

The Texas Commission on Environmental Quality (agency or commission) adopts the amendments to Subchapter F, Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities, Division 3, Operational Requirements, Demonstrations, and Actions to Reduce Excessive Emissions, §§101.221 - 101.223. Sections 101.221 - 101.223 are adopted *with changes* to the proposed text as published in the July 25, 2003 issue of the *Texas Register* (28 TexReg 5787).

These amendments are being adopted as revisions to the Texas state implementation plan (SIP) which will be submitted to the United States Environmental Protection Agency (EPA).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Sections 101.221 - 101.223 were adopted by the commission on August 21, 2002 for the primary purpose of incorporating the statutory requirements of House Bill (HB) 2912, §5.01 and §18.14, 77th Legislature, 2001, into the commission's rules. Sections 101.221 - 101.223 were submitted to EPA on September 3, 2002 as revisions to the Texas SIP. The EPA promulgated a notice of deficiency for the Texas Title V Operating Permits Program on January 7, 2002, and proposed approval in the July 9, 2003 issue of the *Federal Register*. In the approval notice, EPA stated that it is reviewing these amendments and upon final SIP approval, the amendments will satisfy Texas' requirement to correct the program deficiency identified in the January 7, 2002 notice of deficiency. This rulemaking action is required to obtain federal approval of the emissions events rules as part of the Texas SIP and to satisfy the notice of deficiency for the Texas Title V Operating Permits Program.

In addition to deleting repetitive language, this rulemaking action deletes the phrase “exempt from compliance with emissions limitations” in these three sections. The term “exemption” has been used in the commission rules regarding excess emissions since 1979. In enforcement cases for exceedances of emissions and opacity limits, the long-standing practice has been to conduct case-by-case reviews and to use enforcement discretion as appropriate, and beginning in 2000, by using specific criteria incorporated in these rules in §101.11. Section 101.11 was subsequently repealed and the criteria were revised and incorporated into §101.222 on August 21, 2002. The rules have been interpreted by the commission as allowing for the use of enforcement discretion rather than an automatic exemption from compliance. Although the commission’s disposition of the emissions related to these events is changing in part, this rulemaking action will not change evaluation of the demonstration criteria to determine if additional action is required, nor revise any of the demonstration criteria in §101.222. Rather, the amendments more precisely specify the commission’s enforcement policy regarding excess emissions so the rules can be approved as a revision to the SIP. The amendments state that certain emissions events and excess opacity events are subject to an affirmative defense and that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the owner or operator proves the applicable criteria. There is no automatic exemption from compliance with emissions and opacity limits, and these amendments are adopted to eliminate any confusion as to whether there is an automatic exemption.

In previous commission rulemakings, EPA expressed concern regarding the use of the term “exemption” in these rules. Regardless of the use of the term “exemption,” the commission has never

considered that applicable emissions and opacity limits are automatically suspended during emissions events or scheduled maintenance, startup, and shutdown activities; rather, the commission has historically exercised discretion in the method of addressing those exceedances when the regulated entity demonstrated it met the criteria for the event. The commission's August 21, 2002 adoption of the previous changes to these rules, found in the September 6, 2002 issue of the *Texas Register* (27 TexReg 8499 and 8524) incorporated the concepts of "excessive" and "chronic" emissions. The preamble also explained the historical enforcement practice and how satisfaction of the criteria operates as an affirmative defense in certain enforcement actions, by stating: "The commission will review all emissions events against the requirements of §101.222(a) to determine if the emissions events are excessive, and therefore, not exempt. Facilities with excessive emissions events must comply with the requirements in §101.223 upon notification by the executive director. Any emissions events which are not excessive, but do not satisfy all the criteria in §101.222(b) are not exempt and may be subject to an enforcement action, including penalties and appropriate requirements to assure compliance with the national ambient air quality standards and prevention of significant deterioration increments requirements and to minimize the recurrence of similar events in the future. The commission's past experience has been that the exemption criteria now located in §101.222(b) and (c) for emissions events and scheduled maintenance, startup, and shutdown activities operate much like an affirmative defense in enforcement actions." Therefore, owners and operators have had, and will continue to have, an opportunity to mitigate enforcement that may be taken by proving the criteria.

This rulemaking action will provide how emissions events and scheduled maintenance, startup, and shutdown activities are treated where an owner or operator has proved the required demonstration

criteria. Further, owners and operators remain subject to administrative technical orders and injunctive relief even if they prove the applicable criteria. It also provides that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the owner or operator has proved the demonstration criteria. This rulemaking also retains the requirement that the burden of proof is on the owner or operator to prove it meets the criteria in §101.222 when addressing exceedances of emissions or opacity limits. The enforcement practice stated in these rules specifically applies only to unauthorized emissions.

The scope of this rulemaking is limited to changes made to obtain federal approval of the emissions events rules as part of the Texas SIP, and which more precisely state which emissions events are subject to an affirmative defense and when emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule. The adopted amendments will not limit EPA authority to pursue enforcement. Although EPA and citizens are bound by the demonstration criteria in §101.222, assessments made by the executive director or commission under §101.222, which are based on proof provided by the regulated entity and an independent analysis of the facts, will not bar actions regarding exceedances of emissions limitations by EPA or citizens under 42 United States Code, §7401, *et seq.* (also known as the Federal Clean Air Act).

## SECTION BY SECTION DISCUSSION

The adopted revisions to §§101.221 - 101.223 delete references to an exemption from compliance and ensure that the rules are not read to provide an automatic exemption from compliance with emissions limitations. They also specify that an affirmative defense is available for emissions events and excess opacity events, with the exception of claims for administrative technical orders and actions for injunctive relief, if the owner or operator proves the criteria listed in §101.222(b) and (d). The amendments also provide that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule, unless the owner or operator proves the criteria listed in §101.222(c) and (e). The burden of proof remains on the regulated entity to prove the criteria. The enforcement practice stated in these rules specifically applies only to unauthorized emissions. This rulemaking action reflects current enforcement practice, which already involves case-by-case reviews of the demonstration criteria. Administrative changes are also adopted throughout the sections to conform to Texas Register requirements.

### *Section 101.221 - Operational Requirements*

The amendment to §101.221(e) deletes the sentences “The executive director or any air pollution program with jurisdiction may request documentation of the criteria in §101.222 of this title at their discretion. Satisfying the burden of proof is a condition to unauthorized emissions being considered not excessive and exempt from compliance with authorized emission limitations under §101.222 of this title.” The change to §101.221(e) deletes repetitive language within this subsection with regard to burden of proof, and ensures consistency with the change to the rule language adopted in §101.222. As

more fully explained in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES section, this rulemaking action reflects existing commission practice with regard to enforcement actions regarding excess emissions, and the requirement that the owner or operator has the burden of proving all the criteria identified in §101.222.

New subsection (g) provides that this section expires on June 30, 2005. This will allow the commission time to review the rule and determine whether to continue it as adopted.

*Section 101.222 - Demonstrations*

The amendment to §101.222(a) deletes the sentence “Emissions events determined to be excessive are not exempt from compliance with emission limitations.” This amendment is necessary to eliminate any confusion as to whether some emissions are entitled to an automatic exemption, and is consistent with the other changes in §101.222.

The amendments to §101.222(b) delete the sentence “Emissions events determined not to be excessive by the executive director after applying the criteria in subsection (a) of this section are exempt from compliance with emissions limitations if the owner or operator satisfies all of the following criteria.” This is replaced with language which provides that an affirmative defense is available for all claims in enforcement actions for these events, other than claims for administrative technical orders and actions for injunctive relief for which the owner or operator proves the criteria listed in the rule. The affirmative defense applies only to the non-excessive emissions event, and does not apply to subsequent

or independent obligations, such as recordkeeping or reporting. This is necessary to eliminate any confusion as to whether emissions events are entitled to an automatic exemption.

The amendments to §101.222(c) delete the sentence “Emissions from any scheduled maintenance, startup, or shutdown activity are exempt from compliance with emission limitations, if the owner or operator satisfies all of the following criteria:.” This is replaced with language which provides that these emissions are required to be included in certain permits unless the owner or operator proves the criteria in subsection (c)(1) - (9). The commission finds that if the owners and operators prove the criteria in subsection (c)(1) - (9), the emissions from the scheduled maintenance, startup, or shutdown activity are at a level below which certain permits are required as provided by Texas Health and Safety Code, §382.05101. The criteria in subsection (c)(1) - (9) set strict requirements for operating the control equipment and sufficiently provide for the protection of public health and welfare. The commission therefore finds that permitting these events under the specific authority listed would not provide greater air quality benefits if all of the criteria are proven. This is necessary to eliminate any confusion as to whether scheduled maintenance, startup, or shutdown activities are entitled to an automatic exemption.

The amendments to §101.222(d) delete the sentence “Excess opacity events that are subject to §101.201(e) of this title, and other opacity events where the owner or operator did not experience an emissions event, are exempt from compliance with applicable opacity limitations if the owner or operator satisfies all of the following criteria:.” This is replaced with language which provides that an affirmative defense is available for all claims in enforcement actions for excess opacity events if the

owner or operator proves the criteria in subsection (d)(1) - (9). The exception to this is for administrative actions for technical orders and civil actions for injunctive relief. This is necessary to eliminate any confusion as to whether excess opacity events are entitled to an automatic exemption.

The amendments to §101.222(e) delete the sentence “Excess opacity events or other opacity events where the owner or operator did not experience an emissions event, that result from any scheduled maintenance, startup, or shutdown activity are exempt from compliance with applicable opacity limitations if the owner or operator satisfies all of the following criteria:”. This is replaced with language which provides that excess opacity events are subject to the opacity requirements of 30 TAC §111.111(a), concerning Requirements for Specified Sources, unless the owner or operator proves the criteria in subsection (e)(1) - (9). The criteria in subsection (e)(1) - (9) set strict requirements for operating the control equipment and sufficiently provide for adequate visibility. The commission therefore finds that meeting the opacity requirements in §111.111(a) would not result in improved visibility. This is necessary to eliminate any confusion as to whether excess opacity resulting from scheduled maintenance, startup, or shutdown activities is entitled to an automatic exemption. In addition, the word “was” is changed to the word “were” in §101.222(e)(8) to show correct subject-verb agreement.

New subsection (f) specifies that subsections (c) and (e) do not remove any obligations to comply with any other requirements such as permit terms and commission rules, e.g., the prohibition against causing a nuisance or reporting requirements which are applicable to a scheduled maintenance, startup, and shutdown activity, or any federal program requirements.

