House
Legislative
Analysis
Section

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AFFIRMATIVE DEFENSE FOR AIR POLLUTION EMISSIONS

House Bill 5839 as introduced
First Analysis (5-30-00)

Sponsor: Rep. Patricia Birkholtz
Committee: Conservation and Outdoor Recreation

THE APPARENT PROBLEM:

The control of air pollution falls under a complex set of interrelated federal and state laws (and sometimes local ordinances). The major federal legislation is the 1970 Clean Air Act, which was amended in 1977 and 1990 (see BACKGROUND INFORMATION). The 1990 amendments required states to develop programs to attain certain air quality standards and to monitor the amounts of air pollutants that are emitted by industrial facilities operating within their borders. In particular, Title V of the amendments governs operating permits and required states to develop comprehensive permit programs that then had to be approved by the U.S. Environmental Protection Agency.

Under Part 55 of the Natural Resources and Environmental Protection Act (NREPA), which formerly was the state Air Pollution Control Act, when an emergency situation results in emissions above the allowable levels, holders of so-called "Title V" operating permits (which also are known as "renewable operating permits," or "ROPs") can use the emergency as an affirmative defense in court should they be sued for the excess emissions. However, the holder of a "permit to install" (see BACKGROUND INFORMATION) has no such legal defense in similar situations, and legislation has been introduced to remedy this.

THE CONTENT OF THE BILL:

Currently under the air pollution part (Part 55) of the Natural Resources and Environmental Protection Act (NREPA), if an emergency, and not negligence on the part of the permit holder, results in emissions exceeding those allowed under a "renewable operating permit," proper documentation of the emergency is an affirmative defense in court if the permit holder is subject to penalties for the excess emissions. (See BACKGROUND INFORMATION for state and federal definitions of "emergency.")

The bill would amend the NREPA to add the same affirmative defense for emissions exceeding those allowed under a "permit to install" (which is issued under section 5505 of the NREPA).

MCL 324.5527

BACKGROUND INFORMATION:

Air pollution permits. Generally, significant sources of air pollution require governmental permits to operate. There are permits for entire industrial plant or facilities ("renewable operating permits") and permits for specific operations or actions by generally smaller operations that also emit air pollution (nonrenewable "permits to install").

Individual air polluting operations or actions are known as "processes," and the equipment involved is called "process equipment." The NREPA defines "process" to mean "an action, operation, or a series of actions or operations at a source that emits or has the potential to emit an air contaminant." (MCL 324.5501) Examples of such "processes" include physical or chemical changes of materials; combustion of fuel, refuse, or waste material; and storage or handling of materials. According to a guide issued by the Department of Environmental Quality in June 1994, "just about any industrial or manufacturing process and/or process equipment requires a permit to install unless it can be specifically exempted or demonstrated that it does not have the potential to emit an air contaminant."

A "renewable operating permit" (ROP) is a facility-wide permit rather than a permit for an individual process or piece of equipment, and basically consolidates the multiple "permits to install" that otherwise would be required of the multiple processes and equipment within the facility. The ROP is primarily an enforcement tool that documents all of a facility's requirements for compliance with federally enforceable

air quality regulations (though requirements specific to the state also will be found in an ROP). "Major sources" of air pollution (plants or facilities emitting more than 100 tons of pollutants per year) generally need a renewable operating permit.

The 1990 Clean Air Act Amendments. The 1990 Clean Air Act Amendments (which have 11 sections or "titles") were enacted to curb acid rain, urban air pollution, and hazardous pollutants. The first section of the amendments (Title I) recognizes that major areas of the nation do not meet national Ambient Air Quality Standards for six common ("criteria") air pollutants initially identified as being the most significant problems in the nation. These "criteria" air pollutants consist of particulate matter, carbon monoxide, sulfur dioxide, nitrogen dioxide, ground level ozone (which is created when volatile organic compounds, or "VOCs," and nitrogen oxides react with sunlight to create smog), and lead. These Ambient Air Quality Standards were established to protect public health and are monitored on a county-wide basis across the nation. Counties (or, in some cases, smaller areas) not in compliance with these federal standards are considered to be "nonattainment areas," and states with these areas are required to take specific emission reduction measures, with specific reduction deadlines, based on the extent of their air pollution problem. Title I also contains the Prevention of Significant Deterioration (PSD) and Major Offset requirements. During the evaluation of air pollution permits for proposed construction of major potential sources (or major modification of existing sources) of air pollution – a process referred to as New Source Review (NSR) – permit engineers employed by the regulatory agencies determine the source's compliance with these complex requirements.

