TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AGENDA ITEM REQUEST

for Proposed Rulemaking

AGENDA REQUESTED: April 27, 2016

DATE OF REQUEST: April 8, 2016

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Sherry Davis, (512) 239-2141

CAPTION: Docket No. 2016-0201-RUL. Consideration for publication of, and hearing on, proposed new Section 101.225 of 30 Texas Administrative Code Chapter 101, General Air Quality Rules; and corresponding revisions to the Texas State Implementation Plan.

The proposed rule would establish alternative work practice standards for certain excess emissions. (Cynthia Gandee, Janis Hudson) (Rule Project No. 2016-018-101-CE)

Ramiro Garcia, Jr.
Deputy Director

Susan Jablonski
Division Director

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Agenda Coordinator

Copy to CCC Secretary? NO X YES

Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** April 8, 2016

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Ramiro Garcia, Jr., Deputy Director
Office of Compliance and Enforcement

Docket No.: 2016-0201-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 101, General Air Quality Rules
Alternative Work Practice Standards for Certain Excess Emissions
Rule Project No. 2016-018-101-CE

Background and reason(s) for the rulemaking:
On June 12, 2015, the United States Environmental Protection Agency (EPA) published a State Implementation Plan (SIP) Call for Texas, among 36 other states, finding that TCEQ rule 30 Texas Administrative Code §101.222(b) - (e) is substantially inadequate to meet Federal Clean Air Act (FCAA) requirements. Section 101.222(b) - (e) provides an affirmative defense availability, if listed criteria are met, as to monetary penalties for exceedances of emission limits in a rule or permit that result from unplanned maintenance, startup, and shutdown (MSS) activities; upsets; or excess opacity events resulting from upsets or unplanned MSS activities. EPA's SIP Call is a final action on a petition filed by the Sierra Club in 2012 regarding excess emissions during periods of startup, shutdown, or malfunction (SSM) for which TCEQ commented on the proposal in November 2014.

In its final rule, EPA changed its interpretation of the FCAA and policy for SSM emissions from allowing narrowly tailored affirmative defense provisions (such as in TCEQ's rule) to finding that the FCAA prohibits affirmative defense provisions in SIPs. EPA's SIP approval of §101.222(b) - (e) was upheld by the Fifth Circuit Court of Appeals in 2013. This was prior to an opinion by the D.C. Circuit Court of Appeals in 2014 regarding an EPA National Emission Standards for Hazardous Air Pollutants rule which held that the FCAA does not allow rules that limit a court's ability to assess penalties; EPA is relying on this opinion as a basis for its SIP Call. EPA's position is that TCEQ's rule, as well as rules in other states, purport to alter or eliminate the statutory jurisdiction of courts to determine liability and to assess appropriate remedies for violations of SIP requirements and, therefore, are not permissible. EPA also stated that SIP provisions cannot contain enforcement discretion provisions that would bar enforcement by the EPA or citizens for any violation of SIP requirements if the state elects not to enforce, which §101.222 does not do.

In its final rule, EPA states that a legally and practically enforceable alternative emission limitation, applicable during startup and shutdown periods, should be expressed as a numerical limitation, a specific technological control requirement or a specific work practice requirement applicable to affected sources during specifically defined periods or modes of operation, such as startups and shutdowns. All states, including Texas, are required to revise their SIPs by November 22, 2016.

EPA's SIP Call is being challenged in the D.C. Circuit Court of Appeals by Texas/TCEQ and several Texas industry groups, as well as 18 other states, approximately 23 industry groups and trade associations, and several electric generating companies. Five environmental groups have intervened on behalf of EPA.

In addition to the litigation, the response to the SIP Call includes this rulemaking, proposing an alternative emission limit which will become effective if adopted by the commission, but for which the compliance date would be delayed until 60 days after EPA approves the rule as a SIP revision, provided that all appeals of the challenge of the SIP Call are extinguished and the current affirmative defense rule (§101.222(b) - (e)) is no longer legally in effect. This proposal does not include repeal or SIP removal of §101.222(b) - (e).

Scope of the rulemaking:
The proposed rulemaking would add new §101.225.

A.) Summary of what the rulemaking will do:
Proposed new §101.225 would establish new alternative work practice standards for certain excess emissions, which would include the same criteria currently required to prove an affirmative defense. This rule would include a delayed compliance date to put Texas in a position to comply with the SIP Call without jeopardizing our litigation position regarding use of an affirmative defense in SIPs.