The amendments to existing §101.222(f) reletter the subsection as §101.222(g) and delete the wording “When the commission finds a frequent or recurring pattern of events under this subchapter, the commission may pursue penalties and corrective actions from an owner or operator of a facility for unauthorized emissions notwithstanding the exemptions described in subsections (b) - (e) of this section.” This is replaced with “Evidence of any past event subject to subsections (b) - (e) of this section is admissible and relevant to demonstrate a frequent or recurring pattern of events, even if all of the criteria in that subsection are proven.” This amendment will ensure consistency with the changes to the rule language adopted in §101.222(b) - (e). As more fully explained in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES section, the amendments to §101.222 reflect existing commission practice with regard to enforcement actions regarding exceedances of emissions and opacity limits.

New subsection (h) provides that this section expires on June 30, 2005. This will allow the commission time to review the rule and determine whether to continue it as adopted.

*Section 101.223 - Actions to Reduce Excessive Emissions*

The amendment to §101.223(c) deletes “. . . the unauthorized emissions from the event are not exempt from compliance with emission limitations.” This is replaced with language that specifies that the affirmative defenses in §101.222 do not apply to recurring emissions events. This amendment will ensure consistency with the change to the rule language adopted in §101.222. In addition, as more fully explained in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE

ADOPTED RULES section, this amendment reflects existing commission practice with regard to enforcement actions for unauthorized emissions.

New subsection (e) provides that this section expires on June 30, 2005. This will allow the commission time to review the rule and determine whether to continue it as adopted.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that this action is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. A “major environmental rule” is defined as a rule which is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking action is intended to obtain approval as a revision to the SIP by eliminating any confusion as to whether there is an automatic exemption from compliance. The amendments state that certain emissions events and excess opacity events are subject to an affirmative defense, and that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the owner or operator proves the applicable criteria. The amendments do not implement additional regulations that are not already required by the commission and the EPA. This action also retains the requirement that the burden of proof is on the owner or operator to prove it meets the demonstration criteria in §101.222 when

addressing exceedances of emissions or opacity limits. The adopted amendments do not limit the commission's authority for administrative orders for technical orders or civil actions for injunctive relief. Although the amendments apply to all sources of unauthorized emissions, the effect of this rulemaking action is not expected to significantly modify the number and amount of emissions from emissions events and scheduled maintenance, startup, and shutdown activities. In addition, the commission's enforcement practice regarding how cases are evaluated and whether additional action is required is not changing as a result of these rules, nor are the demonstration criteria which must be proved changed by these amendments. The rulemaking action will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, this is not a major environmental rule.

Furthermore, this rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted amendments do not exceed a standard set by federal law or exceed an express requirement of state law. The amendments are being made in order to obtain EPA approval of the rules as a SIP revision and to satisfy the notice of deficiency of the Texas Title V Operating Permits Program. There

is no contract or delegation agreement that covers the topic that is the subject of this rulemaking.

Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of the Texas Health and Safety Code and Texas Water Code which are cited in the STATUTORY AUTHORITY section of this preamble. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the adopted amendments do not meet any of the four applicability requirements.

#### TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the adopted amendments. The specific purpose of this rulemaking is to amend the emissions events rules to obtain federal approval of these rules as part of the Texas SIP by eliminating any confusion as to whether there is an automatic exemption from compliance and more precisely stating the commission's enforcement policy with regard to unauthorized emissions. Promulgation and enforcement of the adopted amendments will be neither a statutory nor a constitutional taking because they do not affect private real property.

Specifically, the adopted amendments do not affect private property in a manner which restricts or limits an owner's right to the property that will otherwise exist in the absence of a governmental action. Therefore, the adopted amendments do not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991,

as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the adopted amendments will maintain the same level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Sections 101.221 - 101.223 are applicable requirements under 30 TAC Chapter 122, Federal Operating Permits. Upon the effective date of this rulemaking, owners or operators subject to the Federal Operating Permits Program will be required to certify compliance with amended §§101.221 - 101.223.

## PUBLIC COMMENT

A public hearing on this proposal was held in Austin, Texas, on August 12, 2003. No person presented oral comments at the hearing. The following persons submitted written comments: Blackburn Carter; BP Products North America Incorporated, BP South Houston (BP); Environmental Defense on behalf of Clean Water Action, Environmental Defense, the Galveston-Houston Association for Smog Prevention, Lowerre and Kelly, Neighbors for Neighbors, Public Citizen, the Sustainable Energy and Economic Development Coalition, Texas Campaign for the Environment, Texas Environmental Democrats, and the Texas Public Interest Research Group (Environmental Defense *et al.*); EPA; ExxonMobil Refining and Supply (ExxonMobil); the League of Women Voters of Texas (LWV-Texas); Baker Botts, L.L.P. on behalf of Louisiana Pacific Corporation (LP); Mothers for Clean Air (MFCA); the Texas Association of Business (TAB); the Texas Chemical Council (TCC); Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP); the Texas Oil and Gas Association (TXOGA); Vinson and Elkins, L.L.P. (V&E); and 381 individuals. As part of their comments, Blackburn Carter and Environmental Defense submitted a copy of the Environmental Integrity Project (EIP) report titled *Accidents Will Happen* (October 17, 2002), and Environmental Defense *et al.* submitted a copy of the EIP report titled *Smoking Guns* (November 2002). BP endorsed the TCC and TIP comments. TXOGA endorsed the ExxonMobil comments.

## RESPONSE TO COMMENTS

EPA, Environmental Defense *et al.*, and MFCA generally supported the proposed amendments to the emissions events rules. LWV-Texas and 381 individuals expressed strong support for the proposed amendments. BP, LP, TCC, TIP, and V&E generally opposed the proposed amendments. Blackburn

Carter stated that while the proposed rules are a good start, they do not go far enough and need to be strengthened. Environmental Defense *et al.* expressed a belief that further additions to the rules are warranted and suggested changes. BP, Environmental Defense *et al.*, LWV-Texas, LP, ExxonMobil, MFCA, TAB, TCC, TIP, V&E, and 379 individuals raised issues or suggested changes.

ExxonMobil, TAB, and TCC stated that the rulemaking has a major impact on the regulated community and more time should be allowed for comments and consideration of options. The affected parties should also be given sufficient time to transition to other options such as permitting if the commission decides to make this option more available.

**The commission declines to extend the time allotted for this rulemaking. As stated earlier, the commission is adopting these amendments to obtain SIP approval in order to satisfy the Texas Title V Operating Permits Program notice of deficiency. The commission finds that because owners and operators have been required, since 1972, to meet specified criteria to obtain relief from enforcement related to unauthorized emissions, and those criteria are not changing in these amendments, a decision to conduct scheduled maintenance, startup, and shutdown activities would be made on the same basis if the goal is to minimize the risk that the owner or operator may be subject to enforcement for unauthorized emissions. Unless the demonstration criteria are proved, the amendments specifically provide that emissions from a scheduled maintenance, startup, or shutdown activity are required to be included in certain permits, and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to meet opacity limits set by commission rule. Meeting the permitting and rule requirements remains an**

**obligation if the demonstration criteria are not proved. Owners and operators retain the option of seeking permit authorization for scheduled maintenance, startup, and shutdown emissions which are sufficiently frequent, quantifiable, and predictable. The currently available authorization options are not affected by this rulemaking action.**

V&E recommended that the proposed rule changes be pulled down and greater time be given to this significant change in the regulations governing emission events related to malfunction, maintenance, startup, or shutdown. Despite the effort in the preamble to minimize the impact of the proposed rule changes on the regulated community, there is a significant legal distinction between the position that an emission event that meets certain criteria is exempt by law and the position that all emission events are subject to the enforcement discretion of the executive director and the criteria are merely an affirmative defense in an enforcement action. In addition, the affirmative defense created by the rule is not available in administrative technical orders or suits for injunctive relief. This is a significant change from existing law that may materially affect the regulated community by discouraging maintenance activity or requiring the regulated community to seek new air permits that account for startup, shutdown, maintenance, and malfunction related emission events. As a result, this rule will have an impact on the productivity of regulated facilities and is a major environmental rule under the definition found in Texas Government Code, §2001.0225.

**The commission declines to extend the time allotted for this rulemaking. As previously stated, the commission is adopting these amendments to obtain SIP approval in order to satisfy the Texas Title V Operating Permits Program notice of deficiency. The commission disagrees that the**

**proposed language will discourage maintenance activities because owners and operators, since 1972, have been required to meet specified criteria to obtain relief from enforcement related to unauthorized emissions, and those criteria are not changing in these amendments. In addition, the rules have never restricted the commission's authority to obtain administrative technical orders or seek injunctive relief. Therefore, a decision to conduct scheduled maintenance, startup, and shutdown activities would be made on the same basis if the goal is to minimize the risk that the owner or operator may be subject to enforcement for unauthorized emissions. It is the long-standing commission interpretation, through its practice, that the rule language being amended by this action exercises enforcement discretion. The commission's position that the rule did not exempt emissions is now reflected in these amendments. The amendments provide that emissions from a scheduled maintenance, startup, or shutdown activity are required to be included in certain permits, and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to meet opacity limits set by commission rule, unless the criteria are proved. This provides an additional basis for conducting, rather than discouraging, maintenance activities in a way that is best for air quality. The emissions from scheduled maintenance, startup, and shutdown activities remain unauthorized and there is no requirement for those emissions to be included in certain permits if the criteria are proven. However, those activities for which the criteria are not proven, the emissions are subject to certain permitting requirements.**

**Emissions events are, by definition in §101.1, unplanned or unanticipated occurrences or excursions of a process or operation that result in unauthorized emissions. Therefore, no best available control technology analysis or protectiveness review can be made in advance for non-**

**excessive emissions events. The commission agrees that the affirmative defense created by the rule is not available in administrative technical orders or suits for injunctive relief. However, the commission disagrees that it is a significant change from existing law because, as discussed earlier, the commission's practice has been that its authority to seek administrative technical orders or suits for injunctive relief has not been limited by these rules. The rulemaking action will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, the commission does not find this rulemaking action to be a major environmental rule.**

V&E commented that the rule triggers Texas Government Code, §2001.0225 because the law exceeds federal requirements and is not specifically required by state law. As proposed, the rules will be retroactively applicable to permits that were issued under the current commission rules and, as previously noted, even the EPA guidance does not require changes to permits based on SIP-approved rules in existence at the time the permit was issued. There is little question that changes in these rules will significantly alter the premises underlying commission air permits issued prior to these proposed changes. In addition, the commission's provisions as to what constitutes an affirmative defense for an unforeseen emission event exceed the requirements of federal law in 40 CFR §70.6(g), previously referenced in the quote from EPA guidance. Aside from differences in the specific elements of the affirmative defenses of federal law compared to the commission's rule proposal, the federal guidance that purports to require this change in state SIPs is based in the enforcement of national ambient air quality standards and prevention of significant deterioration increments. The commission's proposed

rules apply to all air contaminant emissions under state regulation as opposed to the criteria pollutants under the federal laws that are the basis for the EPA guidance. Therefore, these requirements exceed federal requirements in that they apply to emission events for all air contaminants. Thus, the proposed rules exceed the statutory program requirements that EPA has cited as limiting state programs to enforcement discretion or affirmative defense provisions in the regulation of startup, shutdown, maintenance, or malfunction events. The proposed rules exceed federal requirements and are not specifically required by state law and §2001.0255 is applicable.

