

SOAH DOCKET NO. 582-13-5326
TCEQ DOCKET NO. 2012-1799-AIR-E

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	
v.	§	STATE OFFICE OF
	§	
CITGO REFINING AND CHEMICALS	§	
COMPANY L.P.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

THE EXECUTIVE DIRECTOR'S REPLY TO CITGO'S EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE REBECCA SMITH (ALJ) AND HONORABLE COMMISSIONERS:

The Executive Director (ED) files this reply to Respondent's Exceptions to the Proposal for Decision and Proposed Order (Respondent's Exceptions).¹

In this case, the ED alleges two air quality violations against CITGO Refining and Chemicals Company L.P. (Respondent or Citgo). At the evidentiary hearing in this case, the ED provided evidence that the two alleged violations occurred. The ED also provided a recommended penalty calculated in accordance with the TCEQ penalty policy as consistently applied, and in consideration of the statutory factors in TEX. WATER CODE § 7.053. The ED respectfully requests that the Commission, consistent with the ALJ's Proposal for Decision (PFD), issue an order that the two violations occurred and recommending the ED's calculated penalty of \$9,775 and the ED's corrective action.

The reason this case was brought is because Citgo violated its permits, TCEQ rules and the Health and Safety Code causing unauthorized emissions containing 824.17 pounds of benzene, 899.42 pounds of hydrocarbons, 666.75 pounds of toluene, 3.95 pounds of ethyl benzene, and 10.05 pounds of xylene.² The ED followed its Enforcement Initiation Criteria and Penalty Policy in pursuing this enforcement case. Citgo puts forth many alternative, vague and sometimes contradictory positions in this case, none of which have merit. The facts in this case are undisputed. The permits, rules and statutes at issue are clear. The violations occurred as alleged.

Respondents' Exceptions contains numerous inconsistent alternative renditions of the facts and law. It contains novel unsupported interpretations of the rules and statutes at issue in

¹ The ED's exhibits in this case will be referred to in this document as "ED" [exhibit no.] at [Bates page no.] ([description if necessary]). The reference to page numbers is a reference to the stamped number in the bottom center of each page. Hearing testimony will be referred to as "Test. of" [name] and pages in the transcript will be referred to as "Tr." [pages: lines].

² ED 5.

this case. Citgo attempts to provide support of these interpretations with the testimony of Mr. Cheesman, novel interpretations of rules, and references to past rulemaking history. As for Citgo's references to past rulemaking, examination of Citgo's references reveals they are not on point, and do not support Citgo's position in this case. Consequently, the many theories put forth by Citgo amount to nothing more than red herrings in an attempt to muddy the water in what is otherwise a straightforward case.

As an example of the contradictory positions Citgo is taking, in this same case Citgo asserts that the emissions constitute an "emissions event" and Citgo also contends the emissions do not constitute an "emissions event". Specifically, Citgo claims there should be no reporting violation because the emissions were not an "emissions event" required to be reported; on the other hand, Citgo claims there should be no emissions violation because the emissions are an "emissions event" entitled to the affirmative defense only available for emissions events. These positions are irreconcilable.

Additionally, Citgo asks the Commission to find that the emissions in this case are authorized even though Citgo's New Source Review Permit (Permit) ³ expressly states that these emissions are "not authorized". Citgo provides a convoluted argument taking the position that this express language should be ignored.

Citgo's positions in this case not only contradict each other, they contradict the overwhelming evidence in this case. Citgo's own records state that the emissions in this case constitute an emissions event. ⁴

Citgo's defense rests on the testimony of one witness, Mr. Mark Cheesman, who has a self-interest in the outcome of this case. He is an employee of the Respondent and was responsible for overseeing environmental compliance at the refinery at the time of the alleged violations. His testimony is inconsistent with other evidence, including emissions event reports submitted by Citgo. His interpretations of rules and the Permit are inconsistent and not supported by authority. His testimony contradicts Citgo's records. Citgo's own records—the initial and final emissions event reports covering the incident in this case⁵, Citgo's emissions event reporting procedures⁶, Citgo's cooling tower hydrocarbon identification and reduction procedure⁷, and Citgo's internal memo covering this incident⁸—conclusively establish the permit violation and the reporting violation.⁹

³ "Permit" refers to the Respondent's TCEQ New Source Review Permit No. 5418A in effect at the time of the violations and Exhibit ED 2.

⁴ See, e.g., ED 4 and ED 5.

⁵ ED 4 and ED 5.

⁶ ED 10.

⁷ ED 12.

⁸ ED 13.

⁹ Citgo's initial and final emissions event reports regarding the emission in this case expressly state that it was an "emissions event." ED 4 and ED 5. Citgo's emissions event reporting procedures also identify emissions of the type in this case as emissions events. ED 10. The procedure identifies emissions from cooling towers when test results are over the permit limit as Tier 1 emissions events. Further, Citgo's reporting procedure also acknowledges that the upper value limitation in the cooling tower permit provision is a permit limit that, if exceeded, triggers unauthorized

In contrast to Citgo's case, the ED's case is supported by undisputed facts, consistent with Citgo's own records. The ED's application of the permit, rules, and statute in this case are supported by the plain language of these authorities and sound statutory and rule construction. Moreover, the ED's position in this case is based on established consistent application of these rules as testified to by two very qualified and experienced experts in the field, Joseph Janecka and Jeff Grief, whose only interest in this case is in applying the rules the way they are written and intended.

emissions requiring reporting; i.e., it is a violation of an air emission limitation in the permit. ED 10. Thus, Citgo's records establish the emission violation. The reporting procedures acknowledge and state that once an EPS result over the permit limit is obtained, an emissions event has been discovered and a report needs to be filed within 24 hours of that test result. Because according to Citgo's own procedure and records, Citgo knew there was an emissions event when it obtained the EPS results and Citgo did not file a report within 24 hours of obtaining the EPS result, the reporting violation is conclusively established.

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I. Summary¹⁰

The facts in this case are not in dispute. Citgo's many alternative theories regarding this case amount to nothing more than red herrings in an attempt to obscure an otherwise straight-forward case.

Citgo's own records establish both violations alleged. According to Citgo's records, the emissions in this case were unauthorized,¹¹ and constituted an emissions event¹² that Citgo discovered on June 28, 2011 at 5:30 pm.¹³ It is undisputed that Citgo did not file an initial emissions event report within 24 hours of June 28, 2011¹⁴, in violation of the reporting requirement.

The first allegation in the ED's Petition (Violation 1)¹⁵ alleges a permit violation. Special Condition No. 4 of the Permit states that when volatile organic compound (VOC) test results are in excess of 5 ppmw, emissions are unauthorized. This is an air emission limitation in the Permit. When Citgo received the TCEQ approved El Paso Stripper (EPS) test result of 25.56 ppmw, well over the Permit limit, Citgo's emissions from Cooling Tower 10 were not authorized and Citgo was in violation of Special Condition No. 4 of the Permit. Thus, Violation 1 is established.

The second allegation is a reporting violation (Violation 2)¹⁶. The emissions in this case meet all the requirements in the definition of "emissions event". Citgo knew it had unauthorized emissions, and thus an emissions event, at the latest, when it received the EPS test results of 25.56 ppmw. Because Citgo did not file an initial report of the emissions event within 24 hours of receiving the EPS test result, Citgo did not timely report.

Citgo is not eligible for the affirmative defense applicable to emissions events because Citgo failed to meet the first criteria—compliance with reporting requirements. Because Citgo did not file the initial emissions event report within 24 hours as required, it did not comply with the reporting requirements and is not eligible for the affirmative defense.

The TCEQ's voluntary leak detection program does not exempt the Respondent from enforcement for a leak of a component in Cooling Tower 10, such as Citgo's glycol knockout cooler because the TCEQ's program is only applicable to equipment that is not already required to be monitored under current regulations. The Permit requires the Respondent to monitor

¹⁰ The ED's exhibits in this case will be referred to in this document as "ED" [exhibit no.] at [Bates page no.] ((description if necessary)). The reference to page numbers is a reference to the stamped number in the bottom center of each page. Hearing testimony will be referred to as "Test. of" [name] and pages in the transcript will be referred to as "Tr." [pages: lines].

¹¹ ED 12 at 3; *see also* ED 4 and ED 5 stating the emissions are an emissions event, and thus, unauthorized by definition.

¹² ED 4; ED 5.

¹³ *Id.*; *see also* ED 10.

¹⁴ ED 3.

¹⁵ ED A at 4-5, para. 6.a.

¹⁶ ED A at 4-5, para. 6.b.

Cooling Tower 10 with an approved method for detecting leaks. Because the leak in this case is covered by a monitoring program in the Permit and would have been discovered nine days later¹⁷, the TCEQ's voluntary leak detection program does not apply.

Citgo's claim that TEX. GOV'T CODE § 311.031(b)¹⁸ in the Code Construction Act¹⁹ bars the Commission from assessment of a compliance history enhancement to the penalty in this case over 100% is without merit. Citgo misconstrues the revision to TEX. WATER CODE § 5.754 in House Bill 2694 (82nd Legislature, 2011). The revision to section 5.754 is but one piece in a comprehensive revision to the TCEQ enforcement process and penalty calculations (which also includes an increase over two-fold to statutory maximums) and was not intended to be applied in isolation to decrease penalties outside this comprehensive revision. As such, TEX. GOV'T. CODE § 311.031(b) does not apply.

Citgo's request for a reduction in the penalty because Citgo does daily total organic compound (TOC) testing of Cooling Tower 10 is unwarranted. The penalty recommended in this case is the lowest penalty that can be assessed for these violations and is in accordance with the TCEQ Penalty Policy.²⁰ Citgo's claim that it is being punished for its TOC testing is without merit. Citgo meets the TCEQ criteria for enforcement²¹ due to Citgo's violations of TCEQ rules and statutes. Citgo is responsible for unauthorized emissions, and failed to timely report an emissions event. TCEQ did not bring this enforcement action because of Citgo's TOC testing program; the TCEQ brought this enforcement action because Citgo violated TCEQ rules and the Texas Health and Safety Code. The reductions in the ED's recommended penalty are sufficient in this case.

II. Introduction—all of Citgo's theories in this case are unsupportable and without merit.

Respondent's Exceptions contain inconsistent alternative renditions of the facts and law in this case. For example, regarding the reporting violation,²² Citgo claims the emissions in this case do not constitute an "emissions event"²³ such that there is no requirement to report;²⁴ on the other hand, regarding the emission violation,²⁵ Citgo claims it is entitled to an affirmative defense²⁶; this affirmative defense—by TCEQ rule—is only available for emissions events.²⁷ This is but one example of the inconsistent "alternative" positions Citgo takes in this case. In

¹⁷ As Citgo points out in Respondent's Exceptions, the leak would have been discovered, under the Permit's monitoring requirement of monthly EPS tests, nine days later than actually discovered. Respondent's Exceptions at 8.

¹⁸ TEX. GOV'T. CODE § 311.031(b).

¹⁹ TEX. GOV'T. CODE ch. 311.

²⁰ Tr. 92-93, 96-98 (Test. of R. Johnson).

²¹ See, e.g., ED 11,

²² ED A at 4-5, para. 6.b. (Petition).

²³ Respondent's Exceptions at 6.

²⁴ 30 TEX. ADMIN. CODE § 101.201(a)(1)(B).

²⁵ ED A at 4-5, para. 6.a.

²⁶ Respondent's Exceptions at 6.

²⁷ 30 TEX. ADMIN. CODE § 101.222(b).

actuality, the facts are undisputed and applying the facts to the law in this case is simple and straightforward.

The ED's case is based on well-founded application of law to the facts. The facts are undisputed and the ED's position is consistent with Citgo's own records. The ED's application of the law in this case is based on the plain language of the legal authorities at issue, consistent with sound statutory construction and long-standing application of the rules at issue in this case. The ED's highly qualified witnesses in this case—Joseph Janecka, Jeff Grief, and Rebecca Johnsonson—testified as to the well-founded consistent application of the laws in this case.

TCEQ witness Joseph Janecka has worked on air issues at the TCEQ and its predecessor agencies for the past twenty-two years.²⁸ A summary of Mr. Janecka's educational and engineer licensing background follows:

- He obtained a Bachelor's of Science from Texas A&M University in August 1981;²⁹
- He obtained a Master's of Science in International Relations from Troy University in 1986;³⁰
- He obtained a Master's of Science in Engineering Management from The University of Texas at Austin in May 2011;³¹
- He became a licensed professional engineer in environmental engineering in 1998;³² and
- He is a licensed professional engineer in mechanical engineering³³

Additionally, Mr. Janecka has attended multiple training sessions for air rules, regulations, and investigations.³⁴ Because of his extensive knowledge and expertise, he now conducts the annual investigator air training for emissions events³⁵ and makes presentations to the Environmental Trade Fair regarding air permits and emissions events.³⁶

From December 2006 through April 2014, Mr. Janecka worked with the Office of Compliance and Enforcement as an air permits liaison and emissions events liaison between the TCEQ's sixteen regional offices and the Office of Compliance and Enforcement.³⁷ His experience as the air permits liaison and the emissions events liaison includes:

²⁸ Tr. 14:9-15 (Test. of J. Janecka).

²⁹ Tr. 18:12-13 (Test. of J. Janecka).

³⁰ Tr. 18:13-15 (Test. of J. Janecka).

³¹ Tr. 18:16-17 (Test. of J. Janecka).

³² Tr. 19:4-6 (Test. of J. Janecka).

³³ Tr. 19:3-4 (Test. of J. Janecka).

³⁴ Tr. 19:7-13 (Test. of J. Janecka).