B.) Scope required by federal regulations or state statutes:
TCEQ is required to revise the SIP by November 22, 2016, to remove or replace §101.222(b) - (e).

C.) Additional staff recommendations that are not required by federal rule or state statute:
In order to address the specific concern EPA articulated in its final rule (80 FR 33839, June 12, 2015) regarding §101.222(b) - (e), the proposed rule would include rule language to explicitly reiterate what the commission has stated in previous rulemaking preambles regarding EPA and citizen enforcement. The rule states that the new section does not preclude EPA or federal courts to assess civil penalties or other forms of relief or to interfere with the rights of litigants to pursue enforcement.

Statutory authority:
Texas Health and Safety Code, §§382.002, 382.011, 382.012 and 382.017; Texas Water Code, §§5.013, 5.102, 5.103, and 5.105, and FCAA, 42 United States Code, §§7401, *et seq*.

Effect on the:

A.) Regulated community:

The proposed rule would require the regulated community to demonstrate compliance with alternative work practice standards as opposed to demonstrating that they have met affirmative defense criteria as of the compliance date.

B.) Public:
No impact is anticipated.

C.) Agency programs:
The TCEQ's Office of Compliance and Enforcement (OCE) will be minimally impacted. The investigative and enforcement processes would be similar to the current approach, but some training would be needed to implement the proposed rule.

Stakeholder meetings:
The commission did not hold any stakeholder meetings related to this rulemaking; however, a rule public hearing will be held during the comment period in Austin.

Potential controversial concerns and legislative interest:
EPA may propose a Federal Implementation Plan (FIP) to remove §101.222(b) - (e) from the SIP. There is no known legislative interest.

Will this rulemaking affect any current policies or require development of new policies?
There are no anticipated impacts to current agency policy, nor does this rule necessitate policy development.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?
The SIP Call only requires removal of §101.222(b) - (e) from the SIP. A finding of failure to submit a SIP revision could trigger an obligation for the EPA to impose a FIP. EPA has stated that in addition to removal of the affirmative defense rule, states may adopt a rule providing for enforcement discretion or may adopt alternative emission limits for periods of operation, such as startups and shutdowns, for which compliance with emission limits for normal operation cannot be achieved.

Key points in the proposal rulemaking schedule:
Anticipated proposal date: April 27, 2016
Anticipated *Texas Register* publication date: May 13, 2016
Anticipated public hearing date (if any): June 7, 2016
Anticipated public comment period: May 13, 2016 - June 13, 2016
Anticipated adoption date: October 19, 2016

Agency contacts:
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Janis Hudson, Staff Attorney, (512) 239-0466

Re: Docket No. 2016-0201-RUL

Sherry Davis, Texas Register Coordinator, (512) 239-2141

Attachments
None

cc: Chief Clerk, 2 copies
Executive Director's Office
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Erin Chancellor
Stephen Tatum
Jim Rizk
Office of General Counsel
Cynthia Gandee
Sherry Davis

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §101.225.

If adopted, the proposed rule will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

On June 12, 2015, EPA published its final action on a petition for rulemaking filed by the Sierra Club that concerned how provisions in SIPs treat excess emissions during periods of startup, shutdown, or malfunction (SSM) (80 FedReg 33839). In that notice, EPA stated it was clarifying, restating, and revising its guidance concerning its interpretation of the Federal Clean Air Act (FCAA) requirements with respect to treatment in SIPs of excess emissions during periods of SSM. As a result, the EPA issued a SIP Call for 36 states, making a finding that certain SIP provisions are substantially inadequate to meet FCAA requirements and established a due date of November 22, 2016, for submittal of SIP revisions to address this finding. Although Texas was not included in the Sierra Club's petition, and EPA's SIP approval of §101.222(b) - (e) in 2010 was upheld by the Fifth Circuit Court of Appeals in 2013, *Luminant Generation v. EPA*, 714 F.3d 841 (5th Cir. 2013), EPA supplemented its original proposed rulemaking in response to the petition to propose to add the Texas SIP, specifically finding that §101.222(b) - (e) is substantially inadequate to meet FCAA requirements. In its final rulemaking, EPA

included Texas in the SIP Call.