**The commission disagrees that the amendments exceed federal requirements and are not specifically required by state law. Both federal and state law require protection of public health and welfare for all air contaminants, not only those which are criteria pollutants designated by EPA, and therefore, these amendments do not exceed federal requirements. The requirement in 40 CFR §70.6(g) relates to the ability of a permitting authority to provide for an emergency provision as part of the Title V Federal Operating Permits Program. 40 CFR §70.6(g)(5) clearly states that the emergency provision is in addition to any emergency or upset provision contained in any applicable requirement. The rules in Chapter 101 relating to emissions events, which include emissions events and scheduled maintenance, startup, and shutdown activities, are not limited solely to major sources subject to the Texas Operating Permits Program, but are applicable to all sources in Texas.**

**Further, the commission disagrees that these rules are not specifically required by state law. The STATUTORY AUTHORITY section of this preamble lists the specific state law for these amendments.**

**The commission also disagrees that the amendments will be retroactively applicable to permits that were issued under the current commission rules. These rules are applicable to facilities that are operating outside their authorized parameters and, so by definition, do not apply to permitted operations that do not exceed authorized limits for emissions from scheduled maintenance, startup, and shutdown activities, or excess opacity resulting from such activities. The proposed language does not retroactively affect issued permits because it does not change the status of the unauthorized emissions nor any currently issued permits which include authorization for emissions from scheduled maintenance, startup, and shutdown activities. Rather, the rule language specifies that certain emissions events and excess opacity events are subject to an affirmative defense, and when that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the owner or operator proves the applicable criteria. These rules will be applied to emission events and scheduled maintenance, startup, and shutdown activities that occur after the effective date of this rulemaking action and are not retroactive for facilities with unauthorized emissions that have occurred in the past.**

TIP specifically stated that the deficiency related to the definition of “applicable requirement” is analogous to when a state includes a proposed rule in a Title V permit. Specifically, if the proposed

rule is more stringent than the existing rule, TIP, citing a 1996 EPA memorandum, stated that EPA has allowed issuance of the permit. TIP concluded that the EPA staff approach is a sudden and last minute change reversal that in effect hijacks the Title V Program in order to secure wholly unrelated changes.

**The commission does not agree with the commenter. The issue is not whether a Title V permit can be issued by the commission, but whether the Texas Title V Program meets the requirements of 40 CFR Part 70 and can be approved now by the EPA. The commission's understanding of the EPA position is that, although the current definition in §122.10 refers to §101.222, and that the preamble adopting the most recent change to §122.10 in November 2002 explains that §101.11 was renumbered and revised in 2002, this does not satisfy the deficiency. In addition, the commission does not include citation to proposed rules in Title V permits.**

LP commented that EPA has already approved language into the SIP, nothing substantive has changed. EPA has already approved the exemption as part of the Texas SIP and there is no legitimate connection between the Title V notice of deficiency and these rules. BP stated that the proposed changes are not necessary to address EPA concerns in the SIP; neither are they directly related to the Texas Title V notice of deficiency. V&E expressed a similar concern. LP and TIP commented that there is no legitimate relationship between the exemption and the notice of deficiency.

**Concurrent with the revision to the emissions events rules in 2002, the commission relocated the rules into new Subchapter F and repealed the SIP-approved version of the rules in §§101.6, 101.7,**

**and 101.11. In 2002, the commission also revised the definition of applicable requirement to refer to the sections in Subchapter F. The notice of deficiency specifically refers to the repealed sections. In EPA's proposed approval of revisions and notice of resolution of deficiency for the Texas Operating Permits Program, EPA specifically noted that the applicable requirement definition previously did not include all the applicable provisions of the Texas SIP that implement relevant requirements of the Federal Clean Air Act, as required by 40 CFR §70.2. Additionally, EPA noted that Texas had amended the definition of applicable requirement to include revised and recodified §§101.201, 101.211, 101.221 - 101.223, and submitted those sections to EPA as a SIP revision. Finally, EPA noted that it is reviewing the SIP submission and would address the SIP submission in a separate rulemaking prior to EPA's final approval of Texas' definition of applicable requirement. In this case, EPA notified the commission that the 2002 rule amendments to Subchapter F cannot be approved as a SIP revision nor will that revision satisfy the Title V notice of deficiency.**

One individual stated that high air pollution levels which are regularly seen during the Texas summer can bring on an asthma attack. Therefore, for the health of Texas citizens, the individual voiced support for the proposed changes to the emissions events rules.

**The commission appreciates the support.**

One individual stated that in southeast Texas, where chemical companies are the predominant industry, the economy could be directly affected by any legislation passed that increases the cost of or limits the

production of petrochemicals; however, the Southeast Texas area leads the nation in respiratory diseases and cancer rates and is the most dangerous location for females to develop. The individual expressed an opinion that it is time for our values to be evaluated and requested that we stop polluting our air and water in the name of economic security. Another individual stated that if the number of cancer-related deaths and the number of citizens diagnosed with cancer in Port Arthur (and other areas with similar industrial pollution) were evaluated, it would be evident that the carcinogens being released into the air, water, and land are directly causing the deaths of Texans every day. The individual stated that it is time to stop rewarding companies for killing Texans, time to stand up for the health of Texans, and time to make everyone follow the same rules. One individual stated that, according to the American Lung Association, Gregg County is the sixth most polluted county in the state. The individual stated that during the last ten years of a 37-year teaching career, there has been a notable increase in the number of asthmatic students and the severity of their illness. The individual also stated that during the last five years, there were several instances of ambulances coming to the school to rush asthmatic students to the hospital. One individual stated that he was a victim of the pollution in the Houston air in 2000, and became chemically sensitive and very sick from breathing such dangerous pollution. Two individuals stated that excess emissions have a direct negative effect on the health and welfare of those living in communities adjacent to companies with excess emissions. The individuals stated that the communities are normally populated with citizens with low incomes, children, and the elderly. The two individuals also stated that the pollution can be transported by wind currents and contributes to the unhealthy air quality in most of Texas' large cities.

**The emissions events rules apply to all owners and operators who have unauthorized emissions.**

**The commission addressed protection of public health by the inclusion of the demonstration criteria which requires that the emissions do not cause or contribute to an exceedance of the national ambient air quality standards, prevention of significant deterioration increments, or a condition of air pollution, or there is no relief from enforcement action. In addition, these amendments do not restrict the commission's ability to obtain corrective action or injunctive relief. The commission's changes to these rules in 2002, implementing certain portions of HB 2912, 77th Legislature, 2001, were intended to enhance the existing rules for these emissions. The statutory notes of HB 2912, §18.14, state: "The purpose of Sections 382.0215 and 382.0216, Health and Safety Code, as added by this Act, is to add new or more stringent requirements regarding upsets, startups, shutdowns, and maintenance. Those sections may not be construed as limiting the existing authority of the Texas Natural Resource Conservation Commission under Chapter 382, Health and Safety Code, to require the reporting or the permitting of the emission of air contaminants or to bring enforcement action for a violation of Chapter 382." This rulemaking complements the 2002 amendments in that it specifies the commission's enforcement policy and does not change the criteria which must be proved by an owner or operator of unauthorized emissions. Further, the commission's authority to obtain corrective action or injunctive relief is not limited. In implementing all of these rule changes, the commission implemented incentives for owners and operators to reduce these types of emissions. In addition, the amendments do not remove any obligation to comply with any other requirements such as permit terms and commission rules, e.g., as the prohibition against causing a nuisance or reporting requirements, which are applicable to a scheduled maintenance, startup, and shutdown activity.**

One individual expressed a firm belief that the public has a right to clean air, and nobody has a right to take that away. Another individual stated that it is time that Texas took steps toward protecting our air quality for the future. One individual stated that the proposed changes to the rules to more strictly enforce and monitor emissions is a step forward in the protection of Texas citizens. Another individual commented that for too long the old commission acted as the protector of polluters. The individual expressed a hope that the commission has changed its policies and regained sight of its mission to protect the environment and the public interest.

**The commission considers these rules to be a vital part of the state's plan to control and protect air quality in Texas. The commission disagrees that these particular amendments will more strictly enforce and monitor emissions, but notes that the commission's changes to these rules in 2002, implementing certain portions of HB 2912, were intended to enhance the existing rules for these emissions. This rulemaking complements the 2002 amendments in that it specifies the commission's enforcement policy and does not change the criteria which must be proved by an owner or operator of unauthorized emissions. Further, the commission's authority to obtain corrective action or injunctive relief is not limited. In implementing all of these amendments, the commission implemented incentives for owners and operators to reduce these types of emissions. In addition, the amendments do not remove any obligation to comply with any other requirements such as permit terms and commission rules, e.g., as the prohibition against causing a nuisance or reporting requirements, which are applicable to a scheduled maintenance, startup, and shutdown activity.**

379 individuals stated that the proposed rules should help to reduce the alarming number of “upset” emissions at Texas facilities. 381 individuals stated that these excess emissions have a direct negative effect on the health and welfare of those living in adjacent communities, and contribute to the unhealthy air quality in most of Texas’ large cities. 379 individuals stated that six facilities in Port Arthur reported 323 excess emissions events in 2002 which released 1,500 tons of sulfur dioxide, 1,700 tons of volatile organic compounds (including 1,500 tons of carcinogens, benzene, and butadiene), and 350 tons of carbon monoxide in excess of the facilities’ permitted limits. Blackburn Carter stated that the October 2002 EIP report documented that in only seven months (January - July 2002) the total amounts of excess emissions generated in Port Arthur by five refineries included almost 725 tons of sulfur dioxide, nearly ten tons of hydrogen sulfide, 844 tons of volatile organic compounds, nearly 42 tons of benzene, and over 57 tons of carbon monoxide. Blackburn Carter stated that these emissions contribute to ozone standard exceedances and health problems, and therefore the commission has a responsibility to include adequate rule revisions to protect citizens from the dangerous effects of chemical pollutants. LWV-Texas stated that the number of excess “upset” emissions has been unacceptably high and expressed hopes that this rule change would reduce the number and frequency of such incidents. LWV-Texas also stated that such a reduction can be expected to very quickly improve the air quality and quality of life in communities where “upset” emissions have become a nearly daily occurrence and may also make a difference in larger Texas cities that struggle to stay within federal air quality standards. MFCA stated that in 1998 and 1999, 90% and 78.5% of the total upset and maintenance events that occurred in the Houston area were unplanned and reported as upsets. These upsets makes it difficult for the Houston-Galveston area to achieve the one-hour ozone standard, but more importantly, are affecting the health and quality of life of nearby residents. One individual stated that alleged “upset”

emissions at Texas facilities have been exploited shamelessly, and that industry has too often risked the health and welfare of those living in adjacent communities contributing to the unhealthy air quality in most of Texas' large cities.

