

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§101.1, 101.201, 101.211, and 101.221 - 101.223. Sections 101.1, 101.201, 101.211, 101.221, and 101.222 are adopted *with changes* to the proposed text as published in the July 15, 2005, issue of the *Texas Register* (30 TexReg 4090). Section 101.223 is adopted *without change* to the proposed text and will not be republished.

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The rules concerning emissions events and maintenance, startup, and shutdown activities were required by House Bill (HB) 2912, §5.01 and §18.14, 77th Legislature, 2001 and HB 2129, §1, 79th Legislature, 2005. Rules implementing HB 2912 were adopted in 2002. Chapter 101, Subchapter F, Division 3 was amended in December 2003, and one of the amendments was inclusion of an expiration date of June 30, 2005, for §§101.221 - 101.223, in anticipation that these rules might require further consideration and revisions. In a subsequent rulemaking effective June 23, 2005, the commission extended the expiration date of June 30, 2005, to January 15, 2006, unless the commission submitted a revised version of §§101.221 - 101.223 to the EPA for review and approval into the SIP. Upon submittal of the revisions to the EPA, these sections would expire on June 30, 2006. This rulemaking action removes the expiration clause; modifies and adds definitions and revises the notification and reporting requirements for emissions events and scheduled maintenance, startup, and shutdown activities; adds the concepts of unplanned and planned maintenance, startup, and shutdown activities;

and provides for an affirmative defense for certain emissions from planned maintenance, startup, and shutdown activities, which would be phased out according to a prescribed permit application schedule, and replaced by enforcement discretion until there is final action on the permit. The adopted rulemaking would also incorporate applicable statutory changes in HB 2129, §1, 79th Legislature, 2005, including adopting the definition of “Regulated entity” to incorporate statutory requirements of HB 2129.

In development of this adopted rulemaking, the commission sought comment from stakeholders at meetings held between March 4, 2005, and April 1, 2005. Numerous oral comments were received at seven stakeholder meetings and written comments were accepted through April 6, 2005. All comments were considered and evaluated by commission staff. These adopted revisions implement many of the concepts from the comments received. Some comments are best able to be addressed through operational changes and currently many of these changes are underway. For example, the commission is currently modifying the electronic reporting system to implement several changes including allowing for a single incident report for emissions events covering multiple facilities. Other revisions were suggested that are beyond the scope of the commission’s authority and have not been adopted.

The commission’s Annual Enforcement Report, which can be found at <http://www.tceq.state.tx.us/compliance/enforcement/reports/AER/annenfreport.html>, includes information about trends in excess emissions from both emissions events and maintenance, startup, and shutdown activities. Significant reductions in reported emissions have been observed over the past three fiscal years (FYs), for example, in the Amarillo, Beaumont, Corpus Christi, Houston, and

Midland Regions. Between FY 2003 and FY 2005, the total quantities of reported emissions were reduced by 94% in the Amarillo Region, 68% in the Midland Region, 62% in the Beaumont Region, 76% in the Houston Region, and 39% in the Corpus Christi Region. This data indicates that these rules have resulted in the reduction of unauthorized emissions. In addition to implementing legislation, these rules are adopted to provide additional incentive for further reductions by phasing out the affirmative defense for certain emissions.

SECTION BY SECTION DISCUSSION

General Administrative Rule Language Changes

The commission adopts changing the word “which” to “that” and the word “shall” to “must” in numerous locations in the rule language to conform to the drafting standard in the *Texas Legislative Council Drafting Manual*, November 2004.

The commission adopts spelling out acronyms the first time they are used in a section and deleting acronyms that are used only once in a section. The commission also adopts replacing the words “site” or “facility” with “regulated entity” in numerous sections to comply with HB 2129. Additionally, some text is revised to recognize that emissions events would now be contained within one report instead of a report for each facility.