Regarding changes to the SSM policy, EPA rescinded its interpretation that the FCAA allows states to elect to create narrowly tailored affirmative defense provisions in SIPs. Instead, EPA promulgated its new interpretation of the FCAA prohibiting affirmative defense provisions in SIPs based on EPA's conclusion that the enforcement structure in FCAA, §113 and §304 preclude any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. EPA based its position on the decision in *NRDC v. EPA*, 749 F.3d (District of Columbia Circuit (D.C. Cir.)) 2014 regarding an EPA National Emission Standards for Hazardous Air Pollutants rule, which held that the FCAA does not allow rules that limit a court's ability to assess penalties which the EPA is relying on in its final rule, and further asserts that affirmative defense provisions, by their very nature, purport to limit or alter the authority of the federal courts. The EPA's position is that Texas' rule, §101.222(b) - (e), as well as affirmative defense rules in other states' SIPs, purport to alter or eliminate the statutory jurisdiction of courts to determine liability and to assess appropriate remedies for violations of SIP requirements, and therefore are not permissible. The EPA also stated that SIPs cannot contain enforcement discretion provisions that would bar enforcement by the EPA or citizens from taking action for any violation of SIP requirements for which the state elects not to enforce.

The affirmative defense in §101.222(b) - (e) is available only for certain types of excess emissions, specifically non-excessive upset events and unplanned maintenance, startup, and shutdown (MSS) activities. The Texas Clean Air Act defines an emissions event as an upset event, or unscheduled MSS activity, from a common cause that results in the unauthorized emission of air contaminants from one or more emissions points at a regulated entity. An upset is roughly equivalent to EPA's definition of malfunction and is a violation by definition since the emissions are unauthorized. These types of events are unplanned and unavoidable. The existing affirmative defense provisions apply to claims in enforcement actions, the defense does not extend to claims for administrative technical orders and injunctive relief for these types of excess emissions violations.

For an owner or operator to claim an affirmative defense, they must prove certain criteria, based upon the type of excess emissions. When EPA approved the Texas affirmative defense criteria as part of the Texas SIP (75 FedReg 68989 (November 10, 2010)), EPA acknowledged that although the FCAA requires continuous compliance, there may be times when a source may not be able to meet emission limitations during certain operating scenarios (i.e., SSM). When these scenarios occur, criteria that a source must meet incentivizes proper planning, design, operation, maintenance, and monitoring. In this Texas SIP approval, EPA referenced its 1999 policy, stating "in the course of an enforcement action for penalties, a source could assert the affirmative defense and the burden would be on the source to prove enumerated factors, including

that the period of excess emissions was minimized to the extent practicable and that the emissions were not due to faulty operations or disrepair of equipment." The commission continues to support its existing affirmative defense criteria by proposing them as work practice standard requirements that apply to emissions or opacity that exceed a permit, rule, or order requirement; meet the definitions in this chapter; and serve as a bridge to continuous compliance.

In its final rule, EPA stated that, although affirmative defenses are now prohibited under EPA's new FCAA interpretation and must be removed by November 22, 2016, states have alternatives to inclusion of affirmative defenses in SIPs. These include removal of affirmative defenses, with or without replacing them with a rule providing for enforcement discretion; or removal of affirmative defenses and establishing legally and practically enforceable alternative emission limitations, applicable to certain modes of operation, such as during periods of startup and shutdowns. These alternative emission limits can be expressed as a numerical limitation, a specific technological control requirement, or a specific work practice requirement applicable to affected sources during specifically defined periods or modes of operation.

EPA's SSM SIP Call is being challenged in the D. C. Circuit Court of Appeals by the State of Texas, TCEQ, several Texas industry groups, 18 other states, approximately 23 industry groups and trade associations, and several electric generating companies. Five

environmental groups have intervened on behalf of EPA. Accordingly, the commission is not proposing to remove its affirmative defense rule from the Texas SIP.

However, to ensure that Texas will have timely submitted an alternative to its affirmative defense in the event that an affirmative defense is no longer available after all appeals regarding EPA's SSM SIP Call are extinguished, the commission is proposing an alternative emission limit in the form of an alternative work practice standard for the types of emissions currently subject to an affirmative defense in §101.222(b) - (e). These proposed alternative work practice standards include basically the same criteria currently in §101.222(b) - (e). These criteria were developed, in part, based on EPA's SSM Guidance. EPA's SSM SIP Call further reiterated the seven specific criteria enumerated in EPA's 1999 SSM Guidance, Attachment, §III.A, as appropriate considerations for SIP provisions. Because these criteria are based on EPA's 2015 SSM SIP Policy, the criteria are appropriate as the elements of an alternative work practice standard.

