TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 13, 2013

EPA West (Air Docket)
U.S. Environmental Protection Agency
Mail Code 6102T
1200 Pennsylvania Ave, NW
Washington, DC 20460

Attn: Docket ID No. EPA–HQ–OAR–2012–0322

Re: State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

Dear Sir or Madam:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to respond to the United States Environmental Protection Agency's (EPA) proposal published in the February 22, 2013, edition of the *Federal Register* entitled: "State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule."

Enclosed please find the TCEQ's detailed comments relating to the EPA proposal referenced above. If you have any questions concerning the enclosed comments, please contact Mr. Joseph A. Janecka, P.E., Program Support Section, Office of Compliance and Enforcement, (512) 239-1353, or at joseph.janecka@tceq.texas.gov.

Sincerely,

Zak Covar
Executive Director

Enclosure

Texas Commission on Environmental Quality (TCEQ) Comments in response to: State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule (78 FR 12460).

Comment 1. The TCEQ generally supports the policies expressed in this Federal Register notice regarding the treatment of excess emissions in state rules by sources during periods of startup, shutdown, or malfunction. The Texas State Implementation Plan (SIP) regulating these types of emissions, and specifically, demonstration of affirmative defense by the source owner or operators, is consistent with this policy. With only few exceptions noted in the following comments, the policy closely describes the manner in which the Texas SIP-approved rules are implemented.

However, TCEQ strongly supports the law that states have primary responsibility for implementing the National Ambient Air Quality Standards, and have wide discretion to develop their SIPs, adopting whatever mix of emission limitations it deems best suited to their particular situations.[1] This could include the use of an affirmative defenses for certain SIP violations. For example, TCEQ's SIP-approved criteria for an affirmative defense for excess emissions from unplanned maintenance, startup or shutdown activities are similar, but do not mirror, EPA's criteria expressed in its policy memos issued between 1982 and 2001.[2] EPA should respect the federal-state partnership created by the federal Clean Air Act (FCAA), and not substitute its judgment for that of a state. All states' SIPs should be judged only against the FCAA standards of whether the plans are adequate to attain or maintain the National Ambient Air Quality Standards and will comply with the specific requirements in section 110 of the FCAA. Any other basis is unlawful, as discussed further in Comment 5 below.

Comment 2. Rather than require the treatment of all startups as "planned," even those that follow a malfunction, EPA policy should allow for a case-by-case review. These reviews will include startup emissions subject to the same rules as a malfunction, if the startup resulted from a shutdown which resulted from a malfunction.

While sources generally have control over startups, including the timing or scheduling of the event and controlling and minimizing the emissions, the startup itself may not have been foreseen or predicted, such as in the event of an unplanned shutdown. In this situation, a unit could not be expected to startup according to a predetermined plan. Therefore, generally, a startup following an unplanned shutdown is *unplanned.*

This comment is especially relevant when it impacts a source's permitted annual emissions limits for planned startups and shutdowns. Often a New Source Review (NSR) authorization will quantify the planned startup and shutdown emissions in terms of amounts of pollutants, their rates, or the frequency of the activity. If the startup or shutdown was not planned, then it should not be required to "consume" any of the

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[1] *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976); *Train v. NRDC*, 421 U.S. 60, 79 (1975); *BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003).

[2] *Luminant Generation Co. LLC v. U.S. EPA*, No. 10–60934, 2013 WL 1195649 (5th Cir. March 25, 2013).

annual or short-term permitted startup limits. This is particularly important when considering long term emission limits that are based on the expectation of a certain number of planned startup and shutdown events within a given year of operation. If a facility is required to count the emissions from unforeseeable and unpredictable malfunction-related startup events towards annual or short-term emission limits intended for planned startups and shutdowns, the facility may exceed authorized emissions for planned activities.

Comment 3. The EPA notes that the policy in this Federal Register notice described for a state's implementation of affirmative defense differs from that listed in recent New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS) rules. The EPA needs to provide mechanisms to allow states to establish consistency with affirmative defense programs for not only SIP requirements but also for federal affirmative defense programs that the EPA has been incorporating into NSPS and NESHAP rules. Alternative methods for states to implement affirmative defense procedures are available in 40 CFR Part 63, and Texas takes the position that states should be afforded the opportunity to request the use of SIP-approved affirmative defense rules in lieu of those NESHAPS containing different criteria.

For the same reason and because of the preference for states to adopt their own particular SIPs,[3] EPA should provide a comparable means to approve a state alternative affirmative defense in NSPS. Because TCEQ supports the list of affirmative defense criteria in this FR notice, the additional burdens imposed by the extra criteria included in the NSPS and NESHAPS rules are unwarranted. Without the means to obtain approval for a state's affirmative defense process as an equivalent alternative to the NSPS or NESHAPS criteria, regulated entities subject to both requirements will have to report under two different sets of criteria for the same event.