SUBCHAPTER A, DEFINITIONS

The adopted amendment to §101.1, concerning Definitions, adds the definitions of “Agency established facility identification number,” “Boiler,” “Combustion turbines,” “Excess opacity event,” “Regulated

entity,” and “Unplanned maintenance, startup, or shutdown activity.” The definition of “Agency established facility identification number” is to be used only for purposes of Chapter 101, Subchapter F. An agency established facility identification number is a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that is required to report an emission inventory, and is applicable to each facility at that regulated entity. The definition of “Boiler” in 30 TAC Chapter 117 is duplicated in these general definitions since the term is used in multiple state air regulations. The definition of “Stationary gas turbine” is also duplicated in the general definitions and renamed in Chapter 101 as “Combustion turbine” since the term is also used in multiple state air regulations. The term “Excess opacity event” is adopted to be defined so that it is clear what is meant by an excess opacity event. Adopted §101.1(86) defines “Regulated entity” as all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flow lines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation. These changes were required by HB 2129. The commission adopts the new definition of unplanned maintenance, startup, or shutdown activity in §101.1(109). Activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ) or with excess opacity would be one of two types. The first type of unplanned maintenance, startup, or shutdown activity is a startup or shutdown activity that is not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit. The second type of unplanned activity is a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that

requires immediate corrective action to minimize or avoid an upset or malfunction. This is consistent with EPA guidance, which provides that scheduled maintenance is a predictable event, that can be scheduled at the discretion of the operator, and can be coordinated with maintenance and, therefore, can be permitted. Examples of activities that would be considered to be planned would include plant turnarounds, scheduled plant outages, and preventative maintenance such as routine replacement of facility parts that are regular and quantifiable. Planned activities are the type that can be authorized by a permit, standard permit, or permit by rule. Evidence of predictability could include whether procedures and/or personnel assignments exist well in advance of the event.

Adopted §101.1(25), renumbered as §101.1(28), amends the definition of “Emissions event” to clarify that any upset event or unscheduled maintenance, startup, or shutdown activity from a common cause is considered one event. In addition, the unauthorized emissions from the event can also result from one or multiple emission points at a regulated entity.

Adopted §101.1(68), renumbered as §101.1(72), amends the definition of “Non-reportable emissions event” to no longer simply state that non-reportable emissions events are those that are not reportable emissions events, but to more clearly define them as any emissions event in a 24-hour period that does not result in an unauthorized emission equal to or in excess of an RQ.

Adopted §101.1(83), renumbered as §101.1(88), amends the definition of “Reportable emissions event” to clarify it is any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the RQ as defined in this section.

There are several revisions adopted to the definition of “Reportable quantity (RQ)” in §101.1(84), renumbered as §101.1(89). First, as specified in §101.1(89)(A), when determining if a compound is listed in either 40 Code of Federal Regulation (CFR) Part 302, §302.4 or 40 CFR Part 355, Appendix A, the owner or operator must use either the listed compound name or the Chemical Abstracts Service (CAS) number, whichever is more specific. Although this concept is already widely being followed, specific rule language is needed because some compounds can have multiple names. The compound name used by the owner or operator might not be the exact compound name listed in the two tables, but the CAS number should be the same.

The Texas specific list of compounds found in §101.1(89)(A)(i)(III) has been revised so that the compounds are now listed in alphabetic order. In addition, §101.1(89)(A)(i)(III)(-ff-), would provide for an RQ for “oxides of nitrogen.” The new RQ for oxides of nitrogen combines all of the oxides of nitrogen, including nitrogen oxide and nitrogen dioxide. The RQ is 200 pounds in ozone nonattainment areas, ozone maintenance areas, ozone early action compact areas, Nueces County, and San Patricio County. Nueces and San Patricio Counties are included because design value for that area is close to exceeding the national ambient air quality standard (NAAQS) for ozone. The 200-pound figure is based upon adding the current RQs for nitrogen oxide and nitrogen dioxide together. For all other areas of the state, where ozone levels are not approaching the ozone NAAQS, the RQ is 5,000 pounds.