³⁵ Tr. 19:14-18 (Test. of J. Janecka).

³⁶ Tr. 19:12-22 (Test. of J. Janecka).

³⁷ Tr. 15:3-16:3 (Test. of J. Janecka).

- He assisted TCEQ regional offices with reading permits, coordinating proposed permits, and served as a general go-between for permit engineers and investigators;³⁸
- He has been involved in permitting refineries, including the permitting of cooling towers;³⁹
- He supported TCEQ regional offices with technical issues related to emissions events including the constitution of an emissions event, reporting procedures, and setting and advising on guidance regarding emissions events to be applied consistently across the TCEQ regional offices;⁴⁰
- He wrote the fugitive emissions section of the Emissions Event Regional Investigator Protocol;⁴¹
- He served as the point of contact for the review of Federal and State rule proposals related to air media related to investigation procedures and the TCEQ regional offices;⁴²
- He participated in multiple rulemaking projects;⁴³
- He reviewed rulemaking projects, including the 2002 and 2004 emissions event rulemaking projects;⁴⁴
- He was a project manager for the rulemaking team in charge of the voluntary supplemental leak detection rule;⁴⁵ and
- He provided technical consultation to investigators, managers, area directors, and division directors.⁴⁶

Prior to joining one of the TCEQ's predecessor agencies in 1992, Mr. Janecka served as a mechanical engineer in the U.S. Air Force. In that capacity, he monitored a service contract for cooling towers. Currently, Mr. Janecka serves as permit reviewer in the Air Permits Division of the TCEQ.⁴⁷

TCEQ witness Jeff Grief is a technical specialist in the Air Permits Division, Chemical Section of the TCEQ and has worked for the TCEQ or its predecessor agencies for twenty-seven years.⁴⁸ Mr. Grief has a Bachelor's of Science in Chemical Engineering from Texas A&M

³⁸ Tr. 15:13-18 (Test. of J. Janecka).

³⁹ Tr. 58:3-6 (Test. of J. Janecka).

⁴⁰ Tr.15:19-16:22 (Test. of J. Janecka).

⁴¹ Tr. 75:10-21 (Test. of J. Janecka).

⁴² Tr.16:24-17:5 (Test. of J. Janecka).

⁴³ Tr. 17:6-9 (Test. of J. Janecka).

⁴⁴ Tr. 174:15-22 (Test. of J. Janecka).

⁴⁵ Tr. 17:6-14 (Test. of J. Janecka).

⁴⁶ Tr. 17:15-18:1 (Test. of J. Janecka).

⁴⁷ Tr. 14:16-22 (Test. of J. Janecka).

⁴⁸ Tr. 181:13-21 (Test of J. Grief).

University.⁴⁹ He has also attended EPA air training courses.⁵⁰ Mr. Grief trains, and mentors new employees.⁵¹ A summary of his responsibilities during his time at the TCEQ follows:

- He has handled special assignments requiring a high-level of expertise within the engineering group;⁵²
- He has been responsible for managing the engineering services team that provided consultant services to the agency;⁵³
- He has worked on complicated air permits related to the chemical refining industry;⁵⁴
- He trains, advises, and mentors staff on air permitting and environmental procedures;⁵⁵ and
- He has worked on permitting cooling towers and standard approaches as to the language of permits over cooling towers.⁵⁶

TCEQ witness Rebecca Johnson has worked for the TCEQ as an Enforcement Coordinator for the past thirteen years.⁵⁷ Prior to her work with the TCEQ, Ms. Johnson served as an environmental coordinator at a chemical plant and a pollution-control technician for a city.⁵⁸ She has a Bachelor's degree in Environmental Management from the University of Houston.⁵⁹ Ms. Johnson attends annual air investigator training to stay up-to-date on policies, procedures, and regulations.⁶⁰ She received extensive training on enforcement policies and procedures, and is also trained in air permitting, pollution-control devices, and pollution-control technology.⁶¹ Ms. Johnson trains and mentors other Enforcement Coordinators.⁶² As an Enforcement Coordinator in the Air Section, Ms. Johnson is tasked with calculating penalties for violations of environmental statutes and TCEQ rules related to air media, including air emissions cases.⁶³ Ms. Johnson applies the TCEQ Penalty Policy to each enforcement action to which she is assigned.⁶⁴ Ms. Johnson has calculated penalties, in accordance with TCEQ Penalty Policy, for approximately 500 cases, 80-85% of which concerned air quality.⁶⁵

⁴⁹ Tr. 182:11-13 (Test of J. Grief).

⁵⁰ Tr. 182:12-17 (Test of J. Grief).

⁵¹ Tr. 182:20-25 (Test of J. Grief).

⁵² Tr. 182:1-2 (Test of J. Grief).

⁵³ Tr. 182:1-5 (Test of J. Grief).

⁵⁴ Tr. 182:6-10 (Test of J. Grief).

⁵⁵ Tr. 182:6-10, 20-23 (Test of J. Grief).

⁵⁶ Tr. 183:1-6 (Test of J. Grief).

⁵⁷ Tr. 80:3-14 (Test. of R. Johnson).

⁵⁸ Tr. -83:18-22 (Test. of R. Johnson).

⁵⁹ Tr. 82:24-83:1 (Test. of R. Johnson).

⁶⁰ Tr. 83:7-9 (Test. of R. Johnson).

⁶¹ Tr. 83:9-13 (Test. of R. Johnson).

⁶² Tr. 83:16-17 (Test. of R. Johnson).

⁶³ Tr. 81:12-22, 82:9-14, 85:14-15 (Test. of R. Johnson).

⁶⁴ Tr. 85:6-7 (Test. of R. Johnson).

⁶⁵ Tr. 82:1-17, 85:6-9 (Test. of R. Johnson).

In contrast, Respondent's Exceptions rely on inconsistent, novel, and unsupported renditions of the rules in this case. To support these renditions, Citgo offers the testimony of only one interested witness, Mr. Mark Cheesman. Mr. Cheesman is not a disinterested witness. He is an employee of the Respondent, responsible for environmental compliance of the refinery at the time the alleged violations occurred.⁶⁶ His job was to prevent the very violations in this case. Mr. Cheesman's testimony is inconsistent with other testimony in the record. Examples of inconsistencies are as follows:

- Mr. Cheesman testified that emissions with a VOC concentration of 25.56 ppmw were not in violation of the permit,⁶⁷ yet Special Condition No. 4 expressly states that emissions with a VOC above 5 ppmw are not authorized.⁶⁸
- Mr. Cheesman testified that the emissions were not in violation of an air permit limitation,⁶⁹ yet Respondent's Exceptions states the provision in Special Condition No. 4 is in fact an "air emission limit,"⁷⁰ consistent with the testimony of Mr. Janecka⁷¹ and Mr. Grief.⁷²
- Mr. Cheesman testified that the emissions were not "unauthorized," even though the permit expressly states the emissions are "not authorized."⁷³ Mr. Cheesman and Respondent's Exceptions rely on an unsupported and strained concept that "not authorized" is authorized.⁷⁴ Yet, Citgo filed emissions event reports, acknowledging that the incident resulted in unauthorized emissions.⁷⁵
- Mr. Cheesman and Respondent's Exceptions claim that the emissions are not "emissions events."⁷⁶ Yet, according to Citgo's emissions event reports,⁷⁷ Citgo's emissions event reporting procedures⁷⁸ and Citgo's internal memo regarding the emissions at issue,⁷⁹ the emissions do constitute an emissions event.
- Mr. Cheesman and Respondent's Exceptions claim Citgo timely reported the emissions event in this case incorrectly asserting the emissions event was discovered at 9:30 am on

⁶⁶ Tr. 131:23-132:8 (Test. of M. Cheesman).

⁶⁷ See, e.g., Tr. 139:3-19 (Test. of M. Cheesman).

⁶⁸ ED 2 at 9, Special Condition No. 4. (Permit).

⁶⁹ See generally Tr. 135:13-151:13 (Tes. of M. Cheesman).

⁷⁰ Respondent's Exceptions at 2.

⁷¹ Tr. 39:5-14 (Test. of J. Janecka).

⁷² Tr. 184:2-13 (Test. of J. Grief).

⁷³ ED 2 at 9.

⁷⁴ Tr. 139:3-19 (Test. of M. Cheesman); Respondent's Exceptions at 4.

⁷⁵ ED 4 (Initial Emissions event Report) and ED 5 (Final Emission Report). Since, by definition, emissions events necessarily involve unauthorized emissions, Citgo's reports acknowledge that the emissions were unauthorized. Additionally, even as Citgo claims in this case that the emissions were authorized, Citgo has never amended or attempted to withdraw the emissions event reports even though there is a process for doing so. See Tr. 56:11-17 (Test. of J. Janecka).

⁷⁶ Tr. 139:3-19 (Test. of M. Cheesman); Respondent's Exceptions at 2.

⁷⁷ ED 4 and ED 5. The initial and final emission reports submitted by Citgo are only required to be submitted to the TCEQ when there is an emissions event. Citgo has never amended or withdrawn the emissions event reports. See Tr. 56:11-17 (Test. of J. Janecka).

⁷⁸ ED 10 (Citgo Air Emission Reporting Procedure).

⁷⁹ ED 13 (Citgo internal report on event dated August 8, 2011).

June 29, 2011, when Citgo obtained speciated results of the unauthorized emissions.⁸⁰ Yet, consistent with the ED's position in this case, Citgo's emissions event reports and Citgo's reporting procedures acknowledge the emissions event was, at the latest, discovered when Citgo obtained the EPS test result of 25.56 ppmw at 5:30 pm on June 28, 2011.⁸¹ Citgo's own internal memo acknowledges the reporting procedures were not followed and recommends Citgo employees be retrained on these procedures to prevent untimely reporting in the future.⁸² Notably, there is no recommendation by Citgo to rewrite its reporting procedures to be consistent with Citgo's position in this case.⁸³

Respondent's Exceptions also contain many "alternative," inconsistent, and novel positions; Citgo provides no on-point or supportive legal authority for these theories. Some examples include:

- In one theory, Citgo acknowledges it violated the permit, but the emissions did not constitute "unauthorized emissions" because the language "not authorized" in the permit means "authorized."⁸⁴ Citgo attempts to support this strained construction by misconstruing past rulemaking changes to definitions in the air program.⁸⁵ Nowhere in the references Citgo provides is there any discussion claiming that "not authorized" is distinct from "unauthorized."
- Citgo claims the incident is not an emissions event and is therefore not reportable (as to the reporting violation),⁸⁶ yet Citgo asserts it is eligible for an affirmative defense (as to the emissions violation) that only applies to emissions events.⁸⁷ If there is an emissions event, it must be timely reported.⁸⁸ If there is no emissions event, the affirmative defense Citgo relies on is unavailable.⁸⁹
- In one theory, Citgo claims it timely reported the emissions event 24 hours after discovery, (while still claiming there was no emissions event) even though Citgo's own reports,⁹⁰ reporting procedures,⁹¹ and memo on this incident⁹² all acknowledge the emissions event was not reported timely.
- Seeming to acknowledge the weaknesses of its many theories, Citgo lastly requests enforcement discretion be utilized so Citgo is not penalized for its violations in this case.⁹³ Yet Citgo's compliance history shows many past violations of environmental regulations. Moreover, throughout this case Citgo is attempting to utilize unsupported inconsistent theories to avoid compliance and enforcement of violations. The ED is

⁸⁰ Tr. 35: 3-6.

⁸¹ Tr. 34:21–35:2.

⁸² ED 13.

⁸³ *Id.*

⁸⁴ Respondent's Exceptions at 6.

⁸⁵ *Id.*

⁸⁶ Respondent's Exceptions at 6.

⁸⁷ Respondent's Exceptions at 6.

⁸⁸ 30 TEX. ADMIN. CODE § 101.201(a)(1)(B).

⁸⁹ 30 TEX. ADMIN. CODE § 101.222(b).

⁹⁰ ED 4 and ED 5.

⁹¹ ED 10.

⁹² ED 13.

⁹³ Respondent's Exceptions at 10.

requesting the lowest penalty for these violations consistent with the Penalty Policy that is applied to all respondents. The ED is recommending a good faith reduction for the emission violation due to Citgo's actions to remedy this violation. These policies are in place to promote consistency in enforcement of environmental violations. Denying Citgo's request to ignore the TCEQ enforcement and penalty policies is warranted and promotes consistent application of TCEQ policies.

The ED's position in this case is supported by sound application of the law to undisputed facts. Every one of Citgo's convoluted and novel alternative theories is without merit. The ED has conclusively proven this case. Consequently, Citgo is responsible for the unauthorized emission of 824.17 lbs of benzene, 899.42 lbs of hydrocarbons, 666.75 lbs of toluene, 3.95 lbs of ethyl benzene, and 10.05 lbs of xylene into the atmosphere in violation of Citgo's authorization.⁹⁴ Citgo also did not report this reportable emissions event within 24 hours as required by law; thus, Citgo is responsible for a reporting violation. In the remaining sections of this brief, the ED examines and dispels the theories in Respondent's Exceptions.

III. The facts are not in dispute.

This is a TCEQ enforcement case. In this case, the ED alleges two air quality violations,⁹⁵ and recommends a penalty of \$9,775.⁹⁶

The Respondent owns and operates a petroleum refinery in Corpus Christi.⁹⁷ The refinery processes crude oil.⁹⁸ As part of this operation, the Respondent obtained the new source review Permit for Cooling Tower 10, which authorizes specific emissions from the cooling tower.⁹⁹ Citgo also obtained a federal permit (Federal Permit)¹⁰⁰ covering operations at the refinery.