Comment 4. The TCEQ recognizes EPA's practice of the use of interpretive letters from states "to clarify perceived ambiguity in the provisions" of SIP submittals and likewise recognizes that this practice is a "permissible and a sometimes necessary" approach under the federal Clean Air Act (FCAA). Accordingly, TCEQ agrees with EPA's decision to deny the petition on this issue concerning reliance on interpretive letters in actions on SIP submissions based on EPA's proper documentation of interpretative letters in notice and comment rulemakings.

Comment 5. With regard to director discretion, TCEQ understands EPA's position that unilateral director discretion to excuse non-compliance is generally prohibited. However, there may be instances where criteria can be crafted to allow exemptions or variances while ensuring that air quality will be maintained.

For example, TCEQ notes that its SIP approved rule, 30 Tex. Admin. Code § 101.221(d) provides that "[s]ources emitting air contaminants that cannot be controlled or reduced due to a lack of technological knowledge may be exempt from the applicable rules when so determined and ordered by the commission. The commission may specify limitations

[3] *Train v. NRDC*, 421 U.S. 60, 79 (1975); *BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003).

and conditions as to the operation of such exempt sources. The commission will not exempt sources from complying with any federal requirements, including New Source Performance Standards (40 Code of Federal Regulations Part 60), and National Emission Standards for Hazardous Air Pollutants (40 Code of Federal Regulations Parts 61 and 63)." This text, in particular the references to NSPS and NESHAPS, was discussed at length with EPA's Region 6 Office prior to the latest approval of this rule. While this rule is distinguishable because it requires a commission order, rather than director discretion, TCEQ wants to ensure that EPA does not intend to prohibit all director discretion in rules adopted to implement the SIP.

The TCEQ does not agree that this definition applies universally where director discretion is included in other regulatory contexts, i.e., those beyond the Startup, Shutdown, Malfunction (SSM) issues that are the subject of this proposed rule. Each rule must be individually evaluated for compliance with the FCAA. In fact, a broad prohibition on director discretion is contrary to law.[4] In recent litigation regarding EPA's disapproval of TCEQ rules for the Texas SIP, the Fifth Circuit held that director discretion is not a lawful basis for EPA to disapprove rules adopted for Texas' minor NSR permitting program, and that director discretion provisions, when properly drafted, can meet FCAA requirements.[5] Similarly, the court was not persuaded that EPA concerns about director discretion and replicability of use of that discretion would be a basis for disapproving other minor NSR rules in the Texas SIP because there is no such basis in the FCAA.[6]

Further, both of these decisions[7] upheld interpretation of the FCAA and case law that provides that states have the primary responsibility for interpreting state law provisions incorporated into a SIP.

Comment 6. EPA's position is that the FCAA, as interpreted in the EPA's SSM Policy, allows states to set source category specific alternative emission limitations or other forms of enforceable control measures or techniques that apply during periods of startup and shutdown, but such alternative limitations are only permitted in a narrow set of circumstances and must be accomplished through the appropriate SIP process (*see* section VII.A of this notice.) Those alternative limitations must be developed in consultation with the EPA and must be approved by the EPA into the SIP. Further, if sources in fact cannot meet the otherwise applicable emission limitations during planned events such as startup and shutdown, then a state may elect to develop specific alternative requirements that apply during such periods, as long as they meet other applicable CAA requirements.

Along these lines, when TCEQ adopted rules providing an affirmative defense would be available for unauthorized startup and shutdown emissions (those which are scheduled and reported to the TCEQ) for a specified period of time only if an owner or operator files an application to authorize those emissions according to the schedule specified in

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[4] *Luminant Generation Co. v. U.S. EPA*, 690 F.3d 670 (5th Cir. 2012).
[5] *Id.*
[6] *Texas v. U.S. EPA*, 675 F.3d 917, 930-931 (5th Cir. 2012).
[7] *Supra notes 4 and 6.*

rule, these rule changes provided an incentive for owners and operators of facilities with unauthorized startup and shutdown emissions to authorize those emissions through the permitting process. Historically, TCEQ and its predecessor agencies did not require authorization of startup and shutdown activities in most of its new source review (NSR) authorizations in its relevant rules in 30 Tex. Admin. Code Chapters 106 and 116. However, in response to this incentive, TCEQ developed permitting procedures for authorizing emissions from planned startup and shutdown activities. TCEQ received applications to authorize these activities from more than one thousand (1000) owners and operators of various types of industries, including refineries; chemical plants; electric generating plants; and coating, mechanical and agricultural operations.

The TCEQ authorizes startup and shutdown emissions through NSR authorizations (i.e., permits by rule, standard permits, or individual case-by-case NSR permits) which limit these activities to applicable emission limits that comply with all SIP requirements. The NSR permit process is at least as stringent as the federal rules and policies being implemented because it includes the EPA's policy to authorize emissions from what EPA terms scheduled startup and shutdown activities, known under Texas law as planned startup and shutdown activities. Additionally, the TCEQ does not authorize emissions associated with malfunctions or upsets. Examples of unauthorized emissions that cannot and will not be authorized include those resulting from activities and corrective actions that are the result of sudden and unforeseeable events beyond the control of the operator and that require immediate corrective action to minimize or avoid emissions due to an upset or malfunction.