The commission is also adopting establishment of a statewide specific RQ of 5,000 pounds for certain compounds, all of which are either chlorofluorocarbons (CFC), hydrofluorocarbons (HFC), or

hydrochlorofluorocarbons (HCFC) in items (-q-) - (-ss-). The compounds are neither criteria pollutants nor precursors of ozone, and therefore the 100-pound default for the nonattainment, near nonattainment, maintenance, and early action compact areas should not apply. The following compounds have been added since proposal: pentachlorofluoroethane (CFC-111); 1,1,2,2-tetrachlorodifluoroethane (CFC-112); 1,1,1,2-tetrachlorodifluoroethane (CFC-112a); 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113a); 1,1,1-dichlorotetrafluoroethane (CFC-114a); 1-chloro-1,1,2,2-tetrafluoroethane (HCFC-124a); and 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea). All of these compounds are either a CFC, HCFC, or an HFC.

In adopted §101.1(89)(A)(ii), the proposed revision to establish a default RQ of 5,000 pounds for air contaminants when there is not a listed RQ and the regulated entity is not located within nonattainment areas, near-nonattainment areas, maintenance areas, and early action compact areas was not adopted, and the default RQ remains at 100 pounds.

In adopted §101.1(89)(B)(iv), the RQ for natural gas is revised, such that it is clear that carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen are excluded from the composition of the natural gas when determining if an RQ has been exceeded.

In adopted §101.1(89)(C), the proposed language concerning opacity only reporting for boilers and combustion turbines that are fueled by gaseous fuels other than natural gas (are allowed to report only opacity), provided that the fuel being burned does not contain hazardous air pollutants or highly reactive volatile organic compounds at more than 0.02% by weight, was not adopted. The commission

added language noting that the terms “boilers” and “combustion turbines” are now defined in §101.1(6) and (14).

The adopted amendment to §101.1(86), renumbered as §101.1(91), clarifies that the emissions from a scheduled maintenance, startup, or shutdown activity will be considered as part of the activity if they do not exceed the estimates in the notification by more than an RQ. The term “facility” is replaced with “regulated entity.” These changes were required by HB 2129. Additionally, the phrase “whether performing or otherwise affected by the activity,” was added to clarify that if the actions of another regulated entity actions caused a regulated entity the need to conduct a maintenance, startup, or shutdown activity, then that activity would be considered part of this definition.

The commission adopts the amendment to §101.1(87) that deletes the definition of “Site” in order to incorporate the definition of “Regulated entity” to comply with applicable statutory provisions of HB 2129.

The commission also adopts the amendment to §101.1(105), renumbered as §101.1(110), the definition of “Upset event.” The amendment replaces the phrase “or unanticipated occurrence” with “and unavoidable breakdown.” This clarifies that upset events are those that are beyond the control of the operator. A sentence has been added to the definition of “Upset event” due to changes in the structure of §101.222(b). Section 101.222(b) previously covered emissions events, but will now only cover upset events. This change is important to make clear that a certain set of events that begin as maintenance, startup, or shutdown events are still covered by §101.222(b). These events are instances

where a maintenance, startup, shutdown or activity is reported prior to its beginning and the emissions are estimated, but the emissions exceed the estimate by more than an RQ due to an upset condition. These types of events have historically been covered by §101.222(b) and this change ensures that they are still covered under this subsection. This change tailors the events that are of the type that will meet EPA's criteria for an affirmative defense. EPA allows an affirmative defense for malfunctions that are sudden, unavoidable, and unpredictable in nature. Essentially, an affirmative defense is allowed for true emergency-type upset events, which are determined on a case-by-case basis. An example might be a release from a pressure relief valve due to an unplanned and unpredicted pressure surge in a pipeline carrying natural gas or liquids or unanticipated and unpredicted damage or breaks to a pipeline facility. The remaining definitions in §101.1 are renumbered accordingly.

Subchapter F: Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities

Division 1: Emissions Events

Section 101.201 - Emissions Event Reporting and Recordkeeping Requirements

The commission adopts the requirements for reporting to local air pollution control agencies with jurisdiction to §101.201(a)(1)(B) to clarify that local air pollution agencies should receive initial notifications and final reports.