Citgo's process of refining crude oil requires heating and cooling the liquid product.¹⁰¹ In Cooling Tower 10, cool water surrounds tubing of liquid product to transfer heat from the product which consequently warms the water.¹⁰² Because the tubing separates the water from the liquid product, the liquid product is not supposed to come into contact with the water. After the water is heated by the liquid product, the water is re-cooled again through an evaporation process and then cycled back into the heat exchange process. During cooling of the water, part of the water evaporates into the air. It is a continual flow process; it is open-ended at the cooling tower where the evaporation occurs.¹⁰³

⁹⁴ Tr. 35:7-15 (Test. of J. Janecka).

⁹⁵ ED A.

⁹⁶ ED 7.

⁹⁷ ED 1 at 001564; Tr. 131-133.

⁹⁸ *Id.* at 001566.

⁹⁹ *See, e.g.*, ED 2 at 9, Special Condition No. 4.

¹⁰⁰ "Federal Permit" refers to the Respondent's Federal Operating Permit No. 01423 in effect at the time of the violations; the pertinent provisions are attached to the investigation report. Exhibit ED 1 at 001588-1593.

¹⁰¹ Tr. 133: 12-15 (Test. of Mark Cheesman).

¹⁰² Tr. 133-134 (Test. of Mark Cheesman).

¹⁰³ Tr. 134.

When leaks in the piping that separates the water from the product liquid occur, the water is contaminated with VOCs which are released into the air during the evaporation stage of the process. One of Citgo's business practices is to conduct routine total organic compound (TOC) monitoring of the water from Cooling Tower 10.¹⁰⁴ It is a quick easy indicator of whether VOCs are present in the water, indicating leaks which cause unauthorized emissions and loss of valuable product.¹⁰⁵

On June 28, 2011, Citgo began obtaining high TOC monitoring results.¹⁰⁶ Based upon the TOC test results, Citgo conducted an El Paso Stripper (EPS) test¹⁰⁷ on Cooling Tower 10. On June 28, 2011 at 5:30pm, Citgo obtained the EPS test result which was 25.56 ppmw of VOC concentration in the water returning to Cooling Tower 10.

According to the Permit, it specifically states:

Emissions from the cooling tower are not authorized if the VOC concentration of the water returning to the cooling tower exceeds 5 ppmw.¹⁰⁸

Because Citgo's EPS test results demonstrated that the VOC concentration of the water was above 5 ppmv, the emissions from this June 28, 2011 incident were not authorized.

On June 30, 2011 at 8:52am (approximately 46 hours after Citgo obtained the EPS test result), Citgo submitted an initial notification of an emissions event.¹⁰⁹ It states that the emissions event was discovered at 5:30pm on June 28, 2011. It states that the emissions event was "confirmed with an El Paso Stripper test around 1730h 06/28/2011." This initial report estimates "850" pounds (lbs) of benzene were emitted when the permit emission limit for benzene is "0" (zero). The report states that the cause was a leaking heat exchanger.

On July 11, 2011, Citgo submitted the final report of this incident.¹¹⁰ The report states that the incident is an emissions event discovered at 5:30pm on June 28, 2011. It states that the emissions event was "confirmed with an El Paso Stripper test around 1730h 06/28/2011." This final report states that "824.17" pounds of benzene were emitted when the permit emission limit for benzene is "0".

Citgo blocked-in the faulty equipment that was causing the leak, and thereafter fixed the faulty equipment, on approximately June 29, 2011 about twenty-four hours after the EPS test result.¹¹¹

¹⁰⁴ Tr. 144-145 (Test. of Mark Cheesman).

¹⁰⁵ Tr. 144-145.

¹⁰⁶ ED 3; Tr. 147: 6-12.

¹⁰⁷ The EPS test is a test authorized by the TCEQ to utilize to satisfy the testing requirements in the Permit, specifically Special Condition No. 4.

¹⁰⁸ ED 2 at 9.

¹⁰⁹ ED 4.

¹¹⁰ ED 5.

¹¹¹ Tr. 107-108 (Test. of R. Johnson; ED 7 at 000278; ED 5 and ED 6 (stating an event duration of 24 hours); Tr. 147: 16-19.

IV. Citgo's claims regarding Violation 1 (the permit violation causing emissions) are without merit; the undisputed test result of 25.56 ppmw was well over the limit in the permit of 5 ppmw.

Citgo violated the Permit causing emissions that were not authorized, as alleged in the ED's petition.¹¹²

A. In Violation 1, the ED alleges violation of two permits, two rules and a statute, the violation of any one supports the violation; Citgo violated all five of the requirements.

In Violation 1, the ED alleges a violation of two permits, two rules, and a provision of the Texas Health & Safety Code; Citgo violated all provisions as alleged.

The ED cites to a statute, two rules and two permit requirements in support of the violation. Special Condition No. 4 of the Permit states:

Emissions from the cooling tower are not authorized if the VOC concentration of the water returning to the cooling tower exceeds 5 ppmw.¹¹³

At the time of the Cooling Tower 10 emissions on June 28-29, 2011, Citgo's EPS test results demonstrated a VOC concentration in the water of 25.56 ppmw, which is well above the permitted limit of 5 ppmw. As such, Citgo violated the permit as alleged by allowing emissions from evaporation of water with this VOC concentration.

Federal Permit, Special Term and Condition No. 31 states:

Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder.....¹¹⁴

The Permit is a New Source Review (NSR) authorization. By violating the Permit, Citgo also violated this provision of the Federal Permit as alleged.

30 TEX. ADMIN. CODE § 116.115(c) states:

Special conditions. The holders of permits, special permits, standard permits, and special exemptions shall comply with all special conditions contained in the permit document.

Section 116.115(c) requires permit holders to comply with special conditions of NSR permits. By violating Special Condition No. 4 of the Permit, Citgo violated 30 TEX. ADMIN. CODE § 116.115(c) as alleged.

¹¹² ED A at 4-5, para. 6.a.

¹¹³ ED 2 at 9.

¹¹⁴ ED 1 at 001593.

30 TEX. ADMIN. CODE § 122.143(4) states:

The permit holder shall comply with all terms and conditions codified in the permit and any provisional terms and conditions required to be included with the permit. Except as provided for in paragraph (5) of this section, any noncompliance with either the terms or conditions codified in the permit or the provisional terms and conditions, if any, constitutes a violation of the FCAA and the TCAA and is grounds for enforcement action; permit termination, revocation and reissuance, or modification; or denial of a permit renewal application. It shall not be a defense in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to comply with the permit terms and conditions of the permit.

Section 122.143(4) requires permit holders to comply with all terms and conditions of federal operating permits. By violating Special Term and Condition No. 31 of the Federal Permit, Citgo violated 30 TEX. ADMIN. CODE § 122.143(4) as alleged.

Finally, TEX. HEALTH & SAFETY CODE § 382.085(b) states:

A person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order.

Section 382.085(b) prohibits Citgo from causing, suffering or allowing any emission or activity in violation of any TCEQ rule. Because of the rules violated, Citgo violated section 382.085(b) by engaging in an activity in violation of TCEQ rules as discussed above; and by causing suffering and/or allowing emissions in violation of TCEQ rules.

B. Citgo's claims in defense of this violation that there is no permit violation and no unauthorized emissions are without merit; Citgo's claim that there was no emissions event is not relevant since it is not one of the elements of this violation.

In Respondent's Exceptions, Citgo claims the limit in Special Condition No. 4 is not a limit, and therefore there was no permit violation, no unauthorized emissions, and no emissions event. These assertions are without merit.

1. Citgo's claim that it did not violate the Permit is without merit; Citgo violated Special Condition No. 4 of the Permit.

Citgo claims it did not violate the Permit. Citgo relies on other provisions in Special Condition No. 4, and other unnamed provisions of the Permit.¹¹⁵ None of these provisions erase the clear language of the air emission limitation in Special Condition No. 4 that when test results are over 5 ppmw those emissions are not authorized. Citgo's reliance on other provisions in the Permit is misplaced.

¹¹⁵ Respondent's Exceptions at 3.

a. Citgo's reliance on compliance with other provisions of Special Condition No. 4 is misplaced.

In Respondent's Exceptions, Citgo states the provision in Special Condition No. 4 prohibiting emissions with a VOC concentration greater than 5 ppmw should not be construed as an air emission limit but as "operational requirements and work practices" that prescribe repair obligations.¹¹⁶ Based on this, Citgo claims it did not violate the Permit. This is inconsistent with the clear language of Special Condition No. 4, Citgo's emissions event reporting procedures, Citgo's cooling tower identification and reduction procedures, Citgo's emissions event reports, and testimony in this case.

The plain language of Special Condition No. 4 indicates an air emission limitation prohibiting emissions when EPS test results exceed 5 ppmw. While Citgo may have complied with the other provisions of Special Condition No. 4, it was not in compliance with this provision when it obtained EPS test results of 25.56 ppmw. According to Citgo's construction, the language in Special Condition No. 4 stating that these emissions are "not authorized" is meaningless. These words are not meaningless. Jeff Grief, who drafted this permit condition language, testified that, consistent with its plain meaning, this language is an air emission limitation prohibiting emissions when test results are over 5 ppmw.¹¹⁷ Joseph Janecka, an emissions expert, also testified that this provision is an air emission limitation in the permit and that, consistent with the plain language in the permit, emissions when test results are over 5 ppmw are not authorized, and likewise unauthorized.¹¹⁸

This is consistent with Citgo's emissions event reports as well. Citgo submitted an initial and final emissions event report for the emissions in this case.¹¹⁹ In both reports, Citgo characterizes the emissions in this case as an "EMISSIONS EVENT."¹²⁰ By definition, "emissions events" are "unauthorized emissions."¹²¹ By submitting emissions event reports for the emissions in this case, Citgo acknowledges the emissions are unauthorized and therefore not allowed in the Permit.

Citgo's cooling tower source identification and reduction procedure identifies leaks from equipment failure at cooling towers as "unauthorized emissions." In the definition of Leak Source it states:

LEAK SOURCE – Equipment failure that leads to unauthorized emissions at a cooling tower.¹²²

This is consistent with the ED's position in this case.

¹¹⁶ Respondent's Exceptions at 3.

¹¹⁷ Tr. 183:15-184:13 (Test. of J. Grief).

¹¹⁸ Tr. 39:10-40:13 (Test. of J. Janecka).

¹¹⁹ ED 4 and ED 5.

¹²⁰ *Id.*

¹²¹ 30 TEX. ADMIN. CODE §§ 101.1(28) and 101.1(108).

¹²² ED 12 at 3.

Citgo's emissions event reporting procedure also identifies the provision in Special Condition No. 4 prohibiting emissions when EPS test results are over 5 ppmw as an air emission limit triggering an emissions event. It states that the purpose of the procedure is to "avoid late reporting of possible reportable quantities from air **emissions events**."¹²³ It defines emissions such as the ones in this case as "TIER I air emissions events." Specifically, it states:

A TIER I **air emissions event** is defined by the following cases:

...

- Volatile Organic Compounds (VOC) in a Cooling Tower which exceeds the upper limit for that specific Tower.¹²⁴

This procedure identifies as an emissions event an emission from the cooling tower that exceeds the upper limit in the permit for that tower. The upper action limit for the permit in this case, is 5 ppmw. Citgo's test result in this case was more than five times that amount. So, according to Citgo's procedure, this incident was a TIER I emissions event. As such, the emissions are unauthorized and in excess of the air emission limitation in Special Condition No. 4.

Citgo misconstrues the testimony of Jeff Grief and attempts to rely on it for the proposition that the statement in Special Condition No. 4 that the emissions in this case are "not authorized" is ambiguous.¹²⁵ Citgo claims that Mr. Grief stated the TCEQ was in the process of clarifying the language for cooling tower permit special conditions and that this supposed clarification means the language at issue in Special Condition No. 4 is not clear. However, Mr. Grief never testified that there is any clarification. Even if the TCEQ was in the process of considering clarifications to this condition, more importantly, the language in Special Condition No. 4 is clear; emissions with an EPS test over 5 ppmw are not authorized. Additionally, Mr. Grief never testified that there is any clarification. Mr. Grief testified that air emission limitations can be in MAERT tables in permits as well as in other permit provisions, and that boilerplate permit language can change over the years.¹²⁶ In fact, Citgo's attorney asked if there was any clarification, and Mr. Grief indicated he found the question confusing given the context. The only discussion of clarification is as follows:

Q. Okay. So there -- is there -- is that to clarify or to change the interpretation of what's in Special Condition 4 and the MAERT table in this permit?

A. Pardon?¹²⁷

Mr. Grief, who worked on the development of the boilerplate permit language in Special Condition No. 4 on this case, testified unequivocally that the language stating the emissions in this case are "not authorized" is an air emissions limitation in the permit.¹²⁸

¹²³ ED 10 at 1 (emphasis added).

¹²⁴ ED 10 at 2 (emphasis added).

¹²⁵ Respondent's Exceptions at 5.

¹²⁶ Tr. 184-187.

¹²⁷ Tr. 186: 17-20.

Citgo also claims that emissions when test results are between 0.15 ppmw and 5.0 ppmw are “not authorized” because they are not allowed to continue indefinitely.¹²⁹ Presumably, Citgo states this in support of the position that since emissions between 0.15 and 5.0 ppmw do not have to be reported, emissions with test results over 5.0 ppmw do not have to be reported. However, Citgo misconstrues this permit provision. Emissions with test results between 0.15 and 5.0 are allowed to continue under certain conditions—that repair of the leak causing the emissions is repaired at the earliest opportunity but not later than the next scheduled shutdown. As long as these conditions exist, the emissions are authorized. There is no statement in the permit that these emissions are “not authorized”. In contrast, there are no conditions under which emissions are authorized if test results show over 5.0 ppmw; these emissions are expressly “not authorized.”

