline for submitting an initial report is the end of the next regular business day after discovery of the excess emission; the deadline for submitting a final excess emission report is 10 days after the end of the excess emission. If the period of an excess emission extends beyond 10 days, the owner or operator shall submit the final report to the department within 72 hours of the date and time the excess emission ceased.

Alternative reporting. If an owner or operator of a source is subject to both the excess emission reporting requirements of 20.11.49.15 NMAC and the reporting requirements of 40 CFR Parts 60, 61, and 63, and the federal reporting requirements duplicate the requirements of 20.11.49.15 NMAC, then the federal reporting requirements shall suffice.

In addition, there is a provision allowing for electronic reporting, to accommodate the web-based reporting tool that is currently under consideration.

Section 15 requires more information for an excess emission report than in the current rule. A few examples of some information that's not currently covered by the current rule would be permit number, the air quality regulation or permit condition that was exceeded, whether the owner or operator attributes the excess emission to malfunction, startup, shutdown or emergency.

Also in the proposed rule there is a new requirement for a signed certification that the content of the report is true, accurate and complete.

Subsections 20.11.49.16A {111} and 16.B {112} establish the criteria for affirmative defenses for malfunction, startup and shutdown respectively. These sections establish the criterion, and this is effectively the EPA's affirmative defense criteria almost verbatim taken from the 1999 policy. The source bears the burden of proving each affirmative defense criterion. If the source demonstrates that it met each criterion, the Department would not assess a civil penalty. However, the source would remain liable for injunctive relief, meaning that they still have to implement the corrective actions. They are required to eliminate the excess emission events or to prevent an event of excess emissions.

These affirmative defense sections contain specific and common requirements. The specific requirements for Subsection 20.11.49.16A {111}, which is for malfunction, requires that the source must demonstrate that the excess emission was caused by a malfunction. By definition, that would be "any sudden and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator". The source would also have to demonstrate that the excess emission did not stem from any activity or event that could have been foreseen or avoided or planned-for and could not have been avoided by better operation and maintenance practices.

Requirements for startup and shutdown stipulate that the source must demonstrate that the excess emission did occur during a startup or a shutdown; was of minimal duration; could not have been prevented through careful planning and design; and was not part of a recurring pattern indicative of inadequate design operation or maintenance.

The requirements that are common to both sections are that the source must demonstrate that the process and air pollution control equipment was operated in a manner consistent with good practice for minimizing emissions; the emissions were minimized to the extent practicable; emission monitoring systems were kept in operation; repairs were made expeditiously; and the actions were documented by signed, contemporaneous operating logs or other relevant evidence.

Subsection 20.11.49.16.C {113} contains the affirmative defense provisions for emergency. The provisions for an affirmative defense are limited to technology-based requirements, and the source must demonstrate, that an emergency occurred. And by definition, that would be "any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God".

The source must also demonstrate that at the time of an excess emission, that the source was being properly operated and all reasonable steps were taken to minimize levels of emissions and that the notification requirements in Part 42 [20.11.42.12.A.(4).(e).(vii)]{20.2.70 NMAC} were fulfilled.

The Department is proposing a requirement for sources to conduct a root cause and corrective action analysis in Section 17{114}. Root Cause Analysis is a standard engineering practice that is routinely used by many facilities to improve their health, safety and environmental performance.

The requirements for Root Cause Analysis have been developed by the EPA in the context of their "National Petroleum Refinery Initiative" and applied in (many) consent decrees. So the requirements that are found in Section 17{114} are effectively the Root Cause Analysis requirements that are in the "Navajo Consent Decree".

The proposed rule requires that after an excess emission event, a source would be required to identify the root and all contributing causes of the excess emission; they would then conduct an analysis on any corrective actions that would be available to correct this event and prevent a reoccurrence; they would evaluate the effectiveness of every corrective action that would be

possible; they would evaluate the cost of each one of these, and then they would propose an implementation schedule for implementing this corrective action.

A Root Cause Analysis for every single excess emission event might be inefficient and burdensome, so the proposed rule requires that a Root Cause Analysis would only be required upon the written request of the Department . . .after considering relevant factors. Examples of such relevant factors might include, but are not necessarily limited **to,** the significance of the excess emission, the nature or pattern of the excess emissions or the history of the source.

The Department recommends the use of the Department of Energy's "Root Cause Analysis Guidance Document, 1992" (AQD Exhibit # 10) for root cause analysis; however, sources would be allowed to use a root cause analysis method that they may feel is more appropriate or that they may currently be using, subject to Department approval.

The proposed requirement to conduct a root cause analysis stipulates that the source must conduct an analysis using appropriate analytical tools.

The proposed rule stipulates that the Department will request a Root Cause Analysis no later than 90 days after the final excess emission report is submitted and that sources shall submit a Root Cause Analysis no later than 60 days after such request from the Department.

The proposed rule also contains a provision to allow sources to claim confidential business protection for information provided in Root Cause Analysis.

The title of Subsection 20.11.49.16.E{115} is "*Department's Determination of Adequacy of Affirmative Defense*". This section describes the Department's process for making determinations regarding affirmative defenses.

While the Department may issue a determination after reviewing all relevant information regarding an excess emission event, the affected source cannot challenge a decision until the Department commences an administrative or a judicial action.

Section 18{116} is entitled "*Future Enforcement Action*", and is intended to preserve the Department's right to commence an enforcement action for an excess emission on which it has already made a positive determination regarding an affirmative defense. This provision addresses the possibility that the Department might initially approve an affirmative defense and then subsequently discover additional information warranting an enforcement action, even if a previous determination had already been made.

The Department will design forms to report excess emissions, claim affirmative defenses and submit root cause analyses. The Department will also design detailed instructions to go along with these forms. They will be finalized by the effective date of this proposed rule.

The Department will develop a procedure which will enable sources to submit excess emission reports electronically over the Internet. In addition to submitting the actual excess emission

report, the source would also be able to submit any supporting documentation and other potential subsequent submittals, such as affirmative defense demonstration forms or root cause analyses.

That concludes my testimony, and the technical panel and I stand for questions