The commission adopts the amendment to §101.201(a)(2) to clarify that owners and operators of regulated entities, except for boilers or combustion turbines, are required to report emissions events for each emissions point with unauthorized emissions that exceed an RQ. The revised definition of

“Emissions event” could cause confusion about whether emissions from each facility involved in a reportable emissions event should be included in the notification and report.

References to “notification,” “initial notification,” and “24-hour notification” have been revised to read “initial 24-hour notification” in §101.201(a)(2) and (2)(H), (3), and (4), (c), (e), and (g).

The commission adopts the amendment to §101.201(a)(2)(B) and (3)(B) to provide new language that requires identification of the commission Regulated Entity Number (RN) of the regulated entity experiencing an emissions event. If the regulated entity does not have an RN, then the air account number will be identified. Now that the commission has changed to a Central Registry system, the air account number is no longer the primary identifier of the regulated entity. The RN is necessary to report incidents via the agency’s electronic reporting system. If the regulated entity does not have an RN or air account number, the location of a release and a contact telephone number in notifications and final reports must be reported. Accordingly, §101.201(a)(2)(C) and (3)(C) is deleted, since this information is required by §101.201(b)(1)(C) for final reports and is sufficient information regarding location. Subsequent subparagraphs are relettered accordingly in §101.201(a)(2) and (3).

The commission adopts the deletion of the word “event” in §101.201(a)(2)(E) to ensure that the duration of the actual emissions is reported.

The commission adopts the deletion of the language requiring the reporting of authorized emissions limits and if applicable, the estimated opacity and the authorized opacity limit in §101.201(a)(2)(H), relettered as subparagraph (G).

The commission adopts the addition of the term “best known” and “at the time of the notification” to existing §101.201(a)(2)(I), relettered as subparagraph (H), and to existing §101.201(a)(3)(D), relettered as subparagraph (C). This revision clarifies that the cause of the emissions event is based on best available information at the time of the notification.

The commission adopts the amendment to §101.201(a)(3) to clarify that owners and operators of boilers and combustion turbines are required to report emissions events for each emissions point with emissions that exceed an RQ. The revised definition of “Emissions event” could cause confusion about whether emissions from each facility involved in a reportable emissions event should be included in the notification and report.

The commission adopts the amendment to §101.201(a)(3)(E), relettered as subparagraph (D), to remove the requirement to report the facility identification numbers or emission point numbers.

The commission adopts the deletion of the “event” in §101.201(a)(3)(F) to ensure that the duration of the actual emissions is reported.

The commission adopts the amendment to §101.201(a)(3)(I) to delete the provision to report the authorized opacity limit in the initial notification. Opacity is not an emission, and therefore not necessary for evaluation of impacts. The subsequent subparagraphs of §101.201(a)(3) are relettered accordingly.

The commission deletes §101.201(a)(4), moving the language to §101.201(f). Section 101.201(a)(5) is renumbered as §101.201(a)(4).

The commission adopts the amendment to §101.201(b) to delete the phrase, “such records shall identify.”

The commission adopts the amendment to §101.201(b) to separate subsection (b) into two paragraphs, subsection (b)(1) and (2). The commission adopts the amendment to §101.201(b)(1) to outline the provisions required in final records of reportable emissions events. The existing paragraphs in §101.201(b) are relettered as subparagraphs (A) - (L).

The commission adopts the amendment to §101.201(b)(1)(B) and (2)(B) to provide new language that requires identification of the commission RN of the regulated entity experiencing an emissions event. If the regulated entity does not have an RN, then the air account number will be identified. Now that the commission has changed to a Central Registry system, the air account number is no longer the primary identifier of the regulated entity. The RN is necessary to report incidents via the agency’s electronic reporting system. If the regulated entity does not have an RN or air account number, the

location of a release and a contact telephone number in prior notifications and final reports must be reported.

The commission adopts the deletion of the word “event” in §101.201(b)(1)(F) to ensure that the duration of the actual emissions is reported.

The commission adopts the amendment to §101.201(b)(7), renumbered as subsection (b)(1)(G), to require the reporting of air contaminants by emissions point, rather than by facility. This was in response to comments that emissions should be reported and evaluated in total from the entire event, as opposed to reporting the emissions contributed by each facility experiencing the emissions event. However, it is necessary that the commission evaluate the potential excessive impact by facility to meet the statutory requirement.