In addition, the proposed rule includes language to address concerns EPA stated in its supplemental notice of proposed rulemaking (79 FedReg 55945 (September 17, 2014)) that EPA interprets §101.222(b) - (e) to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose penalties as intended in FCAA, §113 and §304. In

response to a comment made regarding the commission's rulemaking for the current affirmative defense criteria adopted in 2005, the commission stated that the TCEQ's authority to adopt an affirmative defense should be limited only to TCEQ enforcement action. The commission declined to make changes to rule language, responding that TCEQ rules are not intended to nor do they impact citizens' legal rights to bring enforcement actions under the FCAA (30 TexReg 8884, 8922 (December 30, 2005)). The commission is explicitly addressing this in new §101.225(h).

Section Discussion

§101.225, Alternative Work Practice Standard Requirements

Proposed new §101.225 establishes new alternative work practice standards as alternative emission limits for certain unauthorized emissions for purposes of commission enforcement action if the owner or operator proves they meet certain criteria. The criteria for the alternative work practice standards in subsections (b) - (e) include basically the same criteria currently required to prove an affirmative defense in §101.222(b) - (e).

Proposed new subsection (a) provides the applicability for the alternative work practice standards in subsections (b) - (e). Proposed subsection (a)(1) specifies that the alternative work practice standards apply only to exceedances of an applicable emission or opacity limits in a permit, rule, or order of the commission, and subsection (a)(2) specifies alternative work practice standards are only available for emissions that have

been reported or recorded under §101.201 or §101.211. Proposed subsection (a)(3) specifies that the alternative work practices cannot apply to violations of federally promulgated standards.

Proposed subsection (a)(4) specifies that §101.225 does not apply to any requirement in the commission's emissions banking and trading program rules in Chapter 101, Subchapter H except if specifically allowed by rule in Chapter 101, Subchapter H. The commission's emissions banking and trading rules that are incentive based programs, such as the Emission Credit Program, may be used as a means of compliance for exceedances of emissions limitations in other Texas SIP rules. Emissions banking and trading rules that are control strategies, such as the Mass Emissions Cap and Trade Program, include specific provisions regarding companies that fail to hold sufficient allowances to cover actual emissions, and it is not the commission's intent that the alternative work practice standards in proposed new §101.225 override such compliance requirements in the emissions banking and trading rules.

Proposed subsection (a)(5) specifies that proposed new subsections (b) - (e) do not remove any obligations to comply with any other requirements in a rule, permit, or order that are applicable during an emissions event or MSS activity.

Proposed subsection (b) specifies the alternative work practice standard as an

alternative emission limit for purposes of commission enforcement action that an owner or operator is subject to for upset events that are determined not to be excessive emissions events. The criteria the commission uses for determining whether or not an emissions event is excessive is located in existing §101.222(a).

The alternative work practice standard requirements proposed in subsection (b)(1) - (11) are basically the same criteria as in current rule §101.222(b)(1) - (11). As discussed earlier, because EPA has approved these criteria, the commission is not proposing any changes to the text of the specific criteria.

Proposed subsection (b)(1) provides the commission will initiate enforcement for failure to report and for the underlying emissions event itself, and subsection (b) does not apply to minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report.

Proposed subsection (b)(2) provides that the unauthorized emissions were caused by a sudden, unavoidable breakdown of equipment or process which was beyond the control of the owner or operator. Proposed subsection (b)(3) provides that the unauthorized emissions stemmed from an activity or event that could have not been foreseen, avoided, or planned for and could not have been avoided by better operation and

maintenance practices or by technically feasible design consistent with good engineering practice.

Proposed subsection (b)(4) requires air pollution control equipment or processes be maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events. Proposed subsection (b)(5) includes the requirement that any necessary repairs must be made as expeditiously as practicable. Proposed subsection (b)(6) requires all possible steps be taken to minimize the impact of the unauthorized emissions on ambient air quality.

Proposed subsection (b)(7) requires all emission monitoring systems be kept in operation, and proposed subsection (b)(8) provides that the response action be documented in contemporaneous operation logs or other relevant evidence.

Proposed subsection (b)(9) provides that the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance.

Proposed subsection (b)(10) requires that the percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high. Proposed subsection (b)(11) requires that the unauthorized emissions did not

cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.

Proposed new subsection (c) specifies the alternative work practice standards an owner or operator is subject to for unplanned MSS activities for emissions that are determined not to be excessive.

The alternative work practice standard requirements proposed in subsection (c)(1) - (9) are basically the same criteria as in current rule §101.222(c)(1) - (9). As discussed earlier, because EPA has approved these criteria, the commission is not proposing any changes to the text of the specific criteria.

