

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** October 14, 2016

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

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

Docket No.: 2016-0877-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 101, General Air Quality Rules
Clarification of Affirmative Defense for Certain Excess Emissions
Rule Project No. 2016-040-101-CE

Background and reason(s) for the rulemaking:

On June 12, 2015, the United States Environmental Protection Agency (EPA) published a State Implementation Plan (SIP) Call for Texas, among 36 other states, finding that the Texas Commission on Environmental Quality (TCEQ, agency, or commission) rule 30 Texas Administrative Code §101.222(b) - (e) is substantially inadequate to meet Federal Clean Air Act (FCAA) requirements. Section 101.222(b) - (e) provides an affirmative defense availability, if listed criteria are met, as to monetary penalties for exceedances of emission limits in a rule or permit that result from unplanned maintenance, startup, and shutdown (MSS) activities; upsets; or excess opacity events resulting from upsets or unplanned MSS activities.

EPA's SIP Call is a final action on a petition filed by the Sierra Club in 2011 regarding excess emissions during periods of startup, shutdown, or malfunction (SSM) for which TCEQ commented on the proposal in November 2014. In its final rule, EPA changed its interpretation of the FCAA and policy for SSM emissions from allowing narrowly tailored affirmative defense provisions (such as in TCEQ's rule) to finding that the FCAA prohibits affirmative defense provisions in SIPs. EPA's SIP approval of §101.222(b) - (e) was upheld by the United States Fifth Circuit Court of Appeals in 2013. This was prior to an opinion by the District of Columbia (D.C.) Circuit Court of Appeals in 2014 regarding an EPA National Emission Standards for Hazardous Air Pollutants rule which held that the FCAA does not allow rules that limit a court's ability to assess penalties; EPA is relying on this opinion as a basis for its SIP Call. EPA's position is that TCEQ's rule, as well as rules in other states, purport to alter or eliminate the statutory jurisdiction of courts to determine liability and to assess appropriate remedies for violations of SIP requirements and, therefore, are not permissible. EPA also stated that SIP provisions cannot contain enforcement discretion provisions that would bar enforcement by the EPA or citizens for any violation of SIP requirements if the state elects not to enforce.

All affected states, including Texas, are required to revise their SIPs by November 22, 2016.

EPA's SIP Call is being challenged in the D.C. Circuit Court of Appeals by Texas/TCEQ and several Texas industry groups, as well as 18 other states, approximately 23 industry

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groups and trade associations, and several electric generating companies. Five environmental groups have intervened on behalf of EPA.

In addition to the litigation, the response to the SIP Call includes this rulemaking, adopting language in subsection (k) to address EPA's interpretation that the affirmative defenses in §101.222(b) - (e) operate to limit the jurisdiction of federal courts. Adopted language in subsection (l) establishes that the applicability date will be delayed until all appeals of the challenge of the SIP Call have ended and the SIP Call has been upheld. This adoption does not include repeal or SIP removal of §101.222(b) - (e).

Scope of the rulemaking:

The adopted rulemaking would add §101.222(k) and (l).

A.) Summary of what the rulemaking will do:

The addition of adopted §101.222(k) provides clarification that the affirmative defenses in §101.222(b) - (e) are not intended to limit the jurisdiction or discretion of federal courts. Adopted subsection (l) provides that adopted subsection (k) will not be applicable until all appeals regarding the SSM SIP Call, as it applies to §101.222(b) - (e), have ended and the SIP Call is upheld.

B.) Scope required by federal regulations or state statutes:

TCEQ is required to revise the SIP by November 22, 2016, to address the SIP Call.

C.) Additional staff recommendations that are not required by federal rule or state statute:

The adoption includes delayed applicability due to ongoing litigation between TCEQ and EPA over the validity of the SIP Call.

Statutory authority:

Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.0215, and 382.0216; Texas Water Code, §§5.013, 5.102, 5.103, and 5.105; and FCAA, 42 United States Code, §§7401, *et seq.*

Effect on the:

A.) Regulated community:

The adopted rule has minimal impact on industry because there is no change in the manner in which the commission regulates emissions events.

B.) Public:

No impact is anticipated.

C.) Agency programs:

The TCEQ's Office of Compliance and Enforcement will not be impacted.