**The commission's changes to these rules in 2002, implementing certain portions of HB 2912, were intended to enhance the existing rules for unauthorized emissions. The statutory notes of HB 2912, §18.14, state: "The purpose of Sections 382.0215 and 382.0216, Health and Safety Code, as added by this Act, is to add new or more stringent requirements regarding upsets, startups, shutdowns, and maintenance. Those sections may not be construed as limiting the existing authority of the Texas Natural Resource Conservation Commission under Chapter 382, Health and Safety Code, to require the reporting or the permitting of the emission of air contaminants or to bring enforcement action for a violation of Chapter 382." This rulemaking complements the 2002 amendments in that it specifies the commission's enforcement policy and does not change the criteria which must be proved by an owner or operator of unauthorized emissions. Further, the commission's authority to obtain corrective action or injunctive relief is not limited. In implementing all of these rule changes, the commission implemented incentives for owners and operators to reduce these types of emissions. In addition, the amendments do not remove any obligation to comply with any other requirements such as permit terms and commission rules, e.g., as the prohibition against causing a nuisance or reporting requirements, which are applicable to a scheduled maintenance, startup, and shutdown activity.**

Blackburn Carter stated that the current emissions events rules do not adequately protect the health and welfare of citizens of the State of Texas.

**The commission disagrees that public health and welfare are not protected. The rules have not authorized emissions from emissions events or maintenance, startup, or shutdown activities, and have not limited the commission's ability to require corrective action or seek injunctive relief.**

**This rulemaking does not change that position. The commission notes that one of the demonstration criteria requires that the unauthorized emissions must not have caused or contributed to an exceedance of the national ambient air quality standards, prevention of significant deterioration increments, or a condition of air pollution. In addition, the rules are designed to promote reduction of these emissions, and the amendments made in 2002 added the additional categories of "excess" and "chronic" emissions events. Those amendments also enhanced actions such as corrective action plans and chronic site responses in addition to enforcement to minimize emissions and events. In addition, the amendments do not remove any obligation to comply with any other requirements such as permit terms and commission rules, e.g., as the prohibition against causing a nuisance or reporting requirements, which are applicable to a scheduled maintenance, startup, and shutdown activity.**

LWV-Texas, MFCA, and 381 individuals supported the rule changes that clarify that all emissions in excess of permit limits are violations subject to enforcement by the commission, EPA, and citizens. MFCA stated that the emissions events rules are necessary to hold violators accountable, and that without these changes, regulated entities will continue to make life for those who live downwind

absolutely sickening. MFCA also asked if it is reasonable to ask a family to shelter in place while a company avoids penalties and enforcement for their actions. Blackburn Carter, Environmental Defense *et al.*, LWV-Texas, and 379 individuals urged the commission to step up its enforcement against facilities that repeatedly exceed their permitted limits. LWV-Texas and 379 individuals stated that facilities that repeatedly exceed their permitted limits should face automatic enforcement, should pay fines that at least recoup the economic benefit they gained through the violation, and should be required to obtain pollution offsets to reduce the area's pollution burden by an amount equivalent to their excess emissions. Environmental Defense *et al.*, stated that the proposed rule changes, if coupled with strong enforcement, should reduce emissions events. One individual expressed an opinion that this rule change would not be of any value and expressed doubt that the commission would in fact pursue the violators. One individual stated that it is only fair that when a law is made, everyone in society follows that law equally, whether they be an individual, a small business, or a giant corporation. The individual also stated that it is not the concern of the government whether big companies think a rule is fair or not, and questioned why the government would allow anyone to specifically violate the law and not even make an attempt to come into compliance. One individual commented that the proposed rules would make it clear that any air pollution in excess of permit limits is illegal and subject to enforcement action by the commission, the EPA, and citizens.

**The commission has not limited its authority to obtain corrective action and seek injunctive relief in this rulemaking. In addition, the amendments do not change the determinations of excessive emissions under §101.222(a) or chronic excessive emissions events under §101.223. These rules will continue to hold the owners and operators responsible for their unauthorized emissions and**

**require them to come into compliance. The rules apply to all owners and operators, regardless of size, and if they cannot prove the criteria in §101.222, they remain subject to penalties, as well as to corrective action and injunctive relief. The rules do not authorize violations of the law, but rather specify that an affirmative defense is available for certain emissions events and excess opacity events and that emissions from or opacity associated with scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet the requirements of §111.111(a) unless the applicable criteria are proven by the owner or operator. Certain unauthorized emissions that would otherwise be a violation of a statute, rule, or permit within the commission's jurisdiction were caused by an act of God, war, strike, riot, or other catastrophe, are not violations under Texas Water Code, §7.251. This is an existing statutory defense that has historically been available to owners and operators of facilities with unauthorized emissions and is not limited by these rules. However, the majority of unauthorized emissions are not covered by this defense and remain unauthorized.**

The EPA also agreed with and supported the commission statement that determinations by the executive director under Subchapter F will not limit or bar enforcement actions for exceedances of emissions or opacity limitations brought by the EPA or citizens under authority of the Federal Clean Air Act.

MFCA agreed that some emissions may qualify for a penalty waiver by the commission, but are still enforceable by the state, the EPA, or citizens. TIP commented that language limiting the availability of the affirmative defenses to enforcement actions brought by the state should be deleted. Specifically, TIP does not disagree that determinations made under §101.222 will not bar certain actions by the EPA or citizens, but the effect of the proposed language is to limit the applicability of the affirmative defense

to the extent that it goes farther than what is needed to preserve EPA's and citizens' rights to bring enforcement actions. TIP commented that this language would bar the use of an affirmative defense in a federal enforcement action, although the EPA has never objected to owners and operators being allowed to make the demonstration. TIP suggests deleting the phrase "brought by the state" in §101.222(b) - (e).

**The commission agrees that although the demonstration criteria in §101.222 will apply in actions brought by EPA or citizens under the Federal Clean Air Act, determinations by the executive director or commission under §101.222 in which the owner or operator proves the criteria will not bar those enforcement actions.**

Blackburn Carter stated that specific criteria need to be in the rule which will trigger further investigation by the commission, and possibly enforcement action, to alleviate discrepancies in types and numbers of investigations in Beaumont/Port Arthur and the Houston/Galveston areas.

**The commission declines to add specific criteria to the rules regarding investigations and enforcement action in these particular areas of the state. The rule amendments adopted by the commission (September 6, 2002 issue of the *Texas Register* (27 TexReg 8499)) require the executive director to determine whether or not each event is excessive. If an emissions event is not excessive, additional action may be required of the owner or operator to either further reduce the emissions from the event or to preclude future events from occurring. The access provided to the public related to emissions events meets the statutory requirement to make such information**

**available and there is sufficient data to base an analysis of trends over and above that provided by the person making the demonstrations under §101.222.**

Environmental Defense *et al.* requested the commission to identify the number of facilities that have been identified as having excessive emissions events under §101.222(a).

**HB 2912 amended the Texas Clean Air Act to require the commission to develop the capacity for electronic reporting, including incorporating reported emissions events into a permanent centralized database for emissions events. The statute also requires that the commission annually assess the information received, including actions taken by the commission in response to the emissions events, and include the assessment in its annual report on enforcement actions which is provided to the governor, lieutenant governor, and speaker of the house of representatives, and made available to the public. The information required by HB 2912 is included in the commission's Annual Enforcement Report for 2002.**

Environmental Defense *et al.* stated that a uniform form would make analysis of emissions events far easier for the public, and presumably, for the commission, and requested that such a form require the facility to identify the number of times emissions events have occurred over the past five years at the unit for which the report is being filed. This would make it much easier for the public and the agency to determine if a particular unit is not being properly maintained or operated and needs attention.

**The commission has not made a change in the rules nor in its reporting practice as a result of this comment. Specifically, §101.222(b)(9) already requires the owner or operator to demonstrate that the unauthorized emissions are not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance. The reporting elements in Subchapter F already specify the required information to report which includes elements that address the amount of time of the excess emissions compared with the time of operation for the unit. Furthermore, as a part of the existing excessive emissions events criteria, the owner or operator must prove the need for startup, shutdown, and maintenance events.**

Environmental Defense *et al.* stated that in order to obtain a more accurate estimate of the emissions caused by emissions events from flares, the Chapter 101 rules should specify that estimates of flare emissions must identify whether or not the flare was smoking and what the wind speed was at the time of the event. Environmental Defense *et al.* stated that the commission should require additional monitoring for excess emissions in its Chapter 101 rules.

**The commission declines to make these specific changes. The commission has the authority to request such information as part of its evaluation of whether the owner or operator has proved it has met the applicable criteria. The commission also has authority to require corrective action, which may include additional monitoring, and these amendments do not restrict that authority. In addition, the scope of this rulemaking was not directed at revising the demonstration criteria.**

The EPA stated that it historically has always considered all excess emissions, scheduled or otherwise, as violations of emission limitations, permitted level, or regulation. However, the EPA also stated that it has recognized that emission events may be caused by circumstances entirely beyond the control of the owner or operator and that the imposition of penalties in these situations may not be appropriate. The EPA expressed a belief that a regulating agency may exercise “enforcement discretion” in such cases, and that the permitting agency may provide in its rules for an affirmative defense to enforcement actions for civil penalties for emission events if the owner or operator can demonstrate that certain criteria have been met when evaluated in a judicial or administrative proceeding.

**The amendments provide for an affirmative defense for emissions events and excess opacity events, with the burden of proof on the owner or operator to demonstrate that it meets the specific criteria to be exempt from penalties. The rule clearly states that the affirmative defense does not apply to claims for administrative technical orders and actions for injunctive relief.**

LWV-Texas and 381 individuals stated that adopting these changes will mean that Texas regulations will finally comply with federal law. Environmental Defense *et al.* stated that Texas’ existing emission event rules do not comply with federal law regarding startup, shutdown, and malfunction, and those rules are similar to those struck down in *Mich. Mfrs. Ass’n. v. Browner*, 230 F. 3d 181 (6th Cir. 2000), because they create a general exemption rather than an affirmative defense. Environmental Defense *et al.* stated that the proposed rules address this deficiency and clarify that the affirmative defense applies only to commission assessed monetary penalties, not to injunctive relief or any relief sought by EPA or citizens.