Citgo's reference to the Federal Clean Air Act's broad definition of “emission limitation” support's the ED's case, not Citgo's. As Citgo notes, the federal “emission limitation” not only includes limits of the quantity, rate or concentration of emissions, it also includes “any . . . work practice or operational standard.”¹³⁰ Citgo fails to explain how a broad definition of “emission limitation” which includes operational and work practices supports Citgo's position. In contrast, the broad federal discussion of “emission limitation” supports the fact that Citgo did violate an emission limitation in this case.

While Citgo may have complied with the other provisions in Special Condition No. 4, it did not comply with the provision in Special Condition No. 4 prohibiting emissions when EPS test results exceed 5 ppmw.

b. Citgo's unspecified reference to other permit provisions is irrelevant; Special Condition No. 4 contains an air emission limitation and Citgo exceeded that limitation.

Citgo claims that Special Condition No. 4 should be construed in the context of “other similar VOC leak detection and repair” programs contained in the Permit.¹³¹ Citgo fails to discuss the other Permit provisions it references. Based on prior arguments by Citgo in this case, Citgo presumably relies on the estimated limits in the MAERT table of the permit to claim the emissions in this case are authorized.¹³² Yet, there is no allegation in this case of a violation of the MAERT table. Citgo's reference to the MAERT table is not relevant.

¹²⁸ Tr. 183-184.

¹²⁹ Respondent's Exceptions at 4.

¹³⁰ Respondent's Exceptions at 5 (quoting 42 U.S.C. § 7602(k)).

¹³¹ Respondent's Exceptions at 3.

¹³² See Respondent's Closing Argument at 6 and 14. The MAERT table contains many of the emission limits in the Permit. ED 2 at 27-31. However, it does not contain all emission limits in the Permit. Tr. 76:13-77:2, and 79:9-13 (Test. of J. Janecka). For example, the provision in Special Condition No. 4 prohibiting emissions when EPS test results exceed 5 ppmw is an emission limitation not contained in the MAERT table. See, e.g., Tr. 184:2-13 (Test. of J. Grief). Whether emission limits are stated in the MAERT table or other sections of a permit is a “formatting issue.” Tr. 79:9-13 (Test. of J. Janecka).

Citgo has also pointed to similarities between Special Conditions Nos. 8 and 9 of the Permit and Special Condition No. 4.¹ However, Citgo fails to provide any explanation as to how Special Conditions Nos. 8 and 9 are relevant.¹ Presumably Citgo is suggesting that because Special Conditions Nos. 8 and 9 do not contain emission limitations, then Special Condition No. 4 does not contain one. However, Special Condition No. 4 expressly contains an air emission limitation. There is no allegation in this case regarding Special Conditions Nos. 8 and 9, and they are not relevant.

2. Citgo's claim that the emissions are authorized is without merit; the Permit expressly states the emissions are "not authorized."

In Respondent's Exceptions, Citgo makes the bold claim that the emissions from Cooling Tower 10 resulting from cooling water return line VOC concentrations in excess of 5 ppmw do not constitute unauthorized emissions even though they are expressly "not authorized."¹³³ As discussed above, the plain language of the Permit, Citgo's emissions event reports, Citgo's reporting procedure, Citgo's cooling tower repair procedure, and the testimony of Mr. Janecka and Mr. Grief all demonstrate that the emissions from Cooling Tower 10 when the EPS test result was above 5 ppmw constituted a violation of the permit and unauthorized emissions. The express statement in the Permit that the emissions are "not authorized" means they are unauthorized. All the evidence points to the obvious—emissions expressly not authorized in the Permit are unauthorized emissions. Because Citgo violated an air emission limitation in a permit, the emissions are unauthorized.¹³⁴

¹³³ See, e.g., Respondent's Exceptions at 5.

¹³⁴ In its closing argument, to support its claim that the emissions are authorized and yet "not authorized," Citgo references 2002 air program rulemaking, but provides no logical connection between the references to rulemaking and any distinction between "unauthorized" and "not authorized." Respondent's Closing at 13-14. An examination of the references cited by Citgo shows, contrary to Citgo's assertion, there is no discussion about any distinction between "not authorized" and "unauthorized."

Citgo relies solely on language from the rulemaking process that certain proposed definitions were characterized by four public commenters (not by the Commission) as "substantial changes." These were not comments by the Commission or Commission staff and moreover, there is no discussion of any distinction between the term "not authorized" and "unauthorized."

An examination of the provisions cited by Citgo reveal that this discussion had to do with proposed definition changes that were beyond the scope of the limited purpose of that particular rulemaking. In comments to proposed definition changes, commenters claimed that the new definition structure would have potential unintended consequences; none of the claimed consequences related to any distinction between "not authorized" and "unauthorized." ED KK (27 Tex. Reg. 8510, September 6, 2002). The issues raised by the commenters were not resolved and no determination was made as to any of them; the TCEQ merely determined that the change in definition structure was not intended to raise these issues, so the proposed change in structure was not adopted. *Id.*

3. Citgo's claim that this is not an "emissions event" is irrelevant because proving an "emissions event" is not one of the elements of this violation; the only impact to this violation there would be—if this were an emissions event—is that the affirmative defense for emissions events would be available had Citgo qualified for it.

In Respondent's Exceptions, Citgo claims the emissions in this case did not constitute an "emissions event."¹³⁵ Citgo erroneously claims that this case "evaporates" if the emissions in this case do not constitute an emissions event.¹³⁶ In a point of clarification, proving an "emissions event" is not an element of Violation 1 and thus, not an element that the ED has to prove to establish this violation. None of the citations allegedly violated in Violation 1 require an emissions event.¹³⁷ The ED only need establish a violation of Special Condition No. 4 to prove a violation of TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§ 116.115(c) and 122.143(4); the Federal Permit, Special Term and Condition No. 31; and the Permit, Special Condition No. 4. As such, the ED does not have to prove an emissions event to establish Violation 1.

In fact, whether the emissions in this case amount to an emissions event is only relevant as to Violation 1 in determining whether Citgo may assert an affirmative defense. The affirmative defense asserted by Citgo in this case is only available for emissions events.¹³⁸ The ED points this out as a demonstration of the inconsistencies in Citgo's position in this case. As discussed in section V. below regarding the reporting violation, the ED's position is that the emissions in this case did constitute an emissions event that had to be reported to the Commission in accordance with the rules governing the reporting of emissions events.

In summary, application of the undisputed facts in this case to the rules cited in Violation 1 demonstrates that this violation is conclusively established.

V. Citgo's claims in defense of Violation 2 (the reporting violation) are without merit; Citgo did not report an emissions event within 24 hours of discovery of that emissions event—i.e., within 24 hours of receiving the test result of 25.56 ppmw.

In the second violation alleged in the ED's Petition, Violation 2, the ED alleges Citgo did not report an emissions event within 24 hours of discovery of the emissions event as required.¹³⁹ Citgo claims the emissions did not constitute an emissions event, and that it timely reported even if it were an emissions event.¹⁴⁰ Both claims are without merit.

¹³⁵ See, e.g., Respondent's Exceptions at 6.

¹³⁶ Respondent's Exceptions at 3.

¹³⁷ TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§ 116.115(c) and 122.143(4); the Federal Permit, Special Term and Condition No. 31; and the Permit, Special Condition No. 4. In Violation 1, the ED has to prove a violation of the Permit. For a discussion the required elements for violation 1, the ED refers' to Section IV.A., above.

¹³⁸ Citgo relies on the affirmative defense in 30 TEX. ADMIN. CODE § 101.222. (See, e.g., Respondent's Exceptions at 6). The affirmative defense in 30 TEX. ADMIN. CODE § 101.222 states it applies to non excessive emissions events.

¹³⁹ ED A at 4-5 para. 6.b.

¹⁴⁰ Respondent's Exceptions at 6.

A. Contrary to Citgo's claim, the emissions in this case constitute an emissions event.

The emissions in this case meet all the requirements in the definition of "emissions event."¹⁴¹ Citgo's sole basis for claiming that the emissions did not constitute an emissions event is based on the assertion that the emissions were authorized and thus, not unauthorized.¹⁴² As discussed above, the emissions were unauthorized.¹⁴³

Moreover, Citgo's emissions event reports identify the emissions in this case as an "EMISSIONS EVENT."¹⁴⁴ Citgo's representative, Mr. Paul Choucair, certified that these emissions event reports are "true, accurate, and complete."¹⁴⁵ Citgo has never attempted to change or withdraw these reports despite it claiming in this case that the emissions are not emissions events and despite the TCEQ having a process for amending emissions event reports.¹⁴⁶

Citgo's emissions event reporting protocol identifies emissions from cooling towers above the upper limit in the permit (in this case 5 ppmw) as emissions events.¹⁴⁷ Citgo's cooling tower source identification procedure identifies these types of emissions as "unauthorized emissions."¹⁴⁸ The Permit expressly states the emissions are "not authorized," thus rendering them unauthorized.¹⁴⁹ Mr. Janecka, a highly qualified emissions event expert, testified that the emissions were an emissions event.¹⁵⁰ The overwhelming evidence in this case establishes the emissions were unauthorized and thereby an emissions event.

B. Contrary to Citgo's assertion, the emissions event was not reported timely, because Citgo discovered the emissions event, at the latest, when it received the EPS results and Citgo did not report within 24 hours of obtaining those results.

To timely report an emissions event, an initial emissions event report must be filed as soon as practical "but no later than 24 hours after the discovery of an emissions event."¹⁵¹ Citgo knew it had unauthorized emissions, and thus an emissions event, at the latest, when it received the EPS test results of 25.56 ppmw. Because Citgo did not file an initial report of the emissions event within 24 hours of receiving the EPS test result, Citgo did not timely report.

¹⁴¹ Tr. 36:19-40:13 (Test. of J. Janecka).

¹⁴² Respondent's Exceptions at 6.

¹⁴³ See section IV.B. above.

¹⁴⁴ ED 4 and ED 5; Tr. 53:5-56:17 (Test. of J. Janecka).

¹⁴⁵ ED 4 at 2; ED 5 at 2.

¹⁴⁶ Tr. 56:11-57:2 (Test. of J. Janecka).

¹⁴⁷ ED 10 at 2.

¹⁴⁸ ED 12 at 3.

¹⁴⁹ ED 2 at 9.

¹⁵⁰ Tr. 36:19-40:13 (Test. of J. Janecka).

¹⁵¹ 30 TEX. ADMIN. CODE § 101.201(a)(1)(B).

1. According to the plain language of the Permit, Citgo's records, and testimony in the record, Citgo discovered unauthorized emissions, i. e., the emissions event, when it received the EPS test results.

The evidence in this case clearly establishes Citgo discovered the emissions event when it received the EPS test result of 25.56 ppmw on June 28, 2011, at 5:30pm.¹⁵²

An emissions event is defined as:

Any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.¹⁵³

According to the Permit, once Citgo received the EPS test result of 25.56 ppmw, Citgo knew it had unauthorized emissions and that it had to perform repairs immediately, even if that meant it needed to shutdown Cooling Tower 10.¹⁵⁴ This amounts to an unscheduled maintenance or shutdown activity as contemplated in the definition of "emissions event." The Permit states the emissions are not authorized, i.e., unauthorized. So, when Citgo received the EPS test result, it knew all of the requirements for an emissions event had been met. This is consistent with Citgo's emissions event reports which both state the time of discovery as the time Citgo received the EPS test results—June 28, 2011, at 5:30 pm.¹⁵⁵

This is also consistent with Citgo's emissions event reporting protocol which correctly treats emissions such as the ones in this case as emissions events that need to be reported within 24 hours of test results exceeding the permit limit.¹⁵⁶ The purpose of the protocol is to "avoid late reporting of possible reportable quantities from air **emissions events**."¹⁵⁷ To prevent late reporting, Citgo's reporting procedure requires:

An initial STEERS Report will be **immediately** submitted for **high probability reportable events**. These events are termed **TIER I** events.¹⁵⁸

The reporting procedure identifies TIER I events as follows:

One of the types of a TIER I air emissions event is defined as: . . . Volatile Organic Compounds (VOC) in a Cooling Tower which exceeds the upper limit for that specific Tower.¹⁵⁹

So, according to Citgo's procedure, this incident was a TIER I emissions event. As such, also according to the procedure, in the section "AIR EMISSIONS EVENT OCCURS" it states:

¹⁵² ED 3.

¹⁵³ 30 TEX. ADMIN. CODE § 101.1(28).

¹⁵⁴ ED 2 at 9.

¹⁵⁵ ED 4 at 1; ED 5 at 1.

¹⁵⁶ ED 10 at 3.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *Id.* at 2.

Shift Superintendent submits Initial STEERS Report upon determination of a TIER I event.¹⁶⁰

It goes on to state:

CAUTION

Initial STEERS Report must be submitted within 24 hours of Event start. In general the quicker this report is submitted the better.

CAUTION¹⁶¹

Since a TIER I Event is defined as when the VOCs in the cooling tower exceed the upper limit for that tower,¹⁶² the start of the event is when Citgo receives the results indicating the upper limit was exceeded. That occurred at 5:30 pm on June 28, 2011. So according to this procedure, the emissions event must be reported within 24 hours of June 28, 2011, at 5:30 pm. If Citgo had followed its own procedure in this case, there would be no reporting violation. However, Citgo did not follow its own emissions event reporting procedure. According to Citgo's reporting procedure, it was required to file the initial STEERS report, i.e., the initial emissions event report, within 24 hours of 5:30 pm, June 28, 2011. So, Citgo was required to file the initial report by June 29, 2011, at 5:30 pm. Yet, Citgo did not file the initial STEERS report until June 30, 2011, at 8:52 pm.