Proposed subsection (c)(1) requires the owner or operator to comply with the reporting requirements of §101.201 and demonstrate that reporting under §101.211(a) was not reasonably possible. Subsection (c)(1) also provides that the commission will initiate enforcement for failure to report and for the underlying emissions event itself, and subsection (c) does not apply to minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report.

Proposed subsection (c)(2) requires that periods of unauthorized emissions from any unplanned MSS activity could not have been prevented through planning and design, and proposed subsection (c)(3) provides that the unauthorized emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

Proposed subsection (c)(4) provides that if the emissions were caused by a bypass of control equipment, the owner or operator must show that the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage.

Proposed subsection (c)(5) requires that the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing emissions. Proposed subsection (c)(6) requires that the frequency and duration of operation in an unplanned MSS mode were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality.

Proposed subsection (c)(7) requires all emission monitoring systems be kept in operation, and proposed subsection (c)(8) provides that the response action be documented in contemporaneous operation logs or other relevant evidence. Proposed subsection (c)(9) requires that the unauthorized emissions did not cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution.

Proposed new subsection (d) specifies the alternative work practice standards an owner or operator is subject to for excess opacity events due to an upset that are subject to §101.201(e), or for other opacity events where there was no emissions event.

The alternative work practice standard requirements proposed in subsection (d)(1) - (10) are basically the same criteria as in current rule §101.222(d)(1) - (10). As discussed earlier, because EPA has approved these criteria, the commission is not proposing any changes to the text of the specific criteria.

Proposed subsection (d)(1) requires the owner or operator to comply with the reporting requirements of §101.201, and that subsection (d) does not apply to minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report.

Proposed subsection (d)(2) provides that the opacity caused by a sudden, unavoidable breakdown of equipment or process was beyond the control of the owner or operator. Proposed subsection (d)(3) provides that the opacity did not stem from any activity or event that could have been foreseen and avoided, planned for, or avoided by better operation and maintenance practices or by technically feasible design consistent with good engineering practice.

Proposed subsection (d)(4) requires air pollution control equipment or processes be maintained and operated in a manner consistent with good practice for minimizing opacity. Proposed subsection (d)(5) includes the requirement that prompt action be taken to achieve compliance once the operator knew or should have known that applicable opacity limitations were being exceeded and that any necessary repairs must be made as expeditiously as practicable. Proposed subsection (d)(6) requires all possible steps be taken to minimize the impact of the excess opacity on ambient air quality.

Proposed subsection (d)(7) requires all emission monitoring systems be kept in operation, and proposed §101.225(d)(8) provides that the response action be documented in contemporaneous operation logs or other relevant evidence.

Proposed subsection (d)(9) provides that the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance.

Proposed subsection (d)(10) requires that the opacity event did not cause or contribute to a condition of air pollution.

Proposed new subsection (e) specifies the alternative work practice standards an owner

or operator is subject to for excess opacity events due to unplanned MSS activities.

The alternative work practice standard requirements proposed in subsection (e)(1) - (10) are basically the same criteria as in current rule §101.222(e)(1) - (10).

Proposed subsection (e)(1) requires the owner or operator to comply with the reporting requirements of §101.201, and demonstrate that reporting under §101.211(a) was not reasonably possible. Subsection (e)(1) also provides that the commission will initiate enforcement for failure to report and for the event itself, and subsection (e) does not apply to minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report.

Proposed subsection (e)(2) provides that the opacity was caused by a sudden, unavoidable breakdown of equipment or process which was beyond the control of the owner or operator. Proposed subsection (e)(3) requires that periods of excess opacity from any unplanned MSS activity could not have been prevented through planning and design, and proposed subsection (e)(4) provides that the opacity was not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

Proposed subsection (e)(5) provides that if the opacity was caused by a bypass of control equipment, the owner or operator must show that the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage.

Proposed subsection (e)(6) requires that the facility and air pollution control equipment be operated in a manner consistent with good practices for minimizing excess opacity. Proposed subsection (e)(7) requires that the frequency and duration of operation in an unplanned MSS mode be minimized and all possible steps be taken to minimize the impact of the opacity on ambient air quality.

Proposed subsection (e)(8) requires all emission monitoring systems be kept in operation, and proposed subsection (e)(9) provides that the response action be documented in contemporaneous operation logs or other relevant evidence.

Proposed subsection (e)(10) requires that the opacity did not cause or contribute to a condition of air pollution.