**The commission agrees that the amendments will comply with the requirements in the federal and state Clean Air Acts for protection of air quality, and they should be approvable as a SIP revision to satisfy the Title V notice of deficiency. These rules do not restrict the ability of the commission, or others, to obtain corrective action or seek injunctive relief as specified in §101.221(f) and §101.222(b) and (d). The commission disagrees that the existing rules operate to provide the type of exemption that was the subject of the *Michigan* case. The existing rules and these amendments both condition enforcement relief on the demonstration by the owner or operator of many specific criteria and no automatic exemption is a part of the commission's rules. The amendments continue to include the requirement that the owner or operator clearly has the burden of proving that it meets the criteria. These amendments are made to delete the references to "exempt from compliance" to eliminate any confusion about the commission's treatment of unauthorized emissions.**

Environmental Defense *et al.* stated that the EPA is prohibited from approving a SIP that would interfere with attainment or any other applicable requirement of the Federal Clean Air Act, citing 42 United States Code, §7410(k)(3) and (l).

**The commission agrees, and these amendments demonstrate that this legal requirement has been met. One of the demonstration criteria in §101.222(b) - (e) is that the emissions do not interfere with attainment or any other applicable requirement of the Federal Clean Air Act.**

V&E stated that the commission should evaluate the EPA guidance in its entirety before action is taken on these proposed rule changes and ensure that the proposed regulations are consistent with that guidance. LP commented that the commission should not treat EPA guidance as rule. The rules were revised in 2000 in part to satisfy EPA's concerns that the exemption was not "automatic" and that the demonstration criteria were sufficiently rigorous. The commission noted in the preamble to the final rule that the primary EPA issue with these rules was the clear assignment of the burden of proof to the owner or operator to demonstrate that an upset was unavoidable, and the commission adopted specific language to address that concern. Further, the commission specifically noted that the adoption of the criteria in §101.11 represents a codification of commission practice.

**The EPA guidance regarding SIPs and excess emissions during malfunctions, startups, and shutdowns consists of memoranda from Kathleen Bennett, Assistant EPA Administrator for Air, Noise, and Radiation, dated September 28, 1982 and February 15, 1983, and memorandum from Eric Schaeffer, Director, EPA Office of Regulatory Enforcement, dated September 20, 1999.**

**EPA has also addressed this in various *Federal Register* notices since 1977. These amendments are not based on the position that EPA guidance has the force and effect of federal rule. Rather, these changes are made to obtain approval as a SIP revision by specifying that certain emissions events and excess opacity events are subject to an affirmative defense, and that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the owner or operator proves the applicable criteria. These amendments are made to resolve existing conflicting interpretations, evidenced in these comments, that the rules provided an exemption**

**from compliance with emissions and opacity limits. The amendments are consistent with the federal and state Clean Air Act requirements to protect air quality. LP is correct that EPA expressed concern in the past regarding the demonstration criteria, but has not expressed concern with the criteria adopted by the commission in the 2000 and 2002 amendments to these rules.**

LP commented that EPA staff have apparently given the State of Texas “marching orders” with respect to the exemption provided by the emissions event and scheduled maintenance, startup, and shutdown rules and, as in the *Appalachian Power* case, EPA’s authority for those orders consists of a guidance document that has not been subject to the notice and comment procedures required for formal agency rulemaking. Notwithstanding the fact that the Texas’ emissions event rules contain demonstration criteria that closely track the excess emissions guidance, EPA’s use of the excess emissions guidance in this case is improper.

**The commission disagrees that EPA has given it “marching orders” such that the commission is expected to adopt federal guidance as a state rule. EPA’s guidance regarding enforcement of unauthorized emissions is distinguishable from the EPA guidance that was the subject of the litigation in *Appalachian Power Co. v. EPA* (208F.3d 1015 (D.C. Cir. 2000)). In *Appalachian Power*, the court held that EPA’s use of guidance for periodic monitoring required by 40 CFR Part 70 was so broad that the guidance was considered to be an amendment to §70.6, which EPA cannot do without completing the necessary rulemaking process. EPA’s guidance with regard to unauthorized emissions does not add any requirements that states or sources must comply with, but rather interprets the Federal Clean Air Act. This guidance has been upheld in *Mich. Mfrs.***

***Ass'n v. Browner* 230 F.3d 181 (6th Cir. 2000). In *Appalachian Power*, the court performed an analysis under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and found that the EPA interpretation of §110 of the Federal Clean Air Act that SIPs cannot provide broad exclusions from compliance with emission limitations during startup, shutdown, and malfunction periods is not unreasonable. As previously stated, the amendments are not based on the position that EPA guidance has the force and effect of federal rule. Rather, these changes are made to obtain approval as a SIP revision by specifying that certain emissions events and excess opacity events are subject to an affirmative defense, and that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the owner or operator proves the applicable criteria. These amendments resolve existing interpretations that the rules provided an exemption from compliance with emissions and opacity limits. The amendments are consistent with the federal and state Clean Air Act requirements to protect air quality, and meet the requirements as approval of a revision to the Texas SIP.**

TIP commented that the EPA has already approved the exemption as part of the SIP, stating that the former §101.11, as adopted in 2000, contained the substantively identical exemption language as in current §101.222. TIP and LP stated that the commission proposed changes in 2000 in part to satisfy EPA's concerns that the exemption was not "automatic" and that the demonstration criteria were sufficiently rigorous, and it was these rules that were adopted by EPA into the SIP. TIP further commented that the only changes made in 2002 were to implement the requirements of HB 2912 which

only made the rules more stringent and to reorganize the rules. Neither change affords the EPA a basis to revisit its earlier SIP approval.

**The commission disagrees that these two events cannot form a basis for the EPA to reconsider its SIP approval. The EPA has authority to require a state to revise its plan if the EPA finds that the plan is substantially inadequate to attain or maintain the relevant national ambient air quality standards, or meet any other applicable requirement of the Federal Clean Air Act. The commission adopts these amendments to ensure that its plan meets the requirements in the Federal Clean Air Act for plan approval, but notes that the current amendments more precisely state the commission's enforcement practice that was in effect before and at the time of the SIP approval in 2000.**

LP stated that the EPA is being inconsistent in requiring the Texas SIP to change while not challenging comparable rules in other states. LP and TIP commented that the EPA has approved far less rigorous rules in other states, specifically citing to New Mexico and Oklahoma.

**The EPA treatment of whether it has approved or failed to issue a SIP call to other states in Region 6 is irrelevant as to whether the commission adopts amendments that will meet the requirements for approval as a revision to the Texas SIP.**

The EPA supported removal of the terms "exempt from" or "exempt from compliance" with emissions and opacity limitations from §§101.221 - 101.223 of these rules, and supported the proposed changes

intended to clarify that there are no automatic exemptions from compliance with emissions and opacity limits in Chapter 101. LWV-Texas and 381 individuals stated that the proposed changes clarify that sources are not exempt from compliance with emission limits during upsets, startup, shutdown, and maintenance. Environmental Defense *et al.* stated that permits and rules which grant broad exemptions from compliance with emission limits cannot assure compliance with the health-based limits under the Federal Clean Air Act.

**The commission has deleted the terms “exemptions” and “exempt from compliance” to ensure that there are no automatic exemptions from emissions and opacity limits. The commission agrees that permits and rules which grant broad automatic exemptions from compliance with emission limits cannot assure compliance with the health-based limits under the Federal Clean Air Act. These amendments do not grant broad exemptions and ensure that the applicable requirements for permits issued under Title V are consistent with the Federal Clean Air Act.**

ExxonMobil, TAB, and TCC stated that the commission does not need to make any changes to §§101.221 - 101.223 to address EPA’s concern that an automatic exemption for emissions occurring during malfunctions, startup, and shutdown would possibly undermine the control of emissions in the SIP. They further stated that the EPA may not fully understand the nature of the existing commission rules on emission events and maintenance, startup, and shutdown emissions, and that these rules do not violate any principles upon which EPA guidance is based.

**The EPA concerns are based on its interpretation of the commission's rules, which, similar to that of the commenters, is that the emissions are exempt from compliance if the demonstration criteria are proved by the owners and operators. Although the commission has a long history of interpreting this language as implementing its enforcement discretion and operating similar to an affirmative defense, the EPA has interpreted the language to provide a complete exemption from compliance and thus considers the language as an impediment to seeking injunctive relief in response to an event that may cause or contribute to an exceedance of the national ambient air quality standards or prevention of significant deterioration increments. The commission has determined that specifying that emissions events and excess opacity events are subject to an affirmative defense, and that certain emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless applicable criteria are proven, better articulates its enforcement practice, as well as eliminates any confusion as to whether these rules authorize emissions or provide an automatic exemption from compliance with emissions and opacity limits.**

ExxonMobil, TAB, and TCC stated that the current rules in Subchapter F provide the necessary controls over emissions from emission events and scheduled maintenance, startup, and shutdown activities to assure that these emissions will not interfere with attainment under the SIP.

**The commission agrees that if owners and operators take appropriate action to comply with the applicable demonstration criteria, including that the emissions did not cause or contribute to an exceedance of the national ambient air quality standards, prevention of significant deterioration**

**increments, or a condition of air pollution, then interference with attainment under the SIP is less likely. However, the purpose of this rulemaking is not to revise these criteria, but rather to specify that certain emissions events and excess opacity events are subject to an affirmative defense, and that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the owner or operator proves the applicable criteria.**

ExxonMobil, TAB, and TCC stated that the rules in Subchapter F recognize that normally applicable emission limits are not appropriate during malfunctions or maintenance, startup, and shutdown events, and that an exemption is provided only if stringent criteria are met.