Title V of the amendments required major changes in the way states enforced air quality control measures. Facilities that have "permits to install" also may need to apply for a "renewable operating permit" (ROP), and all sources emitting certain amounts of particular air pollutants are required to apply for such a permit. The ROP, which basically consolidates individual process "permits to install" into a facility-based permit, must be tailored to the individual "source" (such as an industrial plant) and clearly specify emission limitations, testing procedures, reporting, and recordkeeping requirements. The permit has a fixed term not to exceed 5 years, and during the term of the ROP, the facility must provide periodic proof that it is in compliance with each condition established by the permit.

In 1993, Michigan enacted a number of laws designed to implement and comply with the federal Clean Air Act, including the establishment of a small business clean air assistance program; an operating permit program for stationary sources of air pollution, including fees and enforcement mechanisms; vehicle emissions inspection programs for certain counties in West Michigan (Kent, Ottawa, and Muskegon) and in Southeast Michigan (Wayne, Oakland, and Macomb); gasoline vapor pressure standards; and vapor-recovery systems at gasoline dispensing facilities.

Affirmative defense. Part 70 of Chapter I of Title 40 of the Code of Federal Regulations contains the federal regulations for state operating programs (SIPs) under the Clean Air Act. Section 70.6(g) defines "emergency" to mean "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency." An "emergency" does not include "noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error." The federal regulation says that an emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations" if the following conditions are met: *"The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:*

(1) An emergency occurred and that the permittee can identify the cause(s) of the emergency.

(2) The permitted facility was at the time being properly operated.

(3) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(4) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notices fulfills the requirements of . . . this section. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken."

State law defines "emergency" similarly, but with the addition of "war, strike, riot, catastrophe, or other

condition as to which negligence on the part of the person was not the proximate cause." The complete definition of "emergency" in this part of the NREPA is "a situation arising from sudden and reasonably foreseeable events beyond the control of the source including acts of God, war, strike, riot, catastrophe, or other condition as to which negligence on the part of the person was not the proximate cause, which requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation contained in an operating permit issued pursuant to section 5506 [renewable operating permits], due to unavoidable increases in emissions attributable to the emergency." As in federal regulation, the state definition of "emergency" does not include "acts of noncompliance caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error." (MCL 324.5527)

In September 1999, the EPA issued a memorandum on state implementation plans (SIPs) regarding policy for excess emissions during malfunction, startup, and shutdown that reaffirmed and supplemented the policy contained in 1982-83 memoranda from the agency. The 1999 memorandum defines the term "affirmative defense" for excess emissions to mean, in the context of an enforcement proceeding, "a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding."

State law does not define "affirmative defense," but specifies the conditions under which an emergency "constitutes an affirmative defense to an action brought for noncompliance with a technology-based emission limitation contained in an operating permit issued pursuant to section 5506 [renewable operating permits]". More specifically, and again following federal regulations, the "affirmative defense of emergency" must be "demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that establish all of the following:

(a) An emergency occurred and that the permit holder can identify the cause of causes of the emergency.

(b) The permitted source was properly operated at the time of the emergency.

(c) During the emergency the permit holder took all reasonable steps to minimize levels of emission that exceeded the emission standards, or other requirements of the permit.

(d) The permit holder submitted notice of the emergency to the department within 2 working days of the time when an emission limitation was exceeded due to the emergency. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken." (MCL 324.5527)

As in the federal regulations, in any enforcement proceeding, the permit holder seeking to establish the occurrence of an emergency has the burden of proof.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The Natural Resources and Environmental Protection Act already provides an affirmative defense for certain sources of air pollution – typically, but not always, larger sources such as power plants and other industrial facilities – when the source exceeds its permitted emission limitations (under a "renewable operating permit" under Title V of the 1990 amendments to the federal Clean Air Act) in an emergency situation such as a war, riot, or act of God. (Reportedly, this affirmative "emergency" defense also is in federal law.) However, this same "emergency" legal defense is not available to the typically smaller sources of air pollution that hold "permits to install." The bill would give holders of "permits to install" the same affirmative defense currently available under state and federal law to holders of "renewable operating permits," which seems only fair.

POSITIONS:

The Department of Environmental Quality supports the bill. (5-25-00)

The Michigan Manufacturers' Association supports the bill. (5-25-00)

The Michigan Environmental Council has no position on the bill. (5-29-00)

Analyst: S. Ekstrom

#This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.