Adopted §101.201(b)(7), renumbered as subsection (b)(1)(G), provides language that requires the reporting of air contaminants from all emissions points involved in the emissions event, and allows reporting of air contaminants in the final report that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period without speciation, instead these compounds or mixtures of air contaminants may be identified together as “other.” This provision addresses concerns expressed at the stakeholder meetings that it is difficult and unnecessary to speciate and report very small quantities of chemicals involved in a reportable event.

Adopted §101.201(b)(8), renumbered as subsection (b)(1)(H), is amended to eliminate reporting of the authorized opacity limit and opacity estimate in the final report. The commission adopts a clarification that estimates of emissions for final records must be based on good engineering practice and methods to provide reasonably accurate representations for emissions and opacity. Language has also been added to allow the compounds or mixtures of air contaminants listed as “other” under §101.201(b)(1)(G) to be treated as a group for estimating emissions. The report should only include facilities that have unauthorized emissions. The commission does not require information about facilities involved in the event that do not have unauthorized emissions. The phrase “if any” has been added to clarify that the preconstruction authorization and associated emissions limits is applicable only if those exist and are applicable to emissions from that event. These must only be reported if those emissions were evaluated and included in the authorization. In addition, where the words “experienced,” “incurred,” or “involved” are used in §101.201 and §101.211 regarding reporting of facilities, the commission intends that only those facilities that have unauthorized emissions must be included in the report.

The commission adopts the amendment to §101.201(b)(10), renumbered as §101.201(b)(1)(J), to add the terms “best known” and “at the time of the notification” to clarify that the cause of the emissions event is based on best available information at the time of reporting.

The commission adopts §101.201(b)(2) to outline the provisions required in records of non-reportable emissions events. The commission also adopts the amendment to §101.201(b)(2)(A) - (J) to provide separate provisions for required records for non-reportable emissions events.

The adopted requirements in §101.201(b)(2)(A) - (L) are the same as the language in §101.201(b)(1)(A) - (L).

The commission adopts §101.201(b)(2)(D) to require the reporting of the common name of the process unit or area, the common name and the agency-established facility identification number of the facilities that experienced the emissions event, and the common name and the agency-established emission point numbers where the unauthorized emissions were released to the atmosphere. Section 101.201(b)(2)(D) also provides that owners and operators of those facilities and emission points for which the commission has not established facility identification numbers or emission point numbers are not required to provide the facility identification numbers and emission point numbers in the report, but are required to provide the common name in the report.

The commission adopts the deletion of the word “event” in §101.201(b)(2)(F) to ensure that the duration of the actual emissions is recorded.

The commission adopts §101.201(b)(2)(G) to require the reporting of air contaminants from all emission points involved in the emissions event that are known through common process knowledge or past engineering analysis, except for boilers or combustion turbines, and that were unauthorized. It allows reporting of air contaminants in the final report that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period without speciation, instead these compounds or mixtures of air contaminants may be identified together as “other.” This provision

is intended to address concerns expressed at the stakeholder meetings that it is difficult and unnecessary to speciate and report very small quantities of chemicals involved in a reportable event.

In adopted §101.201(b)(2)(H), the commission requires, for those compounds or mixtures described in §101.201(b)(2)(G), the recording of the estimated total quantities and the authorized emissions limits for those compounds or mixtures, the preconstruction authorization number or rule citation of the standard permit, permit by rule (PBR), or rule governing the regulated entity involved in the emissions event, authorized emissions limits for the facilities involved in the emissions events, except for boilers and combustion turbines which record only the opacity limit and estimated opacity from the event. The report should only include facilities that have unauthorized emissions. The commission does not require information about facilities involved in the event that do not have unauthorized emissions. The phrase “if any” has been added to clarify that the preconstruction authorization and associated emissions limits is applicable only if those exist and are applicable to emissions from that event. These must only be reported if those emissions were evaluated and included in the authorization. In addition, where the words “experienced,” “incurred,” or “involved” are used in §101.201 and §101.211 regarding reporting of facilities, the commission intends that only those facilities which have unauthorized emissions must be included in the report. The commission deleted the requirement that when estimating total quantities and the authorized emissions limits, the methods of estimates for facilities with authorizations should be consistent with the methods used in the applicable permit application, rule, or order of the commission, and that for all other situations, good engineering practice should be utilized. The commission adopts a clarification that estimates of emissions for

records of non-reportable emissions events must be based on good engineering practice and methods to provide reasonably accurate representations for emissions and opacity.