**The commission disagrees that applicable emissions limits are not appropriate during scheduled maintenance, startup, and shutdown activities. Authorizations, such as in 30 TAC §106.263 and permits issued under 30 TAC Chapter 116, are examples of when applicable emissions limits can be established for these activities. For unauthorized emissions which occur as a result of these types of events, it is appropriate for the commission to determine when enforcement should be pursued. Enforcement action may be taken as specified in these rules, which provide owners and operators the opportunity to avoid enforcement or permitting for an event by meeting the demonstration criteria. Section 101.222(c)(3) requires the demonstration that the scheduled maintenance, startup, and shutdown activity was not part of a recurring pattern. Therefore, many routine scheduled maintenance, startup, and shutdown activities would not meet this criteria and are subject to the requirement to obtain authorization for those emissions. Emissions**

**events are, by definition in §101.1, unplanned or unanticipated occurrences or excursions of a process or operation that result in unauthorized emissions. No best available control technology analysis or protectiveness review can be made in advance for emissions events, and therefore, there are not normally applicable emissions limits associated with emissions events or malfunctions. As previously discussed this preamble, the commission has never interpreted these rules to provide an automatic exemption and an automatic exemption was not intended by the commission in the rules even if the criteria are met. These amendments are made to eliminate any interpretation of automatic exemption.**

Blackburn Carter stated that the proposed rule only seeks to eliminate repetition and does little to correct actual violations of the excess emission provision. MFCA commented that the commission has been much too lenient with violations of emissions limits from upsets, and that the upsets are not even considered violations of the law, therefore, eliminating corrective action or lawsuits against the pollution. MFCA stated that these proposed changes will eliminate the “upset loophole” that has permitted industry to report all excess emissions as exempt upsets and to avoid enforcement action for unplanned releases.

**The commission agrees that the rule eliminates duplicate language. The intent of the rule was to clarify the status of these emissions by elimination of the term “exempt” and specifically stating that certain emissions events and excess opacity events are subject to an affirmative defense, and that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are not required to be included in certain permits or meet opacity limits set by**

**commission rule unless the owner or operator proves the applicable criteria. In addition, the amendments do not remove any obligation to comply with any other requirements such as permit terms and commission rules, e.g., as the prohibition against causing a nuisance or reporting requirements, which are applicable to a scheduled maintenance, startup, and shutdown activity. The commission disagrees that the rules previously allowed or currently allow reporting of all excess emissions as exempt upsets. These amendments do not modify any existing reporting requirements.**

ExxonMobil, TAB, and TCC stated that the proposed changes make parties that would have been exempted under the current rules now in violation. TIP commented that the blanket conversion of lawful scheduled maintenance, startup, and shutdown activities from protected status to presumptive “violations” places facilities in an untenable legal position by planning and implementing law violations, and runs directly counter to long-standing agency practice. These activities have always been subject to a clear exemption if the rigorous demonstration criteria are met. LP commented that revised notification requirements without exemption equals company intent to violate the law, and that scheduled maintenance, startup, and shutdown activities have always been subject to a clear exemption if the rigorous demonstration criteria are met. It is disingenuous for the commission now to suggest that these activities, if they cause unauthorized emissions, were always “violations” for which the agency has exercised enforcement discretion. Couching scheduled maintenance as an unlawful activity places facilities in the untenable position of planning and implementing law violations, which most corporate compliance policies flatly prohibit.

Since 1972, maintenance, startup, and shutdown activities have had no protected status, i.e., authorization, under the rules. As stated previously, the commission's long-standing interpretation of these rules was that it was exercising its enforcement discretion and that these rules did not provide authorization of emissions from scheduled maintenance, startup, and shutdown activities. These amendments specify when emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule. The demonstration criteria that must be proved are not changed by these amendments and there is no significant change in the commission's evaluation of emissions events. Section 101.222(c) provides that although emissions from these activities are not authorized by permit, the emissions are required to be included in certain permits unless the owner or operator proves the criteria in subsection (c)(1) - (9). The commission finds that if the owners and operators prove the criteria in subsection (c)(1) - (9), the emissions from the scheduled maintenance, startup, or shutdown activity are at a level below which inclusion in certain permits is not required, as provided by Texas Health and Safety Code, §382.05101. The criteria in subsection (c)(1) - (9) set strict requirements for operating the control equipment and sufficiently provide for the protection of public health and welfare. Finally, there are no revised reporting requirements in these amendments.

EPA supported statements to the effect that an affirmative defense is not applicable in claims for administrative technical orders and actions for injunctive relief. TIP and BP stated that much of the proposed language is inconsistent with affirmative defense, and the limit of the defense in state-only jurisdiction.

**The rules specify that certain emissions events and excess opacity events are subject to an affirmative defense. The affirmative defense does not apply to administrative technical orders and actions for injunctive relief for these events because the commission must retain that authority to comply with the requirements of the Federal Clean Air Act and Texas Health and Safety Code, Chapter 382. The commission recognizes that in some case it is not appropriate to seek penalties for unauthorized emissions. However, the amendments provide that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless applicable criteria are proven, rather than provide for an affirmative defense to these unauthorized emissions. The commission also deleted the reference to state-only enforcement to ensure that the determinations made by the executive director or commission under the rules do not interfere with claims brought by the EPA or citizens.**

BP stated that the commission indicates in the preamble that if a company fails to maintain controls, then an affirmative defense does not apply.

**Specifically, the demonstration criteria provide that a bypass of control equipment which was unavoidable to prevent loss of life, personal injury, or severe property damage is an exception to the prohibition to bypass the control equipment. In addition, the demonstration criteria provide that all emission monitoring systems must be kept in operation, if possible. Therefore, it is not an automatic failure to proving the criteria if an owner or operator fails to maintain controls during the event or activity.**

Environmental Defense *et al.*, citing the memoranda from Kathleen Bennett, Assistant EPA Administrator for Air, Noise, and Radiation, dated September 28, 1982, appendix page 2, stated that the affirmative defense cannot apply to planned startup, shutdown, or maintenance because these activities which result in excess emissions should not be eligible for an affirmative defense.

**The EPA position is that maintenance emissions should be included in permits, and that excess emissions arising from startup and shutdown activities should be treated as violations. However, the EPA does not limit the use of enforcement discretion in resolution of those violations. The commission finds that it is important to encourage adequate maintenance and facility upkeep. The amendments do not authorize emissions from scheduled maintenance, startup, and shutdown activities, but rather specify that emissions and opacity events resulting from these activities are not required to be included in certain permits or meet opacity limits set by commission rule unless applicable criteria are proven by the owner or operator. The commission finds that if the owners and operators prove the criteria in subsection (c)(1) - (9), the emissions from the scheduled maintenance, startup, or shutdown activity are at a level below which certain permits are not required, as provided by Texas Health and Safety Code, §382.05101. The criteria in subsection (c)(1) - (9) set strict requirements for operating the control equipment and sufficiently provide for the protection of public health and welfare.**

Environmental Defense *et al.* stated that the affirmative defense cannot apply to exceedances of the federal new source performance standards or the national emission standards for hazardous air pollutants. ExxonMobil, TAB, and TCC stated that some new source performance standards provide

for exceptions during malfunction, startup, and shutdown activities. Blackburn Carter stated that existing rules and exemptions forego any hope for compliance with Federal Clean Air Act requirements to meet the national ambient air quality standards and national emission standards for hazardous air pollutants levels set by the EPA. TIP stated that the EPA's own new source performance standards provide a blanket exemption and are designed to control criteria pollutants in order to achieve the national ambient air quality standards, just like SIPs, yet EPA has exempted excess emissions during startup, shutdown, and malfunction from compliance with new source performance standards.

**Environmental Defense *et al.* is correct in stating that an affirmative defense cannot apply to exceedances of new source performance standards or national emission standards for hazardous air pollutants where those rules specifically require the emissions limits to be met even during startup, shutdown, or malfunction. For example, in 40 CFR §60.49(b), the EPA explicitly states that nitrogen oxide emissions limits under §60.44(b) apply at all times, but the limits for particulate matter and opacity apply at all times except during startup, shutdown, or malfunction. For the particulate matter and opacity limits in these federal rules, the EPA suspends the emissions limits and standards during these events and instead requires the owner or operator to comply with the work practice standard identified in §60.11(d) in order to mitigate emissions during such activities. Compliance with §60.11(d) is determined after the event has passed, and is determined on a case-by-case basis using the facts surrounding the event, a practice that is identical with the commission's approach. The EPA §60.11(d) workpractice standards, which generally apply during these types of events, effectively include the demonstration criteria that are contained in the commission rules in §101.222. The EPA has addressed emissions during startup,**

**shutdown, and malfunction similarly in the national emission standards for hazardous air pollutants found in 40 CFR Part 63. In national emission standards for hazardous air pollutants, each subpart identifies whether or not emissions limits apply during startup, shutdown, and malfunction events and requires compliance with a work practice standard during those same events when the subpart limits do not apply. The EPA has adopted a more formalized approach to addressing startup, shutdown, and malfunction related emissions in the national emission standards for hazardous air pollutants, under 40 CFR §63.6(e), by specifically requiring that the owner or operator develop and operate in accordance with a startup, shutdown, and malfunction plan as defined in 40 CFR §63.6(e)(3). This alternative work practice standard to be met is likely the exception referred to by ExxonMobil, TAB, and TCC. In either new source performance standards or national emission standards for hazardous air pollutants, where the EPA states that a subpart emissions limit does not apply during startup, shutdown, or malfunction events, the standards likewise do not impose a specific emission limit during the event. Rather, emissions must be minimized and controls operated as best as can be done to minimize emissions. New §101.222(f) makes clear that the rules do not exempt startup or shutdown emissions from other applicable requirements.**

The EPA supported statements to the effect that the owner or operator has the burden of proof to demonstrate that certain criteria have been met for claims of affirmative defense concerning excess emissions.

**The amendments make clear that the owner or operator must prove the criteria for there to be no enforcement action taken under §101.222(b) and (d), with the exception of administrative technical orders and injunctive relief. The burden of proving all demonstration criteria in the rules remains on the owner or operator. Neither the executive director nor the commission has the burden to prove that the criteria are not met as part of an enforcement action.**

Environmental Defense *et al.* commented that the affirmative defense cannot apply in areas including Houston/Galveston and Beaumont/Port Arthur when emissions events from a limited number of sources can cause exceedances of the national ambient air quality standards, and stated that the commission should clarify that no releases of volatile organic compounds in the Houston/Galveston or Beaumont/Port Arthur areas may qualify for an affirmative defense.

**The commission declines to make this change. The emissions events rules apply to all releases of unauthorized emissions of air contaminants, regardless of type or area of the state. The commission's primary controls for volatile organic compound emissions in these areas are contained in 30 TAC Chapter 115, which are independent requirements that must be complied with by owners and operators of facilities which emit volatile organic compounds. Successful demonstration of meeting the criteria in §101.222 does not exempt owners or operators of compliance with the requirements in Chapter 115. The owner or operator whose facilities have unauthorized volatile organic compound emissions must prove the criteria to obtain relief from enforcement for unauthorized emissions of the rules in Chapter 101, Subchapter F, including that**

**the emissions did not cause or contribute to an exceedance of the national ambient air quality standards, prevention significant deterioration increments, or a condition of air pollution.**

TIP commented that the commission should clarify that the term "enforcement action" in the new affirmative defense language includes notices of violation. The term should not be construed to mean only administrative or judicial enforcement actions seeking penalties. The commission has an established procedure for challenging notices of violation and owners and operators are entitled to the opportunity to demonstrate the affirmative defense in such challenges. Such an interpretation would limit the scope of the affirmative defense without justification.