Citgo's own internal memo on this incident acknowledges that the emissions event reporting procedure was not followed. In Citgo's own report of the incident, one of the preventative and corrective actions recommendations is:

Retrain employees on environmental procedure ENV-805 and ENV-806.¹⁶³

The memo goes on to state:

Person Responsible: Mark Cheesman¹⁶⁴

ENV-805 is Citgo's emissions event reporting procedures.¹⁶⁵ Thus, the recommendation is that employees be retrained on Citgo's emissions event reporting procedures.

Preventative and corrective actions are intended to prevent the incident from happening again. If Citgo had followed its procedure, there would be no need to "retrain" employees on the procedure. Importantly, the very provision of the procedure that Citgo did not follow is the one that caused the reporting violation in this case. Citgo's procedure, which was approved by Mr.

¹⁶⁰ *Id.* at 3.

¹⁶¹ *Id.* (emphasis not added).

¹⁶² ED 10 at 2.

¹⁶³ ED 13 3.

¹⁶⁴ *Id.*

¹⁶⁵ ED 10 at 1.

Cheesman in his capacity as Manager of Environmental Affairs,¹⁶⁶ correctly treats this incident as an emissions event required to be reported within 24 hours of notification that it has exceeded Permit limit. This emissions event reporting procedure is consistent with the ED's position in this case.

In addition to Citgo's own records identifying when discovery of the emissions event occurred, Mr. Janecka also testified that the emissions event was discovered no later than when Citgo received the EPS test result of 25.56 ppmw, because the test result conclusively established the emissions were unauthorized and thus an emissions event and unscheduled maintenance was necessary.¹⁶⁷ As Mr. Janecka testified, the Permit is clear as to when the existence of an emissions event is established and discovered.¹⁶⁸

2. Citgo's claim that it did not discover the emissions event until it discovered the root cause of the emissions event is unsupportable; Citgo misconstrues a TCEQ investigator guidance and rule-making history in an effort to support this claim.

In contradiction to Citgo's own records, in Respondent's Exceptions Citgo claims that it discovered the emissions event when it identified the source of the unauthorized emissions from Cooling Tower 10 was a leaking heat exchanger, specifically its glycol heat exchanger.¹⁶⁹ Citgo asserts the standard for determining the discovery of an emissions event is when Citgo unilaterally determines a piece of equipment "can no longer serve its functional purpose".¹⁷⁰ However, Citgo misstates the standard via a misplaced reliance on a TCEQ investigator guidance and rulemaking history. Both references merely give examples of the type of information that may be available indicating an emissions event has occurred. In this case, the Permit clearly establishes the existence of the emissions event. Moreover, Citgo was in the process of repairing and shutting down Cooling Tower 10 when it identified the root cause of the emissions event; Citgo knew Cooling Tower 10, and components within it, was no longer serving its functional purpose when it received the EPS test result of 25.56 ppmw, which is why it began shutdown and repair procedures. While determining the cause of the excess emissions and pinpointing the source eventually aided in Citgo's response to minimize emissions and resolve the incident, determining the root cause for the malfunction does not mark the discovery of the event' discovery of the root cause is not relevant or necessary to meet the reporting requirements.

¹⁶⁶ *Id.*

¹⁶⁷ Tr. 46:17-47:4 (Test. of J. Janecka).

¹⁶⁸ Tr. 77:13-15 (Test. of J. Janecka).

¹⁶⁹ Respondent's Exceptions at 6.

¹⁷⁰ Respondent's Exceptions at 6.

a. Citgo's reliance on an investigator protocol and prior rulemaking is misplaced; the Permit specifically identifies that there are unauthorized emissions, hence an emissions event, when results of an EPS test are greater than 5 ppmw.

According to the Permit, when Citgo received the EPS test results from the cooling tower over 5 ppmw, Citgo knew the emissions were unauthorized and there was an emissions event.¹⁷¹ Mr. Janecka explained this best when he testified as follows:

Q. . . . So when did CITGO discover this emissions event?

A. It would seem from that timeline that -- and help me with that timeline, where is that?

Q. Sure. It's Exhibit ED-3.

A. The date, time, and discovery that would appear to start a 24-hour clock is the June 28th, 2011, 5:30 p.m., CITGO obtains EPS test results of 25.56 parts by million by weight.

Q. So June 28, 2011, 5:30, CITGO has an El Paso Stripper test result of 25.56, and that was sufficient information for CITGO to know and it had an emissions event?

A. Yes.

Q. And why is that?

A. It is the point where they discovered they have an emissions event, meaning Special Condition 4, describes that the permit holder has to use the approved method, the approved method being the El Paso Stripper test method, to determine compliance or determine at what level of VOC concentration they have when they have gone above five. They have unauthorized emissions. That's the discovery when the test results are showing that they exceeded five.¹⁷²

When Citgo received the EPS test result over 5 ppmw, Citgo knew it had unauthorized emissions from faulty equipment necessitating unplanned maintenance and shutdown procedures; it knew it had an emissions event.

Citgo's reliance on an investigator protocol and prior rulemaking is misplaced. The investigator protocol and prior rulemaking merely provide examples of information indicating an emissions event, and do not explain or describe when an event is discovered. These references do not stand for the proposition that Citgo can ignore the Permit and make a unilateral determination that it discovered the emissions event only after it identified the root cause of the emissions event.

¹⁷¹ ED 2 at 9; Tr. 48:6-49:6 (Test. of J. Janecka).

¹⁷² Tr. 46:9-47:4; *see also* Tr. 47:9-48:12 (Test. of J. Janecka).

The investigator protocol provides guidance to investigators as to the types of information that might be available to determine an emissions event.¹⁷³ The language in the guidance relied on by Citgo actually supports the ED's case.

Citgo claims this guidance language indicates that the only method for discovery of an emissions event is when Citgo makes a unilateral determination that a component can no longer serve its functional purpose.¹⁷⁴ Citgo conveniently omits language in the guidance that states an emissions event "may" be the appropriate designation when a component failure renders the component in a condition where it "can no longer serve its functional purpose."¹⁷⁵ The use of the word "may" indicates that this methodology is not the only methodology to identify emissions events. This guidance provides investigators different options; this is merely one. Consistent with the rules, the guidance provides that it is the responsibility of the owner/operator to identify emissions events. It is true that owner/operators are responsible for correctly determining emissions events, and are in violation if they do not. Citgo misconstrues this language to claim that owner/operators can unilaterally determine when they discover an emissions event, and cannot be contradicted. That is not only an incorrect interpretation of this guidance, it is not consistent with the rules or TCEQ's longstanding interpretation of § 101.201. Such a convoluted interpretation could undermine the TCEQ's ability to regulate emissions events.

Mr. Janecka, who wrote this language in the guidance, testified in contradiction of Citgo's position. Not only did Mr. Janecka testify that Citgo knew it had an emissions event when it received the high EPS test result, Mr. Janecka's testimony regarding the purpose of this language supports the ED's claim (that emissions from Cooling Tower 10 can qualify as emissions events). As Mr. Janecka testified, this guidance language was added to clarify, at the request from industry representatives similar to Citgo, that leaks from fugitive sources, such as cooling towers can be emissions events, and thus eligible for the affirmative defense.¹⁷⁶

Both the rulemaking and the guidance referenced by Citgo stand for the proposition that emissions from equipment failure such that the equipment can no longer serve its functional purpose can be emissions events—no more, no less. There is no discussion within these two references about the time of discovery of the emissions event. These references are not on point and do not support Citgo's assertion; in fact, they support the ED's claim that the emissions in this case constitute an emissions event.

b. Citgo knew that Cooling Tower 10 could no longer serve its functional purpose when, as dictated by the Permit, it received the EPS test result establishing that the faulty equipment in Cooling Tower 10 was of such extent that it

¹⁷³ See, e.g., Tr. 63:21-25.

¹⁷⁴ Respondent's Exceptions at 6.

¹⁷⁵ See Respondent's Closing Argument at 15 (includes large excerpt with "may" language) in comparison to Respondent's Exceptions at 6, footnote 18 ("may" language omitted).

¹⁷⁶ Tr. 66:24-67:14 (Test. of J. Janecka).

required immediate repair including requiring shutdown of the cooling tower if necessary.

Citgo knew Cooling Tower 10 and components within Cooling Tower 10 could no longer serve their functional purpose when it received the EPS test of 25.56 ppmw and had to make immediate repairs, including shutdown if necessary. The permit, as well as common sense, dictates that when Citgo was forced to repair and initiate shutdown of Cooling Tower 10 (which contains the leaking heat exchanger), Cooling Tower 10 as well as the component causing the leak could no longer serve its functional purpose and had to be repaired. Because faulty equipment using cooling water circulated in the cooling tower can no longer serve functional purpose, the Permit dictates immediate repair, even if a shutdown is required to do so.

Citgo may not have known which exact component within the cooling water system served by Cooling Tower 10 was no longer serving its functional purpose when it received the EPS test result, but it did know there was faulty equipment within that system that no longer served its functional purpose. The leaking heat exchanger (the glycol knockout cooler) stopped serving its functional purpose by the time Citgo received the EPS result. The emissions event had already begun. The reason Citgo was trying to find the source of the leak is because the equipment had already malfunctioned. In fact, apart from the requirement to report an emissions event within 24 hours of discovery, Citgo had an obligation to respond to an emissions event and minimize unauthorized emissions. Citgo's claim is analogous to saying that a car part malfunctioned, not when the car stopped working, but when the mechanic identified the specific non-working part. It is illogical. The glycol knockout cooler malfunctioned causing VOCs to leak in the cooling tower water resulting in the high EPS test. The glycol knockout cooler stopped working properly before Citgo discovered the source of this leak. Citgo's identification of the specific malfunctioning component is not relevant to a determination of when the emissions event started or when Citgo discovered the emissions event in this case. Citgo discovered the emissions event when it received the EPS test result.

Moreover, in Respondent's Closing Argument, Citgo admits it knew there was a leak and instituted procedures to find, isolate and repair the leak **after** receiving the EPS test result.¹⁷⁷ Citgo acknowledges "the EPS **confirms** the VOC leak".¹⁷⁸ Then, after the EPS test, Citgo instituted procedures to identify the source of the leak and had begun systematic shutdown of the process units associated with Cooling Tower 10.¹⁷⁹ So, Citgo knew it had a malfunction and unauthorized emissions when it obtained the EPS test results.

The reason Citgo failed to report timely is because it is "sensitive to reporting" and made a business decision to wait until it speculated the results to confirm that the emissions were reportable before reporting, even though the reporting rules require reporting reportable emissions events no later than 24 hours after discovery of the emissions event, not 24 hours

¹⁷⁷ Respondent's Closing Argument at 8.

¹⁷⁸ Respondent's Closing Argument at 7.

¹⁷⁹ *Id.*

after discovery of whether the event is reportable. Mr. Cheesman testified as to the reason it waited for speciation results before reporting:

If we have a shutdown and that resulted in emissions, that STEERS report is now picked up by the New York Trade Press and it goes out on the wire that we have had human operations issue. So we're -- we are sensitive to reporting across the board. We want to, first of all, make sure that it's a reportable event because once you submit it in, it's there for -- even if it ends up in non-reportable, which has happened, and you make a courtesy notification, it's there for eternity.¹⁸⁰

Citgo made a business decision to speciate before reporting and consequently took a risk that it would not file an initial report timely. The 24 hour period starts at the point in time that an emissions event is discovered. According to the reporting requirements, the initial determination of whether an emissions event is reportable must be made within 24 hours of discovery of the emissions event such that the emissions event is reported no later than 24 hours after discovery.¹⁸¹

Mr. Janecka testified about the risk of waiting to file the initial report. As Mr. Janecka testified, the reporting requirement requires an initial report no later than 24 hours after discovery of an emissions event.¹⁸² At trade conferences, he cautions industry that in those situations in which a regulated entity is unable to quickly determine if the emissions event is reportable within 24 hours of discovery of an emissions event, they take a risk if they do not report the emissions event within the 24 hour period. The risk is that if the emissions event is reportable, the regulated entity not only fails to comply with the 24 hour initial filing deadline, the regulated entity cannot meet the criteria of the affirmative defense for emissions events requiring timely reporting.¹⁸³

If Citgo would have complied with its reporting procedures, it would have timely reported the emissions event. Instead, Citgo made a business decision to speciate before reporting, and consequently did not timely report. Because Citgo did not report the emissions event within 24 hours of discovery, Citgo violated 30 TEX. ADMIN. CODE § 101.201(a)(1)(B) as well as TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE § 122.143(4); and FOP No. 01423, Special Terms and Conditions No. 2. F, as alleged.¹⁸⁴

VI. Citgo is not eligible for the affirmative defense for this emissions event because it did not submit a timely initial emissions event report as required.

Citgo argues the emissions event is eligible for the affirmative defense described in 30 TEX. ADMIN. CODE § 101.222(b). However, Citgo has not made the demonstrations required to make the affirmative defense. Citgo has the burden of proof to demonstrate its eligibility for the

¹⁸⁰ Tr. 150:1-9.

¹⁸¹ 30 TEX. ADMIN. CODE § 101.201(a)(1).

¹⁸² Tr. 48:23-49:2, Tr. 161:6-165:10.

¹⁸³ Tr. 164:13-165:10 (Test of J. Janecka).