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Stakeholder meetings:

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

Public comment:

The commission held a public hearing on August 8, 2016. The comment period closed on that date as well. The commission did not receive comments at the public hearing. The commission received written comments from the Association of Electric Companies of Texas (AECT), Environmental Integrity Project (EIP), Environment Texas and Lone Star Chapter of the Sierra Club (Environment Texas and LSCSC), EPA, Luminant, Sierra Club, Texas Chemical Council (TCC), Texas Industry Project (TIP), and Texas Oil & Gas Association (TXOGA).

The following comments were made regarding the proposed rule. AECT, TCC, TIP, Luminant, and TXOGA expressed support for the rulemaking. EIP, EPA, Environment Texas and LSCSC, and Sierra Club made suggestions to revise the commission's response to the SSM SIP Call. AECT suggested a change to the proposed rule language. AECT and Luminant made similar suggestions for future rulemakings. Significant comments and recommendations are discussed further below.

TCC commented that the proposed rule does not alter or restrict the authority of federal courts to impose liability. AECT commented that defendants have the burden to demonstrate that all of the conditions of the claimed affirmative defense are met. Luminant commented that each of its coal-fired facilities, to varying degrees of significance and along with most other sources of air emissions in Texas, are affected by EPA's June 12, 2015 SIP Call.

EPA acknowledged that this rulemaking is TCEQ's response to the SSM SIP Call, but commented that this rulemaking is insufficient because the provisions will be perceived as imposing binding requirements that courts must adhere to, rather than exercising the full range of authority conferred upon the federal courts in the FCAA. Environment Texas and LSCSC, EIP, and Sierra Club commented that the proposed rule ignores the SIP Call. Environment Texas and LSCSC, EIP, and Sierra Club commented that TCEQ's practices allow industries to treat the narrow defense to penalties as a blanket exemption. Sierra Club commented that power plants and other facilities can emit massive amounts of dangerous pollution during periods of SSM.

EPA commented that it strongly recommends that TCEQ submit a SIP revision that would remove §101.222(b) - (e) from the Texas SIP. Environment Texas and LSCSC, EIP, and Sierra Club commented that TCEQ could remove the affirmative defense provisions, as EPA has recommended.

Luminant and AECT commented that EPA should exercise restraint, accept the proposed rules and not proceed with a Federal Implementation Plan (FIP) until its latest reinterpretation of the FCAA is settled by the courts. Luminant commented that to the extent that EPA may voice concerns about a SIP revision that is made contingent on an external event, such as the outcome of the D.C. Circuit litigation, that would not be a

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lawful basis for EPA to disapprove proposed new subsection (l). EPA commented that the practical effect of §101.222(l) is that substantially inadequate SIP provisions (§101.222(b)-(e)) would remain in the SIP for an indefinite period of time, perhaps a period of several additional years.

AECT suggested that part of proposed new §101.222(l) be revised to remove the term "prohibited" and restate the last portion of the rule as "there is a final and non-appealable court decision that upholds the SIP Call." Changes were made in response to these comments to state that subsection (k) is not applicable until all appeals have ended and the SIP Call is upheld.

In addition to comments about the proposed rule, AECT also requested that TCEQ consider rules that would establish work practice standards based on the existing work practice standards that EPA adopted in its rules that apply to MSS activities, such as the work practice standards identified in Table 3 of the Mercury and Air Toxics Standards (MATS) in 40 Code of Federal Regulations Part 63, Subpart UUUUU. Similarly, Luminant recommends that the TCEQ consider incorporating work practices, like those in the MATS rule, in the TCEQ-issued air permits for these units as emission limits for the startup and shutdown phases of operation, regardless as to whether the startup or shutdown is planned, unplanned or as a result of a malfunction.

Significant changes from proposal:

Changes were made to §101.222(l) in response to a comment from AECT. Instead of stating that subsection (k) is applicable when appeals have extinguished and the affirmative defense provisions in §101.222(b) - (e) are prohibited; the rule submitted for adoption states that subsection (k) isn't applicable until appeals have ended and the SIP Call is upheld.

Potential controversial concerns and legislative interest:

EPA may propose a FIP to remove §101.222(b) - (e) from the SIP. There is no known legislative interest.

Does this rulemaking affect any current policies or require development of new policies?

There are no anticipated impacts to current agency policy, nor does this rule necessitate policy development.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

A finding of failure to submit a SIP revision that is more in line with EPA's comment letter could trigger the EPA to impose a FIP.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: July 22, 2016

Anticipated *Texas Register* adoption publication date: November 18, 2016

Anticipated effective date: November 24, 2016

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Six-month *Texas Register* filing deadline: January 22, 2017

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Attachments:

None.

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