**The commission declines to make this change. The commission defines “enforcement action” in 30 TAC §3.2(12) as “{a}n action, initiated by the executive director, seeking an enforcement order.” The commission does not seek penalties in association with a notice of violation, but rather only in the context of an enforcement action where an administrative order is deemed the most appropriate avenue to resolve emissions events and excess opacity events. The amendments do not affect the procedure for owners or operators challenging notices of violation.**

TIP opposed the deletion of the last sentence in the current §101.221(e) because the existing provision makes clear that an emission event is not considered “excessive” if the owner or operator satisfies its burden of proof of demonstrating that the emissions events are not excessive based on the criteria in §101.222(a). The effect of this change is to contravene basic due process principles and gives the

executive director absolute discretion to deprive owners and operators the opportunity to mount the affirmative defense. TIP suggested language to revise, rather than delete, §101.222(e).

**The commission has not made any change in response to this request. The deletion of this language does not deprive owners and operators of the ability to challenge any excessive emissions determinations under §101.222(a). As stated in the commission's adoption of the Subchapter F rules in the September 6, 2002 issue of the *Texas Register* (27 TexReg 8499 and 8524), if an emissions event is excessive, the owner or operator will have an opportunity to challenge the executive director's excessive determination through the enforcement process. HB 2912 did not contemplate a separate appeal process regarding the executive director's decision on whether each emissions event is excessive. Rather, the intent of the addition to the statute was for facilities with excessive emissions events to quickly implement a corrective action plan, independent of any enforcement action the commission might take. The excessive emissions event determination is not a final action of the commission which is appealable to district court, and therefore, owners and operators who disagree with these determinations can seek review with commission staff. Therefore, the commission disagrees that due process principles are violated by these rules.**

The EPA supported the exclusion of claims for failure to take action, record, or report emissions or information about the events or activities required by law from availability of the affirmative defense. The EPA also stated that this exclusion makes clear that excess emissions are subject to deviation reporting under the Title V Operating Permits Program or other requirements to report violations of permit limits or regulations. TIP commented that the commission should not promulgate §101.222(f).

The demonstration criteria themselves implicitly acknowledge that emissions for which a demonstration can be made may involve controls that are not applied as required, such as specified in §101.222(b)(2) and (6). Along with the other demonstration criteria, these criteria provide a more than adequate basis for a determination to be made whether a particular failure to apply controls as required is subject to an affirmative defense. TIP further commented that owners and operators are required by regulations and permits to take certain actions, including maintaining emissions below applicable emission limits. The demonstration criteria allow for an individualized assessment of whether a failure to do so is subject to a defense against liability, and that it simply makes no sense to insert in the rules an ambiguous provision that can be read broadly to render the defense provisions meaningless for large categories of events. BP and TIP supported the deletion of the proposed language in §101.222(f) and allowing the operator to prove that the demonstration criteria in §101.222(a) or (b) apply.

**The commission revised §101.222(f) to provide that §101.222(c) and (e) do not exempt the owner or operator from violations which may be part of the circumstances associated with unauthorized emissions from any scheduled maintenance, startup, or shutdown activity or excess opacity events resulting from scheduled maintenance, startup, or shutdown activities. Furthermore, subsection (f) provides that §101.222(c) and (e) do not exempt the owner or operator from compliance with any subsequent, independent requirement such as deviation or emissions inventory reporting. This eliminates any ambiguity of whether other requirements, such as in other rules and permits, are eligible for any exemption from penalties. The amendments do not affect the owner or operator's opportunity to prove the demonstration criteria in §101.222(a) or (b).**

TIP commented that the current provision simply makes clear that the fact that an event is exempt does not mean it cannot be considered in a future enforcement action as part of an alleged recurring pattern indicative of inadequate design, operation, or maintenance. TIP stated that this provision can be revised without losing this essential point, and recommended revised language in new §101.222(g).

**The commission declines to make the specific change requested by TIP. The amendment specifies that evidence of any past event subject to §101.222(b) - (e) is admissible and relevant to demonstrate a frequent or recurring pattern of events, even if all of the criteria in the applicable subsection are proved. Therefore, even if the demonstration criteria are proven for a past event, the event can still be considered when a determination is made with regard to a frequent or recurring pattern of events.**

BP stated that the commission should clarify that the provision concerning the recurrence of excess emissions events is subject to an affirmative defense. Specifically, BP stated that the rules should clarify that a recurring event is one that involves the same equipment and the same cause. Because complex mechanical equipment can fail for a variety of reasons, BP stated that it is unreasonable to label failures as “recurring” solely based on the equipment involved.

**The commission disagrees that such clarification is necessary and thus declines to make a change in response to this comment. The commission agrees that events should not be judged as recurring solely on the fact that a given emission unit has experienced numerous events without**

**regard as to the reasons why or causes of the individual events. The commission agrees that a fair assessment must be based on the merits of the individual facts of each case.**

Blackburn Carter stated that it is unfair to provide extra emissions which clearly exceed individual permit allowances when emissions from maintenance, startup, and shutdown activities can be easily ascertained at the time of permit issuance. Blackburn Carter also stated that existing rules and exemptions allow individual sources to exceed permit limits. Maintenance, startup, and shutdown emissions should not be described as part of the excess emissions rule, and should be included in permit applications for individual sources. 379 individuals stated that it makes no difference if stringent limits are included in Texas' air permits if industry is allowed to exceed those limits with impunity.

**The rules in Subchapter F do not provide authorization for any "extra emissions," i.e., those which are in excess of permitted emissions. The commission agrees that it is preferable that maintenance emissions which are sufficiently frequent, quantifiable, and predictable, be included in permits for individual facilities or sources. This rulemaking provides that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the owner or operator demonstrates it meets the applicable criteria. The commission finds that if the owners and operators prove the criteria in §101.222(c)(1) - (9), the emissions from the scheduled maintenance, startup, or shutdown activity are at a level below which certain permits are not required, as provided by Texas Health and Safety Code, §382.05101. The criteria in subsection (c)(1) - (9) set strict requirements for operating the control equipment and sufficiently provide for**

**the protection of public health and welfare. However, because not all scheduled maintenance, startup, and shutdown emissions are authorized by a permit or permit by rule, and therefore no control technology or health and property protectiveness review has been performed, the commission is specifying in these rules the criteria which must be met to protect air quality as much as possible. The rules encourage minimization of the emissions such that there will be protection of public health and property. Furthermore, maintenance, startup, and shutdown activities which are part of a recurring pattern indicative of inadequate design, operation, or maintenance would not meet the demonstration criteria in §101.222(c)(3) and (e)(3).**

ExxonMobil, TAB, and TCC stated that changes should not be made to parts of the rules affecting maintenance, startup, and shutdown emissions. Maintenance, startup, and shutdown emissions that are not authorized by §101.211, are considered emissions events, and are only exempt if they meet the rigid demonstration requirements under §101.222(b) and are not determined to be excessive emissions events under §101.222(a). ExxonMobil, TAB, and TCC stated that the elimination of the exemption option under Subchapter F would not provide the necessary options under the remaining alternatives unless/until greater opportunity is provided under Chapter 116. LP commented that unless and until the commission establishes an avenue to authorize valid scheduled maintenance, startup, and shutdown activities under Chapters 106 or 116 or another means, the commission should not extinguish the important legal protection now afforded scheduled maintenance, startup, and shutdown activities.

**This purpose of this rulemaking is to obtain federal approval of the emission events rules as part of the Texas SIP, addressing the issue of whether Texas' current rules provide an automatic**

**exemption from all enforcement. As stated in the proposal preamble (July 25, 2003 issue of the *Texas Register* (28 TexReg 5787)), the commission has never considered that applicable emissions and opacity limits are automatically suspended during emissions events or maintenance, startup, or shutdown activities. Rather, the commission historically exercised discretion in the method of addressing those exceedances when the regulated entity demonstrated it met the criteria for the event. Therefore, the rules did not provide an authorization mechanism for those emissions if criteria were met. The amendments specify that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the applicable criteria are proven. Authorization of these emissions from these events and activities is beyond the scope of this rulemaking, and the emissions authorization options currently available are not affected by this rulemaking action.**

V&E suggested specific language for §101.222(b) - (e), which would provide that the applicable emissions are “allowable” if the owner or operator proves to the satisfaction of the executive director that all of the criteria are met.

**The commission declines to make these changes. Texas Health and Safety Code, Chapter 382, Subchapter C, requires that the commission find that best available control technology will be utilized and that public health and property will be protected before air contaminant emissions are authorized, unless authorized under a permit by rule as insignificant or are *de minimis*. Emissions events are, by definition in §101.1, unplanned or unanticipated occurrences or excursions of a**

**process or operation that result in unauthorized emissions. Therefore, no such best available control technology analysis or protectiveness review can be made in advance for non-excessive emissions events. Although this determination can be made for scheduled maintenance, startup, and shutdown activities, it is beyond the scope of this rulemaking. The purpose of this rulemaking action is not to prescribe when such emissions can be authorized, but rather to specify that certain emissions events and excess opacity events are subject to an affirmative defense and that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the owner or operator proves the applicable criteria. The commission finds that if the owners and operators prove the criteria in subsection (c)(1) - (9), the emissions from the scheduled maintenance, startup, or shutdown activity are at a level below which certain permits are not required, as provided by Texas Health and Safety Code, §382.05101. The criteria in subsection (c)(1) - (9) set strict requirements for operating the control equipment and sufficiently provide for the protection of public health and welfare. The commission therefore finds that permitting activities which meet all of the demonstration criteria would not provide greater air quality benefits. Finally, it is not necessary to specify that the executive director must be satisfied if the criteria are met by the owner or operator, because it is the responsibility of the regulated entity to prove the demonstration criteria.**

BP expressed concern that the rules will have significant implications in the commission's evaluation of emissions events. In particular, necessary and responsible startup, shutdown, and maintenance activities should retain protective status rather than being converted to presumptive violations. BP

stated that the commission should provide legal alternatives for emissions from necessary maintenance, startup, and shutdown operations prior to removing the existing legal protections in the commission's general rules. ExxonMobil, TAB, and TCC stated that facilities must be able to conduct necessary maintenance, startup, and shutdown operations with reasonable assurance that they will not be in violation if they follow specific guidance for emission control.