¹⁸⁴ See, e.g., Tr. 46:6-51:20 (Test. of J. Janecka).

affirmative defense.¹⁸⁵ Citgo is not eligible for the affirmative defense applicable to emissions events because Citgo failed to meet the first criterion—compliance with reporting requirements. Because Citgo did not file the initial emissions event report within 24 hours as required, it did not comply with the reporting requirements and is not eligible for the affirmative defense.

A. According to the express language of the affirmative defense rule, Citgo had to timely submit the initial emissions event report; Citgo did not timely report the emissions event.

The affirmative defense for emissions events is in 30 TEX. ADMIN. CODE § 101.222(b). A non-excessive emissions event is subject to the affirmative defense if the owner or operator proves each of eleven demonstrations. The first of these demonstrations is that the owner or operator must comply with emissions event reporting and recordkeeping requirements found in 30 TEX. ADMIN. CODE § 101.201. Section 101.222(b)(1) requires a demonstration that:

[T]he owner or operator complies with the requirements of § 101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements).

As discussed above, Citgo did not file an initial emissions event report within 24 hours of discovery of the emissions event in violation of 30 TEX. ADMIN. CODE § 101.201(a)(1)(B). Because Citgo did not comply with 30 TEX. ADMIN. CODE § 101.201, it does not meet the first demonstration necessary to avail itself of the affirmative defense.

B. Citgo's claim that timeliness is not required is erroneous; Citgo misconstrues and attempts to rewrite Texas Health & Safety Code § 382.0216, the affirmative defense rule, and rulemaking history in an effort to suit its desired outcome in this case.

Citgo misconstrues sections 382.0215 and 382.0216 of the Texas Health and Safety Code. These sections do not limit the Commission's discretion (1) to enforce reporting violations or (2) to implement an affirmative defense for emissions events. In fact, § 382.0216(i) of the Health & Safety Code, the section relied on by Citgo, has no provision that limits enforcement, and in fact, contains a mandate for enforcement of certain reporting violations.

- 1. Citgo inaccurately claims § 382.0216(i) is a limitation on the ability to enforce and a limitation on requiring timeliness as part of the affirmative defense; in actuality, § 382.0216(i) mandates enforcement for particular reporting violations and § 382.0216(d) provides complete discretion to the Commission as to the existence of an affirmative defense and affirmative defense requirements.**

Citgo's reliance on § 382.0216(i) of the Health & Safety Code (§ 382.0216(i)) is misplaced. Citgo erroneously claims § 382.0216(i) contains the Commission's authority for the

¹⁸⁵ See TEX. HEALTH & SAFETY CODE § 382.0216(g) "The burden of proof in any claim of a defense to commission enforcement action for an emissions event is on the person claiming the defense"

affirmative defense,¹⁸⁶ when § 382.0216(i) actually has nothing to do with the affirmative defense.

§ 382.0216 contains provisions regarding the regulation of emissions events. The authority for establishing an affirmative defense is contained in § 382.0216(f), not § 382.0216(i). Section 382.0216(f) states:

The commission by rule may establish an affirmative defense to a commission enforcement action if the emissions event meets criteria defined by commission rule. In establishing rules under this subsection, the commission at a minimum must require consideration of the factors listed in Subsections (b)(1)-(6).

The statute states that the Commission “may” establish an affirmative defense; whether to create an affirmative defense is left completely within the Commission’s discretion. The Commission did implement rules establishing an affirmative defense.

Section 382.0216(i) does not mention the affirmative defense at all. It merely mandates enforcement for certain reporting violations—a substantial failure to report—by requiring enforcement of both the reporting violation and the underlying emissions event if a regulated entity either (1) completely fails to report, or (2) files a report containing information that the owner or operator knowingly or intentionally falsifies. This section does nothing more than require enforcement in this particular circumstance. It certainly does not require the Commission to allow an affirmative defense if reports are untimely, nor does it prohibit the Commission from enforcement of other violations resulting from emissions events.

2. Citgo’s assertion that the affirmative defense even applies when there is untimely reporting is unfounded.

Citgo misconstrues a portion of the reporting requirement for affirmative defenses in support of its assertion that timeliness is not required; the affirmative defense rule, consistent with § 382.0216 mandates enforcement (meaning the affirmative defense is not available) for certain reporting violations, and allows minor omissions and inaccuracies in the content of the initial emissions event report, given the 24 hour reporting requirement.

Citgo claims the affirmative defense rule allows the affirmative defense even when a report is not filed timely as required in the reporting rule. Citgo relies on the third sentence in 30 TEX. ADMIN. CODE § 101.222(b)(1), which states:

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;

¹⁸⁶ Respondent’s Exceptions at 7.

Citgo asserts that "minor omissions or inaccuracies," contrary to the plain meaning of the words, includes untimeliness. According to the plain language of this term, as well as the rulemaking for the affirmative defense rule, "minor omissions or inaccuracies" refers to the content of the reports, not to whether or not they are timely filed. "Omissions" and "inaccuracies" describe the information within the report; untimeliness is not an "omission" or "inaccuracy."

A review of the affirmative defense rulemaking demonstrates that "minor omissions or inaccuracies" applies to the content and the information within the report. It does not apply to timeliness. Examining this rulemaking shows that the Commission allows the affirmative defense for "minor omissions or inaccuracies" in initial reports in light of the fact that the initial report must be submitted within 24 hours of discovery of the emissions event. In the Summary of Comments, it states:

Summary of Comments: TCC and ExxonMobil Downstream appreciated the effort to clarify in §101.222(b)(1) that minor omissions or inaccuracies that do not impair the commission's ability to review the event should not be cause to invalidate the notification and initiate enforcement. TIP suggested that the rule should be revised to clarify that formal enforcement is not the appropriate remedy **for reports that may inadvertently exclude information or contain imprecise information.** ... TxOGA proposed that the commission add language to §101.222(b)(1) stating specifically that the commission will not initiate enforcement for failure to report, and the owner or operator will not be deemed to be in violation or lose eligibility for an affirmative defense, solely on the basis of minor omissions or inaccuracies that do not materially impair the commission's ability to review the event. TxOGA stated that this provision is badly needed because such minor clerical errors have, in the past, resulted in the issuance of notice of violations and/or notice of enforcement and a denial of an affirmative defense claim. Specifically, **TxOGA stated that this has been a particular problem with the initial report, which often has to be hurriedly prepared to meet the reporting deadline.** These changes will take the pressure off the industry field personnel who need to make weekend or after-hours reports and allow them to focus on addressing the physical problems associated with an emissions event instead of worrying about getting all of the paperwork details exactly correct. Addition of the word "materially" recognizes that a strict interpretation of this provision would cause the denial of virtually every claim for an affirmative defense if the emissions event report contained any error or inaccuracy whatsoever.

Response: The rule clearly states that failure to report as required by §101.201(a)(2) or (3), (b), or (e) will cause the commission to initiate enforcement, except when the failure consists of minor omissions or inaccuracies that do not impair the commission's ability to review, and it is not intentional falsification or knowing omissions. The commission appreciates the support for the additional language regarding enforcement, but declines to add the word "materially" because **the rule specifies that the missing information is limited to minor omissions or inaccuracies** that do not impair the commission's ability to review the activity or event. In addition, there is no need to specify in the rule that formal enforcement is not the remedy or that no

enforcement will be taken **when reports may inadvertently exclude information or contain imprecise information** because the enforcement determinations are based on a case-by-case review of the facts. Exclusion of some information could possibly result in formal enforcement. ...The new language provides the remedy sought to minimize enforcement for minor omissions and inaccuracies.¹⁸⁷ (emphasis added)

The summary of comments and response demonstrate that minor omissions or inaccuracies applies to the information in the report and does not extend to untimeliness. Additionally, the comment by the Texas Oil & Gas Association (TxOGA), made clear that the initial 24-hour notification requirement is a firm standard, and that minor omissions or inaccuracies are allowed with that understanding. The minor omissions or inaccuracies refer to the content of the initial report, not the existence or timeliness of the report itself.

When the TCEQ adopted the current version of § 101.222(b), the TCEQ actually clarified the importance of the 24-hour notification requirement in response to comments regarding § 101.201. The Commission's summary of comments and response state:

Summary of Comment: Arkema suggested that initial reports be changed from 24 hours to "one working day" where a working day would be defined as Monday through Friday, excepting federal and/or state holidays where the commission offices are closed. In addition, Arkema suggested that emergency provisions should be added to indicate that an event where an emergency responder must be called still must include a filing of initial reports within 24 hours. This is requested because the commission typically reviews reports during normal business hours.

Response: Notifications serve as "notice" to the commission and determine the level of response necessary. A decision to respond and conduct an on-site investigation immediately following the initial notification is based on a number of factors. In addition, the commission does responses[sic] to incidents 24 hours a day when this immediacy is warranted.¹⁸⁸

Failure to report the emissions event within 24 hours is not a minor omission or inaccuracy. In the comments above, the Commission made clear that it was not willing to extend the 24 hour deadline to even "one working day" to allow for weekends and holidays. As demonstrated in the comments above, every hour counts. The 24 hour deadline is necessary to enable the TCEQ to determine whether an immediate response or on-site investigation is warranted. If the 24 hour deadline is not met, the purpose the initial report serves is thwarted. Failing to file a timely 24 hour report is a serious impairment to the TCEQ's ability to determine whether to respond or conduct an on-site investigation immediately following the notification.

Citgo also relies on the similarity in the language between Tex. Health & Safety Code § 382.0216(i) and the third sentence in 30 TEX. ADMIN. CODE § 101.222(b)(1). Citgo argues that

¹⁸⁷ 30 Tex. Reg. 8925-26 (December 30, 2005).

¹⁸⁸ 30 Tex. Reg. 8910 (December 30, 2005).

because both provisions allow for incompleteness and inaccuracies, both provisions must also intend to allow for untimeliness—even though “untimeliness” is notably missing in the affirmative defense rule. This does not comport with the rulemaking history (as discussed above), statutory and rule construction principles, the plain language, or logic.

Actually, in 30 TEX. ADMIN. CODE § 101.222(b)(1), the Commission does adopt the enforcement mandate contained in TEX. HEALTH & SAFETY CODE § 382.0216(i) in the second (not third) sentence of this subsection.¹⁸⁹ In the third sentence, exercising its discretion to allow an affirmative defense, the Commission specifically chose to extend the affirmative defense for only “minor”¹⁹⁰ omissions and inaccuracies, but intentionally did not extend the affirmative defense for untimely reports.¹⁹¹ In exercising its discretion in crafting an affirmative defense, the Commission did not choose language that mirrors TEX. HEALTH & SAFETY CODE § 382.0216(i). It chose to exclude “untimeliness” and only include “minor” omissions and inaccuracies. These distinctions are meaningful.

The Respondent's failure to report the emissions event within 24 hours renders it ineligible to claim the affirmative defense. 30 TEX. ADMIN. CODE § 101.222(b)(1) requires that the Respondent comply with the 24 hour reporting requirement found in 30 TEX. ADMIN. CODE § 101.201(a)(1). The Respondent's assertion that an exception to this specific requirement of the affirmative defense exists is not based in rule or statute. The Respondent filed its initial notification past the 24 hour initial reporting deadline and, therefore, is ineligible for the affirmative defense.

VII. Citgo's TOC testing program is not eligible for immunity under the TCEQ's voluntary leak detection program because the program does not apply to equipment already required to be monitored for leaks.

The TCEQ's voluntary supplemental leak detection (VSLD) program cannot exempt Citgo from enforcement for a leak of a component in Cooling Tower 10, such as Citgo's glycol knockout cooler, because the VSLD program is only applicable to pieces of equipment not already required to be monitored under current regulations. The Permit requires Citgo to monitor Cooling Tower 10 with an approved method for detecting leaks. Because the leak in this case is covered by a monitoring program in the Permit, and would have been discovered nine days later,¹⁹² the VSLD program does not apply.

The VSLD program does not exempt Citgo from enforcement due to its daily TOC testing because the plain language of the VSLD program's rules show the program does not apply. Section 101.150(b) of Title 30 of the Texas Administrative Code is written such that only

¹⁸⁹ See 30 Tex. Reg. 8892 (December 30, 2005).

¹⁹⁰ The qualification “minor” is also a distinction between the affirmative defense rule and TEX. HEALTH & SAFETY CODE § 382.0216(i).

¹⁹¹ See 30 Tex. Reg. 8892 (December 30, 2005); 30 TEX. ADMIN. CODE § 101.222(b).

¹⁹² As Citgo points out in Respondent's Exceptions, the leak would have been discovered, under the Permit's monitoring requirement of monthly EPS tests, nine days later than actually discovered. Respondent's Exceptions at 19.

sources of air emissions “not subject to a required fugitive monitoring program” are applicable. A plain language reading of this section precludes a permittee from the VSLD program if the permittee is required to monitor the leaking equipment under its permit. This interpretation is bolstered by language in section 101.155(2). Section 101.155(2) states the exemption from enforcement can only apply if an equipment’s leak “would not have been detected under the [TCEQ’s] regulatory program for leak detection and repair in effect on the date of the detection.”

Section 382.401 of the Texas Health and Safety Code provides the Commission authority to create the VSLD program. It only exempts from enforcement leaks that “would not have been detected under the commission’s regulatory program for leak detection and repair in effect on the date of detection.”¹⁹³ Consistent with the Health and Safety Code, TCEQ rules state that the program is only available for leaks that would not otherwise be detected. 30 TEX. ADMIN. CODE § 101.153 states the program applies for the detection and repair of leaks “not otherwise detectable.” 30 TEX. ADMIN. CODE § 101.155 also states the exemption for enforcement only applies to leaks that “would not have been detected under the commission’s regulatory program for leak detection and repair in effect on the date of the detection.” Because, under the commission’s regulatory program, the Permit leak detection and repair monitoring requirement in Special Condition No. 4 (requiring monthly testing), which was in effect at the time Citgo discovered the leak in this case and would have detected the leak nine days later, the leak in this case is not eligible for the enforcement exemption.