Proposed new subsection (f) specifies that the burden of proof to demonstrate that the applicable criteria in (b) - (e) are met rests with the owner or operator of a facility.

Proposed new subsection (g) provides that evidence of any past event subject to

subsections (b), (c), (d), or (e) is admissible and relevant to demonstrate a frequent or recurring pattern of events, even if all of the criteria in that subsection are proven.

Proposed new subsection (h) is added to clarify that this section does not preclude EPA or federal court jurisdiction under FCAA, §113, to assess civil penalties or other forms of relief for periods of excess emissions; to prevent EPA or the courts from considering statutory factors for the measurement of civil penalties under FCAA, §113; or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of FCAA, §304. As discussed earlier, the commission has stated in previous rulemakings that agency rules are not intended to nor do they impact citizens' legal rights under the FCAA.

Proposed new subsection (i) establishes the compliance date for §101.225. Subsection (i)(1) would provide that the compliance date is 60 days after publication in the *Federal Register* of final approval by EPA of this section as a revision to the Texas SIP, provided that two conditions are met. Those conditions are that all legal appeals regarding EPA's SIP Call for §101.222(b) - (e) is extinguished and that the commission has repealed the affirmative defense in §101.222(b) - (e).

Proposed subsection (i)(2) provides that until the compliance date in subsection (i)(1), §101.222(b) - (e) of this title remains applicable to non-excessive upset events,

unplanned MSS activities, excess opacity events, and opacity events resulting from unplanned MSS activities.

As discussed earlier, the commission is challenging EPA's SIP Call and, therefore, is not proposing to repeal or remove §101.222(b) - (e) from the SIP. The text of proposed subsection (i) provides the commission with options based on the final outcome of the litigation. For example, if the commission prevails, the commission may elect to repeal §101.225, and retain the affirmative defense in §101.222(b) - (e). Or, if EPA prevails, the commission may elect to repeal §101.222, and retain §101.225. This rule does not bind the future commission to a particular action, but rather provides a path forward for addressing emissions that, by statute, are unauthorized but for which EPA states that an alternative emission limit is required for startups and shutdowns.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, has determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rulemaking would add new §101.225 that establishes alternative work practice standards for certain unauthorized emissions and that would consist of the

current affirmative defense criteria in §101.222(b) - (e). The proposed rule would include a delayed compliance date to put Texas in a position to comply with the EPA SIP Call. The compliance date would not be effective until EPA approves the Texas SIP revision, the appeals of the SIP Call are extinguished, and the affirmative defense rule (§101.222(b) - (e)) is no longer in effect. Until the compliance date is reached, the existing §101.222(b) - (e) remains in effect.

The rulemaking establishes a new regulatory component, but does not change the currently required information, including reporting and recordkeeping, regarding certain excess emissions that is required to be provided to the TCEQ by the regulated community for owners and operators with these types of emissions under §§101.201, 101.211, and 101.222. The scope of the types of excess emissions subject to and the regulatory requirements of the alternative work practice standards are the same as those under the current affirmative defense rule. Although the rulemaking proposes a new regulatory component, it does not include additional, new, or revised activities that affect the manner in which TCEQ conducts investigations.

No fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule. The proposed rulemaking would modify current commission rules concerning air emissions events. State and local governments do not typically engage in the type of activities that

would generate such emissions, and the proposed rulemaking would not apply to these entities.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with federal law and a continuation of the public benefit currently experienced from the emissions event program.

The proposed rule adds a new §101.225 that establishes the current affirmative defense criteria as alternative work practice standards. The rulemaking establishes a new regulatory component, but does not change the currently required information regarding certain excess emissions that is required to be provided to the TCEQ, including the reporting or recordkeeping for the regulated community under §§101.201, 101.211, and 101.222. The scope of the types of excess emissions subject to and the regulatory requirements of the alternative work practice standards are the same as those under the current affirmative defense rule. Although, the rulemaking proposes a new regulatory component, it does not include additional, new, or revised activities that affect the manner in which TCEQ conducts investigations.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect for small or micro-businesses. The scope of the types of excess emissions subject to and the regulatory requirements of the alternative work practice standards are the same as those under the current affirmative defense rule.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is necessary under federal law and does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare an RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rule is to establish alternative work practice standards as alternative emission limits for excess emissions and opacity from non-excessive upset events, unplanned MSS activities, and excess opacity events resulting from upsets or unplanned MSS activities.