**As stated earlier, the commission's long-standing practice of using its enforcement discretion is now specified in the rule. Specifically, the rules provide that certain emissions events and excess opacity events are subject to an affirmative defense and that emissions and opacity events resulting from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits or meet opacity limits set by commission rule unless the applicable criteria are proven. The demonstration criteria that must be proved are not changed by these amendments, and thus there is no significant change in the commission's evaluation of emissions events. Since 1972, maintenance, startup, and shutdown activities have had no protected status, i.e., authorization, under the rules. The commission expects necessary maintenance, startup, and shutdown activities to meet the criteria in §101.222(c) and (e) to avoid the requirement for a permit or meet the regulatory opacity requirements, as applicable. If the criteria are met, the commission is confident that the emissions were minimized and there are no adverse impacts on public health and property.**

ExxonMobil, TAB, and TCC stated that the commission should not change the parts of the rules affecting emissions events. All emission events are subject to being classified as excessive under

§101.222(a), and if so classified, can no longer meet the criteria for exemption. This addresses the EPA concern that the rule provide an automatic exemption for emission events.

**The commenters have commingled the independent requirements of excessive determination under §101.222(a), and when the affirmative defense under subsections (b) and (d) is applicable. If the executive director determines under §101.222(a) that emission events are excessive, the owner or operator must take corrective action to reduce the emissions. This is an independent requirement designed to obtain reductions in emissions as quickly as possible. Each emission event remains subject to the regular enforcement process, i.e., each event may be part of an enforcement action. For emissions which are not excessive, the owner or operator must meet the criteria for enforcement not to be pursued as to penalties.**

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

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

**§§101.221 - 101.223**

**STATUTORY AUTHORITY**

The amendments are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air; §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions except as authorized by commission rule or order; §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria for determining when emissions events are excessive and to require

facilities to take action to reduce emissions from excessive emissions events; §382.05101, concerning *De Minimis* Air Contaminants, which authorizes the commission to develop by rule the criteria to establish a *de minimis* level of air contaminants for which a permit is not required; and §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions of air contaminants except as authorized by commission by rule or order.

**§101.221. Operational Requirements.**

(a) All pollution emission capture equipment and abatement equipment shall be maintained in good working order and operated properly during facility operations. Emission capture and abatement equipment shall be considered to be in good working order and operated properly when operated in a manner such that each facility is operating within authorized emission limitations.

(b) Smoke generators and other devices used for training inspectors in the evaluation of visible emissions at a training school approved by the commission are not required to meet the allowable emission levels set by the rules and regulations, but must be located and operated such that a nuisance is not created at any time.

(c) Equipment, machines, devices, flues, and/or contrivances built or installed to be used at a domestic residence for domestic use are not required to meet the allowable emission levels set by the rules and regulations unless specifically required by a particular regulation.

(d) Sources emitting air contaminants which cannot be controlled or reduced due to a lack of technological knowledge may be exempt from the applicable rules and regulations when so determined and ordered by the commission. The commission may specify limitations and conditions as to the operation of such exempt sources. The commission will not exempt sources from complying with any federal requirements.

(e) The owner or operator of a facility has the burden of proof to demonstrate that the criteria identified in §101.222(a) and (b) of this title (relating to Demonstrations) for emissions events, or in §101.222(c) of this title for scheduled maintenance, startup, or shutdown activities are satisfied for each occurrence of unauthorized emissions. The owner or operator of a facility has the burden of proof to demonstrate that the criteria identified in §101.222(d) of this title for excess opacity events, or in §101.222(e) of this title for excess opacity events resulting from scheduled maintenance, startup, or shutdown activities are satisfied for each excess opacity event.

(f) This section does not limit the commission's power to require corrective action as necessary to minimize emissions, or to order any action indicated by the circumstances to control a condition of air pollution.

(g) This section expires on June 30, 2005.

**§101.222. Demonstrations.**

(a) Excessive emissions event determinations. The executive director shall determine when emissions events are excessive. To determine whether an emissions event or emissions events are excessive, the executive director will evaluate emissions events using the following criteria:

- (1) the frequency of the facility's emissions events;
- (2) the cause of the emissions event;
- (3) the quantity and impact on human health or the environment of the emissions event;
- (4) the duration of the emissions event;
- (5) the percentage of a facility's total annual operating hours during which emissions events occur; and
- (6) the need for startup, shutdown, and maintenance activities.

(b) Non-excessive emissions events. Emissions events that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these events, other

than claims for administrative technical orders and actions for injunctive relief, and for which the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements);

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

(3) the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided, and could not have been avoided by good design, operation, and maintenance practices;

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

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded;

(6) the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized;

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

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

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

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

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

(c) Scheduled maintenance, startup, or shutdown activity. Emissions from a scheduled maintenance, startup, or shutdown activity are required to be included in a permit under Texas Health and Safety Code, §382.0518 or §382.0519, a standard permit under §382.05195, or a permit by rule under §382.05196 unless the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements);

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

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

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

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

(6) the frequency and duration of operation in a scheduled maintenance, startup, or shutdown mode resulting in unauthorized emissions were minimized;

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

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

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

(d) Excess opacity events. Excess opacity events that are subject to §101.201(e) of this title, or for other opacity events where there was no emissions event, are subject to an affirmative defense to all claims in enforcement actions for these events, other than claims for administrative technical orders and actions for injunctive relief, and for which the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.201 of this title;

(2) the opacity did not stem from any activity or event that could have been foreseen and avoided, and could not have been avoided by good design, operation, and maintenance practices;

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

(4) prompt action was taken to achieve compliance once the operator knew or should have known that applicable opacity limitations were being exceeded;

(5) the amount and duration of the opacity event and any bypass of pollution control equipment were minimized;

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

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

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

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

(e) Opacity events resulting from scheduled maintenance, startup, or shutdown activity.

Excess opacity events, or other opacity events where there was no emissions event, that result from a scheduled maintenance, startup, or shutdown activity are subject to the opacity requirements of §111.111(a) of this title (relating to Requirements for Specified Sources) unless the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.211 of this title;

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

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

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

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

(6) the frequency and duration of operation in a scheduled maintenance, startup, or shutdown mode resulting in opacity were minimized;

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

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

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

(f) Subsections (c) and (e) of this section do not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to a scheduled maintenance, startup, or shutdown activity, including complying with any federal permitting requirements.

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

(h) This section expires on June 30, 2005.

**§101.223. Actions to Reduce Excessive Emissions.**

(a) The executive director will provide written notification to an owner or operator of a facility upon determination that a facility has had one or more excessive emissions events. The written notification shall contain, at a minimum, a description of the emissions events that were determined to be excessive and the time period when those excessive emissions events were evaluated. Upon receipt of this notice, the owner or operator of the facility must take action to reduce emissions and shall either file a corrective action plan (CAP) or, if the emissions are sufficiently frequent, quantifiable, and predictable, in which case the owner or operator may file a letter of intent to obtain authorization from the commission for emissions from such events, in lieu of a CAP.

(1) When a CAP is required, the owner or operator must submit a CAP to the commission office for the region in which the facility is located within 60 days after receiving notification from the executive director that a facility has had one or more excessive emissions events. The 60-day period may be extended once for up to 15 days by the executive director. The CAP shall, at a minimum:

(A) identify the cause or causes of each excessive emissions event including all contributing factors that led to each emissions event;

(B) specify the control devices or other measures that are reasonably designed to prevent or minimize similar emissions events in the future;

(C) identify operational changes the owner or operator will take to prevent or minimize similar emissions events in the future; and

(D) specify time frames within which the owner or operator will implement the components of the CAP.

(2) An owner or operator must obtain commission approval of a CAP no later than 120 days after the commission receives the first CAP submission from an owner or operator. If not disapproved within 45 days after initial filing, the CAP shall be deemed approved. The owner or operator of a facility must respond completely and adequately, as determined by the executive director, to all written requests for information concerning its CAP within 15 days after the date of such requests, or by any other deadline specified in writing. An owner or operator of a facility may request written approval of a CAP, in which case the commission shall take final written action to approve or disapprove the plan within 120 days from the receipt of such request. Once approved, the owner or operator must implement the CAP in accordance with the approved schedule. The implementation schedule is enforceable by the commission. The commission may require the owner or operator to

revise a CAP if the commission finds the plan, after implementation begins, to be inadequate to prevent or minimize emissions or emissions events. If the CAP is disapproved, or determined to be inadequate to prevent or minimize excessive emissions events, the executive director shall identify deficiencies in the CAP and state the reasons for disapproval of the CAP in a letter to the owner or operator. If the commission finds a CAP inadequate to prevent or minimize excessive emissions events after implementation begins, an owner or operator must file an amended CAP within 60 days after written notification by the executive director.

(3) If the emissions from excessive emissions events are sufficiently frequent, quantifiable, and predictable, and an owner or operator of a facility elects to file a letter of intent to obtain authorization from the commission for the emissions from excessive emissions events, the owner or operator must file such letter within 30 days of the notification that a facility has had one or more excessive emissions events. If the commission denies the requested authorization, the owner or operator of a facility shall file a CAP in accordance with paragraph (1) of this subsection within 45 days after receiving notice of the commission denial.

(A) If the intended authorization is a permit, the owner or operator must file a permit application with the executive director within 120 days after the filing of the letter of intent. The owner or operator of a facility must respond completely and adequately, as determined by the executive director, to all written requests for information concerning its permit application within 15 days after the date of such requests, or by any other deadline specified in writing.

(B) If the intended authorization is a permit by rule or standard permit, the owner or operator must obtain authorization within 120 days after filing of the letter of intent.

(b) The executive director, after a review of the excessive emissions events determinations made at a site as defined in §101.1 of this title (relating to Definitions), may forward these determinations to the commission requesting that it issue an order finding that the site has chronic excessive emissions events. Orders issued by the commission under this section shall be part of the entity's compliance history as provided in Chapter 60 of this title (relating to Compliance History). The commission may issue an order finding that a site has chronic excessive emissions events after considering the following factors:

- (1) the size, nature, and complexity of the site operations;
- (2) the frequency of emissions events at the site; and
- (3) the reason or reasons for excessive emissions event determinations at that site.

(c) If an emissions event recurs because an owner or operator fails to take corrective action as required and within the time specified by a CAP approved by the commission, the emissions event is excessive and the affirmative defenses in §101.222 of this title (relating to Demonstrations) do not apply.

(d) Nothing in this section shall limit the commission's ability to bring enforcement actions for violations of the Texas Clean Air Act or rules promulgated thereunder, including enforcement actions to require actions to reduce emissions from excessive emissions events.

(e) This section expires on June 30, 2005.