Citgo’s claim that one should “focus on the ‘date of detection’ ” is illogical and contrary to the clear intent of the language. Citgo incorrectly asserts that if the leak would not otherwise be detected on the “date of detection”, then immunity applies. The “date of detection” refers to the regulatory program in place. If the leak would have otherwise been detected by the regulatory program in place on the date of detection, then immunity does not apply. This is consistent with the intent of this program only to apply to components that do not already have leak detection in place. According to Citgo’s interpretation, regulated entities could do their leak monitoring a day early and avoid enforcement of all leaks by detecting them a day early. This construction is not intended and is not workable.

30 TEX. ADMIN. CODE § 101.150 states the purpose of the VSLD program is to encourage and provide incentives for voluntary monitoring “of components not subject to commission rules.” TCEQ rules require compliance with permit provisions, and the Permit requires monitoring Cooling Tower 10. Thus, (as demonstrated in Violation 1), if Citgo does not comply with Special Condition No. 4, it does not comply with 30 TEX. ADMIN. CODE §§ 116.115(c). Because the leak detection and repair provisions for Cooling Tower 10 in the Permit are required by and subject to Commission rule, additional monitoring of Cooling Tower 10 does not qualify for the VSLD program.

To interpret 30 TEX. ADMIN. CODE § 101.150(b)(1) differently would exempt a permittee from enforcement if it violates an express term of its permit. Such exemption would be contrary

¹⁹³ TEX. HEALTH & SAFETY CODE § 382.401(e).

to the TCEQ's intent for the VSLD program, as clarified in the preamble to the VSLD program's rules. The VSLD program was never intended to exempt a permittee from complying with a permit requirement, but was instead to incentivize using leak detection technology on equipment not monitored by rule or permit. The result of using this program would identify and eliminate leaks that result in emissions but which would have remained undetected even if a permittee complies with the monitoring requirements in its permit.¹⁹⁴ The TCEQ clarified the limited scope of the VSLD program's applicability when it described potential consequences of interpreting the VSLD program to allow a permittee to not comply with its federally-required permit:

[B]oth the SIP and the Title V Permitting Program do not allow any exemption from enforcement and also require that the [TCEQ] have the authority to enforce both programs. . . . Failure to do so can result in a SIP call by EPA, including sanctions. . . . The [TCEQ] is therefore limiting the incentive regarding exemption from enforcement and adopts the text of the statute which provides that, *to the extent consistent with federal requirements*, the [TCEQ] may not take an enforcement action against a program participant owner or operator of [sic] for a leak or emission of an air contaminant *detected using alternative technology and would not have been detected under the [TCEQ's Leak Detection and Repair] program*.¹⁹⁵

Furthermore, the TCEQ went on to clarify that “[f]ederal requirements include all authorizations, both those in the new source review program and the federal operating (Title V) permits,” and that the TCEQ has promulgated at least one rule in the same chapter of the Texas Administrative Code that it “will not exempt sources from complying with any federal requirements. . . .” *Id.* (quoting 30 TEX. ADMIN. CODE § 101.221(d)). Consequently, interpreting the rules governing the VSLD program, found in subchapter C of 30 TEX. ADMIN. CODE ch. 101, to exempt Citgo from enforcement would excuse Citgo from complying with its operating permit, the enforcement of which is required under Texas’s State Implementation Plan (SIP) and Texas’s Title V Permitting Program. Doing so would risk Texas’ ED delegated authority to administer the Texas Clean Air Act, its EPA-approved SIP and Federal Operating Permit (Title V) Program, which could result in sanctions from the federal government.

Citgo argues its TOC testing should exempt it from enforcement for violations of its permit, because the TOC testing is not required by its permit and it allows Citgo to discover leaks faster than it would if it only monitored Cooling Tower 10 according to the requirements of its permit. This argument requires interpreting the VSLD program to apply when a permittee uses leak detection testing on equipment already subject to leak detection testing requirements under a permit, because such additional testing allows for faster discovery. When the TCEQ published the VSLD rules, it explained in the rules’ preamble that such additional testing cannot

¹⁹⁴ This is made abundantly clear by the preamble for the VSLD program rules repeatedly and specifically referencing optical gas imaging cameras, and explaining aspects of the rules in terms of the said camera’s use. *See, e.g.*, 35 Tex. Reg. 5284 (June 18, 2010) (citing the U.S. EPA’s adoption of a rule regarding Alternative Work Practice to Detect Leaks from Equipment, which speaks only of optical gas imaging cameras as the equipment for alternative leak detection).

¹⁹⁵ 35 Tex. Reg. 5286 (June 28, 2010) (emphases added).

qualify equipment already monitored for leak detection for the VSLD program.¹⁹⁶ The TCEQ also expressly states that using an additional leak detection method to find a leak, earlier than would be found under permit-required methods, does not qualify equipment for the VSLD program because that equipment is “subject to a commission rule for [Leak Detection and Repair] in effect on the date of detection.”¹⁹⁷ Furthermore, qualifying such equipment would allow for the TCEQ to exempt from enforcement a permittee who violated express terms in its permit, thus risking Texas’s authority to administer the Texas Clean Air Act, its EPA-approved SIP and Federal Operating Permit (Title V) Program, which could result in sanctions from the federal government.

Citgo is not exempt from enforcement in this case due to the VSLD program, because Special Condition No. 4 in Citgo’s permit for operating Cooling Tower 10 already requires Citgo to monitor Cooling Tower 10 for leaks.¹⁹⁸ Such requirements include that the VOC “associated with cooling tower water shall be monitored monthly for VOC leakage from heat exchangers with an approved air stripping method,” that faulty equipment “be repaired at the earliest opportunity,” and that “[e]missions from the cooling tower are not authorized if the VOC concentration of the water returning to the cooling tower exceeds 5 ppmw.”¹⁹⁹ Allowing Citgo to escape enforcement from violating its permit because of its TOC testing is contrary to the plain language of the statute and rules governing the VSLD program and would allow it to escape complying with a federal requirement, which would require an interpretation of the VSLD program’s rules that risks Texas’s delegated authority to administer its Clean Air Act.

VIII. Citgo’s assertion that the compliance history enhancement to the penalty should be capped at 100% is without merit; TEX. GOV’T CODE § 311.031(b) in the Code Construction Act is inapplicable.

Citgo claims section 311.031(b)²⁰⁰ of the Code Construction Act²⁰¹ bars the Commission from assessing a compliance history enhancement to the penalty in this case greater than 100%. Citgo misconstrues the revision to Texas Water Code § 5.754 (Section 5.754) in House Bill 2694 (H.B. 2694) during the regular session of the 82nd Texas Legislature. The revision to section 5.754 is but one piece in a comprehensive revision to the TCEQ enforcement process and penalty calculations (which also includes an increase over two-fold to statutory maximums) and was not intended to be applied in isolation to decrease penalties outside this comprehensive revision.

H.B. 2694 is comprehensive legislation resulting from the recommendations of the Sunset Advisory Commission (SSAC) after the SSAC’s review of the TCEQ. H.B. 2694 provides for changes in many areas of the agency and changes to agency programs. Article 4 of H.B. 2694

¹⁹⁶ 35 Tex. Reg. 5290 (June 18, 2010) (documenting the TCEQ’s response to a suggestion for further incentives to participate in the Voluntary Leak Detection Program, including that leaks not be counted toward a leak rate if they were found earlier than required under the terms of a permit).

¹⁹⁷ *Id.*

¹⁹⁸ ED 2 at 9.

¹⁹⁹ *Id.*

²⁰⁰ TEX. GOV’T. CODE § 311.031(b).

²⁰¹ TEX. GOV’T. CODE §§ 311.001 et. seq. (Code Construction Act).

requires changes to the TCEQ enforcement program and compliance history evaluation and use.²⁰² H.B. 2694 requires the TCEQ to adopt standards for evaluating and using the compliance history of regulated entities.²⁰³ H.B. 2694 amended sections 5.753 and 5.754 of the Water Code which require the TCEQ to adopt rules regarding evaluating and using compliance history.²⁰⁴ As part of the comprehensive changes to evaluation and use of compliance history, H.B. 2694 amended section 5.754 of the Water Code to limit use of compliance history penalty enhancements to 100% of the base penalty for an individual violation as determined by the TCEQ's penalty policy.²⁰⁵ Article 4 of H.B. 2694 also added section 7.006 of the Water Code to require the Commission to assess, update, and publically adopt enforcement policies, including policies regarding the calculation of penalties.²⁰⁶ H.B. 2694 became effective September 1, 2011.

Consistent with H.B. 2694, the Commission revised its penalty policy effective September 1, 2011 (2011 Penalty Policy) to implement some of the changes in H.B. 2694.²⁰⁷ The 2011 Penalty Policy includes the limitation on compliance history enhancements to 100%.²⁰⁸ The 2011 Penalty Policy states that it applies to violations occurring on or after September 1, 2011.²⁰⁹

The chronology of the adoption of the compliance history enhancement reform demonstrates that the legislature did not intend to issue a penalty reduction to which section 311.031(b) would apply. The legislature intended to reform the TCEQ's approach to compliance history and enforcement. The compliance history enhancement provision was added to H.B. 2694 by amendment. The author of H.B. 2694, Representative Wayne Smith, offered Amendment No. 13 to the legislation.²¹⁰ This amendment included the limitation on the penalty enhancement alongside other changes to the Commission's development of compliance histories.²¹¹ Amendment No. 2, also offered by Representative Smith, clarified the increase of maximum penalty amounts.²¹²

These amendments were offered by the same representative, the original author of the bill; both amendments were offered on the same day. The limitation on the Commission's use of compliance history to enhance penalties was considered contemporaneously with other changes to the use of compliance history and penalty increases. It is a mistake to consider Amendment No. 13 as a penalty reduction when, in fact, it was a one piece of a broader reform of compliance history and penalty structure.

²⁰² Tex. H.B. 2694, 82nd Leg., R.S. (2011) at Article 4.

²⁰³ *Id.* at sections 4.03, 4.04 and 4.05.

²⁰⁴ *Id.* at sections 4.04 and 4.05; TEX. WATER CODE §§ 5.753(a), and 5.754(a) and (e).

²⁰⁵ *Id.* at section 4.05; TEX. WATER CODE § 5.754(e-1).

²⁰⁶ *Id.* at, section 4.09; TEX. WATER CODE § 7.006(b).

²⁰⁷ Texas Commission on Environmental Quality, *Penalty Policy, Effective September 1, 2011*, October 2011, http://www.tceq.texas.gov/assets/public/comm_exec/pubs/rg/rg253/penaltypolicy2011.pdf.

²⁰⁸ *Id.* at 15.

²⁰⁹ *Id.* at 1.

²¹⁰ H.J. of Tex., 82nd Leg., R.S. 1945-46 (2011).

²¹¹ *Id.*

²¹² *Id.* at 1937.

In construing statutes, the goal is to give effect to the Legislature's intent.²¹³ Courts consider the language used, the object to be attained by the statutes, the circumstances surrounding the statutes' enactment, legislative history, former statutory and common law, and the consequences of a particular construction.²¹⁴ Courts avoid construing a statutory provision in isolation from the rest of the statute and consider the act as a whole, and not just single phrases, clauses, or sentences.²¹⁵ Courts use context provided by the surrounding statutory landscape as an aide in statutory construction.²¹⁶ Citgo asks the ALJ to construe section 5.754 of the Water Code in isolation and ignore the Legislative intent of H.B. 2694, to provide comprehensive changes to the TCEQ compliance history evaluation and use. These changes occur through a process whereby the Commission adopts rules, policies, and procedures to implement the comprehensive changes in an efficient and meaningful way.²¹⁷

Additionally, the compliance history enhancement to the penalty recommended in this case by the ED is proper for at least the following reasons: 1) it was calculated according to the penalty policy in effect at the time, 2) retrospective application of amended section 5.754 of the Water Code is not permitted under the law, 3) the Code Construction Act provides a general savings clause which is applicable to section 5.754 of the Water Code by "saving" application of the statutes regarding compliance history prior to the amendment, and 4) section 311.031(b) of the Texas Government Code does not apply to the comprehensive compliance history changes enacted by House Bill 2694, including the amendments to section 5.754 of the Water Code.

A. Amended Tex. Water Code § 5.754 does not apply retroactively to this case.

In this case all violations occurred before September 1, 2011. The 2002 Penalty Policy applies to violations occurring before September 1, 2011. The 2002 Penalty Policy was applied in this case.²¹⁸

Texas law militates strongly against the retroactive application of laws.²¹⁹ In Texas, a statute is presumed to be prospective in its operation unless expressly made retroactive.²²⁰

²¹³ *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-626 (Tex.2008); *One 1980 Pontiac, VIN No. 2D19SAP21357 v. State*, 707 S.W.2d 881, 882 (Tex. 1986).

²¹⁴ *City of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex.2002); *Drug Test USA, Quick Results, L.L.C. v. Buyers Shopping Network, Inc.*, 154 S.W.3d 191, 193 (Tex.App.—Waco 2004, no pet.); see also TEX. GOV'T CODE § 311.023.

²¹⁵ *City of Austin*, 92 S.W.3d at 442; *Drug Test USA, Quick Results, L.L.C.*, 154 S.W.3d at 193.

²¹⁶ See, e.g., *LTTS Charter Sch., Inc.*, 342 S.W.3d at 75; see also *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929-30 (Tex. 2010).