Additionally, even if the rule met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring an RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is

specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rule would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410, generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. Additionally, once states have developed SIPs, and those plans are approved by

the EPA. The FCAA prescribes, in 42 USC, §7502(e), that the EPA, in modifying a NAAQS, shall promulgate rules that apply to all areas that have not attained the previous NAAQS that provide for controls that are no less stringent than the controls that previously applied to the area. This rulemaking will establish alternative work practice standards as alternative emission limits for excess emissions and opacity from non-excessive upset events, unplanned MSS activities, and excess opacity events resulting from upsets or unplanned MSS activities.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct an RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was

a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board. The commission contends that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rule may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact, creates no additional impacts since the proposed rule does not exceed the requirement to attain and maintain the NAAQS. For these reasons, the proposed rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an

agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rule implements requirements of the FCAA, specifically to adopt and implement SIPs, including a requirement to emission limits that apply to periods of operation that are not authorized by permit or rule. The specific intent of the proposed rulemaking is to establish alternative work practice standards as alternative emission limits for excess emissions and opacity from non-excessive upset events, unplanned MSS activities, and excess opacity events resulting from upsets or unplanned MSS activities. The proposed rule was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property

owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, §17 or §19, Article I or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to establish alternative work practice standards as alternative emission limits for excess emissions and opacity from non-excessive upset events; unplanned MSS activities; and excess opacity events resulting from upsets or unplanned MSS activities. The proposed rule will not create any additional burden on private real property. The proposed rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and commission rules in 30 TAC Chapter 281, relating to Applications Processing, Subchapter B. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The proposed rule will benefit the environment by ensuring that the rule meets applicable federal and state requirements, and is adequately enforceable so that air quality is protected. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the

coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

After the addition of §101.225 as an applicable requirement in 30 TAC Chapter 122, Federal Operating Permits Program, and after the compliance date of §101.225, owners or operators subject to the Federal Operating Permit Program will be required to certify compliance with new §101.225. A separate rulemaking (Rule Project No. 2016-012-122-AI) is planned for commission consideration to incorporate §101.225 into the definition of *applicable requirement* in §122.10.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 7, 2016, at 2:00p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order

of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-018-101-CE. The comment period closes on June 13, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Cynthia Gandee, Program Support Division, (512) 239-0179 or Janis Hudson, Environmental Law Division, (512) 239-0466.

SUBCHAPTER F: EMISSIONS EVENTS AND SCHEDULED MAINTENANCE, STARTUP, AND SHUTDOWN ACTIVITIES

DIVISION 3: OPERATIONAL REQUIREMENTS, DEMONSTRATIONS, AND ACTIONS TO REDUCE EXCESSIVE EMISSIONS

§101.225

Statutory Authority

The new rule is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The new rule is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.017, concerning Rules, which authorizes the

commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act.

In addition, the rule is also proposed under Federal Clean Air Act, 42 United States Code, §§7401, *et seq*., which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The proposed rule will implement THSC, §§382.002, 382.011, 382.012, and 382.017.

§101.225. Alternative Work Practice Standard Requirements.

(a) Applicability. The alternative work practice standards in subsections (b) - (e) of this section:

(1) apply only to an exceedance of an applicable emission or opacity limit in a permit, rule, or order of the commission;

(2) are available only for emissions that have been reported or recorded under §101.201 or §101.211 of this title (relating to Emissions Event Reporting and

Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements);

(3) do not apply to violations of federally promulgated performance or technology based standards, such as those found in 40 Code of Federal Regulations Parts 60, 61, and 63;

(4) do not apply to any requirement in the commission's emissions banking and trading program rules in Subchapter H of this chapter (relating to Emissions Banking and Trading) except as may be specifically allowed by rule in Subchapter H of this chapter; and

(5) do not remove any obligations to comply with any other existing permit, rule, or order requirements that are applicable to an emissions event or a maintenance, startup, or shutdown activity.

(b) Non-excessive upset events. For upset events that are determined not to be excessive emissions events under §101.222(a) of this title (relating to Demonstrations), the owner or operator of the facility is subject to the work practice standard in this subsection as an alternative emission limit for purposes of commission enforcement action if the owner or operator proves it meets all of the following requirements:

(1) the owner or operator complies with the requirements of §101.201 of this title. In the event the owner or operator fails to report as required by §101.201(a)(2) or (3), (b), or (e) of this title, the commission will initiate enforcement for such failure to report and for the underlying emissions event itself. This subsection does not apply when there are minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the unauthorized emissions were caused by a sudden, unavoidable breakdown of equipment or process, beyond the control of the owner or operator;

(3) the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded, and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;

(9) the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;

(10) the percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high; and

(11) the unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.