Adopted §101.201(b)(2)(H) allows for the compounds or mixtures of air contaminants listed as “other” under §101.201(b)(2)(G) to be treated as a group for estimating emissions.

The commission adopts §101.201(b)(2)(I) to require the recording of the best known cause of the emissions event at the time of recording.

The commission adopts §101.201(b)(2)(J) to require the recording of the best known cause of the emissions event at the time of recording.

The commission adopts §101.201(b)(2)(K) to require the recording of the actions taken, or being taken, to correct the emissions event and minimize emissions.

The commission adopts §101.201(b)(2)(L) to require the recording of any additional information necessary to evaluate the emissions event.

The commission adopts the addition of the requirement to report to local air pollution control agencies with jurisdiction to §101.201(c) to clarify that local air pollution agencies should receive initial notifications and final reports.

In adopted §101.201(d), the proposed language that allows for the use of gaseous fuels other than natural gas, provided the hazardous air pollutants or highly reactive volatile organic compound content of the fuel does not exceed 0.02% by weight, was not adopted.

The commission adopts the amendment to §101.201(e) to delete duplicative language that is now covered in the definition of “Excess opacity event” in §101.1. The commission adopts the amendment to add reporting to local air pollution control agencies with jurisdiction to §101.201(e) - (g) to clarify that local air pollution agencies should receive initial notifications and final reports.

The commission adopts the amendment to §101.201(e)(2) to add the requirement to identify the commission RN of the regulated entity experiencing an excess opacity event. If the regulated entity does not have an RN, then the air account number will be identified. Now that the commission has changed to a Central Registry system, the air account number is no longer the primary identifier of the regulated entity. The RN is necessary to report incidents via the agency’s electronic reporting system. If the regulated entity does not have an RN or air account number, the location of a release and a contact telephone number in notifications and final reports must be reported.

The commission adopts the amendment to §101.201(e)(8) to change the term “source” to “facilities” to make this reporting requirement consistent with other uses of the term “facility” in the rule as well as the changes of the term “facility” to “regulated entity.”

The commission adopts the amendment to §101.201(e)(9) to add the term “best known” and “at the time of the notification” to clarify that the cause of the excess opacity event is based on the best known information at the time of the notification.

The commission adopts the amendment to §101.201(f) to add language requiring the submittal of a technical analysis of emissions events to the appropriate local air pollution agencies with jurisdiction. In addition, the commission added the requirement, previously in §101.201(a)(4), that the owner or operator of a regulated entity experiencing an emissions event must provide, in writing, additional or more detailed information regarding the emissions event when requested by the executive director or any air pollution control agency with jurisdiction, within the time established in the request.

The commission received input from regulated entities that input of the 24-hour report into the commission’s Web server has caused many personnel and operational problems. To address this concern, the commission has added language to §101.201(g) to allow submittal by facsimile, or electronic mail to meet the 24-hour requirement as long as the same information is input into the commission’s Web server within 48 hours of discovery of the event. This is not meant to be an opportunity to modify information in the report as the first submittal must meet the 24-hour reporting requirements on its own.

The citation for the definition of “small business” in §101.201(g) and (h)(3) is corrected to refer to Texas Water Code, §5.135(g)(2).