²¹⁷ Article 4 of H.B. 2694 repeatedly discusses the Commission's implementation of its enforcement and compliance history program through the development of procedures, rules and policies. The following sections in H.B. 2694, article 4, are examples: section 4.04 (amended section 5.753(a) of the Water Code requires the Commission to develop standards and adopt rules regarding compliance history), section 4.05 (amended section 5.754(a) and (e) requires the Commission to develop rules for evaluation and use of compliance history), section 4.09 (added section 7.006 of the Water Code to require the Commission adopt a rule regarding general enforcement policy, and adopt specific enforcement policies, including policies regarding penalty calculation).

²¹⁸ ED A at 6, para 12, Tr. 84:16-22 (Test. of R. Johnson).

²¹⁹ *Houston Indep. Sch. Dist. v. Houston Chronicle Publ'g Co.*, 798 S.W.2d 580, 585 (Tex.App.—Houston [1 Dist.] 1990, writ denied).

²²⁰ *Id.*; TEX. GOV'T CODE § 311.022.

Texas courts apply statutes retroactively only if it appears from language used that it was the intention of the Legislature to make it applicable to both past and future transactions.”²²¹ Doubts as to retroactivity are resolved against the retroactive application of a statute.²²² Amendments are also presumed not to apply retroactively.²²³

Amended section 5.754 did not become effective until September 1, 2011. H.B. 2694 directs the Commission to develop rules, procedures and policies regarding compliance history, including use of compliance history discussed in amended section 5.754(e) of the Water Code.²²⁴ H.B. 2694 also directs the Commission to develop enforcement and penalty policies.²²⁵ The Commission did exactly that. It revised the penalty policy to incorporate the amended provision of section 5.754, effective September 1, 2011—the very date the amended section became effective. According to the revised penalty policy, it applies to violations occurring after September 1, 2011. It would be improper to ignore the Commission’s 2002 Penalty Policy and retroactively apply amended section 5.754 to the violations in this case.

B. The Code Construction Act provides a general savings clause applicable to Texas Water Code § 5.754.

Additionally, the 2002 Penalty Policy in effect for this case is protected by the general savings clause in the Code Construction Act.²²⁶ The Legislature has adopted a general savings provision which has been codified in the Code Construction Act.²²⁷ The adoption of the general savings provision is an indication of the existence of a legislative policy that the amendment of any statute shall not affect the prior operation of the statute nor extinguish any liability incurred or affect any right accrued or claim arising before the repeal or amendment takes effect.²²⁸ The general savings clause found in section 311.031(a) of the Texas Government Code applies to every statute in the Texas Water Code, including section 5.754.²²⁹

C. TEX. GOV'T CODE § 311.031(b) does not apply to this case because TEX. WATER CODE § 5.754 is not a penalty reduction—it is a limitation on the Commission's procedures and rules regarding the use of compliance history.

According to Citgo's interpretation, section § 330.031(b) of the Government Code requires application of amended section 5.754(e-1) to all pending enforcement cases and bars the TCEQ's use of the 2002 Penalty Policy for the violations in this case. Section 311.031(b) states:

²²¹ *Houston Indep. Sch. Dist.*, 798 S.W.2d at 585; see also *State v. Humble Oil & Refining Co.*, 169 S.W.2d 707, 708–09 (Tex. 1943).

²²² *Houston Indep. Sch. Dist.*, 798 S.W.2d at 585; see also *Ex parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981).

²²³ *Houston Indep. Sch. Dist.*, 798 S.W.2d at 585.

²²⁴ H.B. 2964, at Section 4.05.

²²⁵ *Id.* at Section 4.09.

²²⁶ TEX. GOV'T CODE § 311.031(a).

²²⁷ *Id.*

²²⁸ *Bates v. Tesar*, 81 S.W.3d 411, 428 (Tex.App.—El Paso 2002, no pet.).

²²⁹ TEX. WATER CODE § 1.002.

If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.²³⁰

This provision applies to penalty reduction statutes. However, amended section 5.754 is not a penalty reduction statute. Section 5.754(e-1) is a limitation of the use of compliance history in enforcement cases. The Legislature enacted section 5.754 as part of subchapter Q of article 5 of the Water Code, which is the performance based-regulation program of the TCEQ. In the legislative history of H.B. 2694, a description of the changes to compliance history in the bill analysis of the House Committee Report is that it “Restructures TCEQ’s approach to compliance history” and also states:

The bill removes the requirement for a uniform standard for compliance history and requires the Commission to develop standards for evaluating and using compliance history. C.S.H.B. 2694 makes conforming changes consistent with the change to develop a standard to use compliance history, and makes conforming changes throughout the bill relating to the method developed to use compliance history instead of evaluating compliance history.²³¹

As such, H.B. 2694 is not a penalty reduction measure; it is a measure to restructure evaluation and use of compliance history.

Contrary to the Respondent’s assertion, the Legislature did not intend for changes to the compliance history program to occur instantaneously. For example, section 5.754(e)(2) of the Water Code requires the Commission to adopt rules regarding the use of compliance history in enforcement cases. Repeatedly in H.B. 2694, the Legislature refers to the “method for using compliance history *developed* by the commission under Section 5.754”²³² and the “rules adopted and procedures developed” under “Sections 5.753 and 5.754.”²³³ Rules are not adopted nor procedures developed instantaneously. Moreover, the Legislature directs the Commission adopt enforcement policies, including policies regarding the calculation of penalties.²³⁴ Consequently, the Legislature has provided express intent for the Commission to develop and adopt rules, procedures and policies implementing the requirements in the Water Code.

Citgo asserts that because there is a specific savings clause in H.B. 2694 regarding section 5.753 and there is not one regarding section 5.754, there is no savings clause for section 5.754. This is a misconstruction of H.B. 2694. That there are specific savings clauses in H.B. 2694 does not negate the general savings clause.²³⁵ The savings clause in H.B. 2694 does not conflict with the general savings clause and both are applicable. This is consistent with the clear

²³⁰ TEX. GOV'T CODE § 311.031(b).

²³¹ House Comm. on Environmental Regulation, Bill Analysis (substituted) at 3; H.B. 2964.

²³² H.B. 2964, at Section 4.13 (amended TEX. WATER CODE § 26.028(d)(4)); at Section 4.14 (amended TEX. WATER CODE § 26.0281); at Section 4.21 (amended Tex. Water Code § 27.051(d)(1)); at Section 4.22 (amended TEX. WATER CODE § 32.101(c).)

²³³ *Id.* at Section 4.15 (amended TEX. WATER CODE § 26.040(h)); at Section 4.20 (amended TEX. WATER CODE § 27.025(g).)

²³⁴ TEX. WATER CODE § 7.006.

²³⁵ *Quick v. City of Austin*, 7 S.W.3d 109, 130 (Tex. 1998).

intent of the Legislature's enactment of section 5.754. Section 5.754 requires adoption of rules and procedures regarding the use of compliance history.²³⁶ Because the instantaneous adoption of rules is impractical if not impossible, there must be a different legislative intent than that proffered by Citgo.

D. Citgo's construction would have implementation considerations beyond this case.

Citgo does not state how it proposes the amendment be implemented. There is no discussion about the implementation to practically the entire TCEQ enforcement docket—including pending default and agreed orders that have been published and are waiting for consideration at a Commission agenda meeting. According to Citgo, on September 1, 2011, every pending TCEQ enforcement case had to be re-initiated. Regardless, the Legislature expressly provides for the Commission to establish procedures, rules and policies regarding the use of compliance history and calculation of penalties. The Commission has followed the Legislature's intent.

In sum, the Respondent ignores that the main purpose when construing statutes is to ascertain the Legislature's intent. The Legislature did not intend TEX. GOV'T CODE § 311.031(b) to apply to amended TEX. WATER CODE § 5.754(e-1). The Code Construction Act is only an aid in construing statutory amendments.²³⁷ It provides rules of construction that are subordinate to legislative intent.²³⁸ The clear legislative intent of H.B. 2694 is for the Commission to implement policies, procedures and rules for a comprehensive revision to compliance history evaluation and use. Section 5.754(e-1) pertains to the use of compliance history evaluations. The Legislature did not intend to specify for the Commission to implement compliance history evaluation revisions according to a different time-frame than implementation of compliance history use revisions. This is exactly what Citgo argues by claiming that the Commission is required to implement the amendments to TEX. WATER CODE § 5.754 (use revisions) before TEX. WATER CODE § 5.753 (evaluation revisions). H.B. 2694 repeatedly references the revisions to evaluation and use together. To interpret H.B. 2694 to require the Commission to implement different compliance history revisions at different times would require multiple unnecessary process and policy changes which can lead to confusion and inefficiencies. In construing statutes, courts presume the Legislature intended a result feasible of execution.²³⁹ Citgo's interpretation is not reasonable.²⁴⁰

²³⁶ See TEX. WATER CODE § 5.754(e)(2).

²³⁷ *Savin Corp. v. Copy Distributing Co., Inc.*, 716 S.W.2d 690, 691-692 (Tex.App.—Corpus Christi 1986, no writ) (court does not apply section 311.031(b) and relies on statutory intent as reflected by looking at statute as a whole); see also TEX. GOV'T CODE § 311.003.

²³⁸ *Savin Corp.*, 716 S.W.2d at 691-692.

²³⁹ See TEX. GOV'T CODE § 311.021(4).

²⁴⁰ See TEX. GOV'T CODE § 311.021(3).

IX. A reduction of the penalty due to “other factors as justice may require” is unwarranted.

Citgo requests a reduction in the penalty because Citgo conducts daily TOC testing of Cooling Tower 10. As Ms. Johnson testified, the recommended penalty in this case was calculated in accordance with the applicable TCEQ Penalty Policy as consistently applied across all enforcement cases.²⁴¹

The penalty recommended in this case is the lowest penalty that can be assessed for these violations.²⁴² Additionally, the recommended penalty already includes a good faith reduction to the emissions violation due to the Respondent's prompt efforts to come into compliance.²⁴³ Contrary to Citgo's assertion, the TCEQ staff did consider Citgo's claims in this case; moreover, there was a meeting between Citgo representatives and TCEQ Enforcement Division management to discuss the issues Citgo has raised in this case.²⁴⁴ The reductions in the ED's recommended penalty are sufficient in this case.

Citgo's claim that it is being punished for conducting TOC testing is without merit. Citgo meets the TCEQ criteria for enforcement²⁴⁵ due to Citgo's violations of TCEQ rules and statutes. Mainly, Citgo is responsible for unauthorized emissions, and failed to timely report an emissions event. The TCEQ did not bring this enforcement action because of Citgo's TOC testing program. Moreover, this enforcement action would have occurred if Citgo had not done its TOC testing because Citgo would have discovered the leak nine days later when it did its monthly EPS test.

The TOC testing, and the fact that Citgo discovered the leak earlier, does benefit Citgo. Discovering the leak earlier can minimize penalties because duration of emissions events and amount of air contaminants are factors in calculating penalties.²⁴⁶ Additionally, early prevention of leaks minimizes Citgo's loss of valuable product.²⁴⁷ At hearing Mr. Cheesman identified Citgo's daily testing as “quick and easy” method of identifying whether there is a leak.²⁴⁸ Citgo's business decision to do TOC testing is not a factor considered in the Penalty Policy.

Furthermore, a subjective analysis of a regulated entity's business practices to determine if the regulated entity should avoid enforcement of violations based on prudent business practices could lead to a lack of consistency and arbitrary enforcement, contrary to the intent of the Enforcement Initiation Criteria and the Penalty Policy. The policies in place provide for consistency and lack of arbitrary penalties.

²⁴¹ ED 7 (Penalty Calculation Worksheet); ED 8 (2002 Penalty Policy) ; Tr. 106:17-107:2 (Test. of R. Johnson).

²⁴² Tr. 92:17-93:12, 96:2-98:25 (Test. of R. Johnson).

²⁴³ Tr. 104:20-106:3 (Test. of R. Johnson).

²⁴⁴ Tr. 127:1-25 (Test. of R. Johnson).

²⁴⁵ See, e.g., ED 11.

²⁴⁶ TR 128:15-18-130:1; ED 8.

²⁴⁷ See, e.g., Tr. 133:12-134:13 (Test. of M. Cheesman).

²⁴⁸ TR 143:5-8 (Test. of M. Cheesman).

Citgo claims that through this enforcement proceeding, the TCEQ is not encouraging Citgo to implement additional monitoring methods other than the minimum requirements under the law. The ED disagrees. Encouragement does not equate with immunity from enforcement for unauthorized emission and reporting violations.

Moreover, other factors weigh against any further reduction. Within approximately the five years prior to this proceeding, Citgo was issued 22 notices of violation and a respondent in 11 enforcement orders.²⁴⁹ Citgo's compliance history does not weigh in favor of a reduction.

Another factor weighing against further reduction is the many positions taken in this case. As of this date, Citgo still denies any violation occurred; Citgo denies that there was a permit violation, that there were unauthorized emissions, that there was an emissions event, that there was any requirement to report, and that it did not report timely. Citgo's resistance towards compliance also weighs against a reduction.

For these reasons, the ED requests that the ALJ propose the penalty as recommended by the ED in this case.

X. Conclusion and Prayer

For these reasons and based on the evidence in the record, the ED respectfully requests the Commission issue an order determining the two alleged violations occurred, recommending a penalty of \$9,775 and recommending the ED's recommended corrective action for the reporting violation, consistent with the ALJ's PFD and Proposed Order.

²⁴⁹ ED 7 at 277.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, the foregoing original document and seven (7) copies were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas; the document was electronically filed with the Chief Clerk as well.

I further certify that on this day the foregoing document was served as indicated:

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