(c) Unplanned maintenance, startup, or shutdown activity. For emissions from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive emissions events under §101.222(a) of this title the owner or operator of the facility is subject to the work practice standard in this subsection as an alternative emission limit for purposes of commission enforcement if the owner or operator proves it meets all of the following alternative work practice standard requirements:

(1) for a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of §101.211 of this title. For an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of §101.201 of this title and demonstrates that reporting under §101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the activity, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to meet the alternative work practice standard, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the periods of unauthorized emissions from any unplanned maintenance, startup, or shutdown activity could not have been prevented through planning and design;

(3) the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in an unplanned maintenance, startup, or shutdown mode resulting in unauthorized emissions were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emissions monitoring systems were kept in operation if possible;

(8) the owner or operator actions during the period of unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were documented by contemporaneous operating logs or other relevant evidence; and

(9) unauthorized emissions did not cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution.

(d) Excess opacity events. For excess opacity events due to an upset that are subject to §101.201(e) of this title, or for other opacity events where there was no emissions event, the owner or operator of the facility is subject to the work practice standard in this subsection as an alternative emission limit for purposes of commission enforcement if the owner or operator proves it meets all of the following alternative work practice standard requirements:

(1) the owner or operator complies with the requirements of §101.201 of this title. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to meet the alternative work practice standard, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the opacity was caused by a sudden, unavoidable breakdown of equipment or process beyond the control of the owner or operator;

(3) the opacity did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or by technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing opacity;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable opacity limitations were being exceeded and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the opacity event and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the opacity on ambient air quality;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the opacity event were documented by contemporaneous operation logs or other relevant evidence;

(9) the opacity event was not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) the opacity event did not cause or contribute to a condition of air pollution.

(e) Opacity events resulting from unplanned maintenance, startup, or shutdown activity. For excess opacity events, or other opacity events where there was no emissions event that result from an unplanned maintenance, startup, or shutdown activity, the owner or operator of the facility is subject to the work practice standard in this subsection as an alternative emission limit for purposes of commission enforcement if the owner or operator proves it meets all of the following alternative work practice standard requirements:

(1) for excess opacity events that result from a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of §101.211 of this title. For excess opacity events that result from an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the

requirements of §101.201 of this title and demonstrates that reporting pursuant to §101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to meet the alternative work practice standard, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the opacity was caused by a sudden, unavoidable breakdown of equipment or process beyond the control of the owner or operator;

(3) the periods of opacity could not have been prevented through planning and design;

(4) the opacity was not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(5) if the opacity event was caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(6) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing opacity;

(7) the frequency and duration of operation in a startup or shutdown mode resulting in opacity were minimized;

(8) all emissions monitoring systems were kept in operation if possible;

(9) the owner or operator actions during the opacity event were documented by contemporaneous operating logs or other relevant evidence; and

(10) the opacity event did not cause or contribute to a condition of air pollution.

(f) Burden of proof. The owner or operator of a facility has the burden of proof to demonstrate that the applicable criteria identified in subsections (b) - (e) of this section are satisfied.

(g) Frequent or recurring pattern. Evidence of any past event subject to subsections (b), (c), (d), or (e) of this section is admissible and relevant to demonstrate a frequent or recurring pattern of events, even if all of the criteria in that subsection are

proven.

(h) No prohibition on federal action. This section shall not be construed to preclude the United States Environmental Protection Agency (EPA) or federal court jurisdiction under the Federal Clean Air Act (FCAA), §113, to assess civil penalties or other forms of relief for periods of excess emissions or opacity, to prevent EPA or the courts from considering the statutory factors for the assessment of civil penalties under FCAA, §113, or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of FCAA, §304.

(i) Compliance date.

(1) The compliance date for this section is 60 days after publication in the *Federal Register* of the final approval by the EPA of this section as a revision to the Texas State Implementation Plan provided that both of the following conditions are met:

(A) all legal appeals regarding EPA's SIP Call for §101.222(b) - (e) of this title have extinguished; and

(B) §101.222(b) - (e) of this title is not a legally effective rule.

(2) Until the compliance date in paragraph (1) of this subsection, §101.222(b) - (e) of this title remains applicable to non-excessive upset events; unplanned maintenance, startup, or shutdown activities; excess opacity events, and opacity events resulting from unplanned maintenance, startup, or shutdown activities.