The commission adopts the amendment to delete the existing language in §101.201(h) and add language to require annual emissions event reporting by March 31 of each calendar year or as directed by the executive director. The reporting requirement would begin in 2007 to allow for a full year of records following adoption of this rule. This report is required for owners or operators that are subject to reporting under §101.10, Emissions Inventory Requirements, and owners and operators that are not subject to reporting under §101.10 and are located in nonattainment, maintenance, early action compact areas, Nueces County, and San Patricio County, that experience at least one emissions event during the calendar year. For those entities that already submit an emission inventory report, this information would be included in that report. For entities that do not submit an emission inventory report, this report must be submitted electronically except that small businesses may submit by other viable means. Adopted §101.201(h)(1) specifies that the report must include the total number of reportable and the total number of non-reportable emissions events experienced at the regulated entity. Adopted §101.201(h)(2) specifies that the report must include estimated total quantities for all compounds or mixtures of air contaminants, by compound or mixture that were emitted, except for compounds or mixtures that have an RQ greater than or equal to 100 pounds and the amount released is less than one pound in a 24-hour period. The commission added the requirements to report the quantities of emissions based on good engineering practice and methods to provide reasonably accurate representations for emissions. Adopted §101.201(h)(2) does not apply to boilers and combustion turbines referenced in the definition of RQ in §101.1, that must report only the estimated opacities during emissions events and duration of unauthorized opacity.

Division 2: Maintenance, Startup, and Shutdown Activities

Section 101.211 - Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements.

The commission adopts the amendment to §101.211(a) to clarify that actual emissions from maintenance, startup, or shutdown activities that exceed the estimated emissions in the initial notification by more than an RQ are either upsets or unplanned startup, shutdown, or maintenance activities. This change is required by HB 2129. The factor determining whether the event becomes an emissions event or an unplanned startup, shutdown, or maintenance activity will be the cause of the exceedance. If the unanticipated emissions result from a sudden breakdown of equipment that occurs during the scheduled activity the event would be treated as an upset. However, if during a scheduled maintenance activity additional maintenance is required that results in the unanticipated emissions, and that maintenance was unforeseeable and requires immediate corrective action to avoid a malfunction, then the event would be treated as an unplanned maintenance activity. This distinction is made to reflect the changes to §101.222, which provide a different list of demonstration criteria for upsets and for unplanned maintenance, startup, and shutdown activity.

The commission adopts the amendment to §101.211(a) to add “by emissions point” to clarify the RQ applies to each emissions point and to ensure consistency with the requirements for emissions events.

The commission adopts the amendment to §101.211(a) to add “with jurisdiction” to clarify that local air pollution agencies should receive initial notifications and final reports.

The commission adopts the amendment to §101.211(a) to add a reference to §101.1, where excess opacity is defined, and accordingly deletes the reference to §101.201(e) for excess opacity.

The commission adopts §101.211(a) to clarify that for facilities with emissions authorizations, the determination for reporting of emissions must be based on good engineering practice and methods to provide reasonably accurate representations for emissions and opacity.

The commission adopts the amendment to §101.211(a)(1)(B) and (2)(B) and (b)(1)(B) and (2)(B) to add language that requires the identification of the commission RN of the regulated entity experiencing the activity. If the regulated entity does not have an RN, then the air account number will be identified. If the regulated entity does not have an RN or air account number, the location of a release and a contact telephone number in prior notifications and final reports must be reported.

The commission adopts the amendment to §101.211(a)(1)(E) to require the reporting of the expected duration of any maintenance activity. The commission also adopts the amendment to §101.211(a)(1)(G) to clarify that the duration of the emissions from the scheduled maintenance, startup, and shutdown activity must be reported.

The commission adopts the amendment to §101.211(a)(1)(F) to denote that these scheduled maintenance, startup, and shutdown activities are not emissions events, but are emissions activities.

The commission adopts the amendment to §101.211(a)(1)(H) to provide language that requires the reporting of air contaminants by all emissions points involved in the activity, and to allow the reporting of compounds or mixtures of air contaminants in the final report that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period without speciation, instead these compounds or mixtures of air contaminants may be identified together as “other.”

The commission adopts the amendment to §101.211(a)(1)(I) and existing language in subsection (b)(9), renumbered as subsection (b)(1)(I), to add language requiring the reporting of the quantities of emissions by utilizing good engineering practice and methods to provide reasonably accurate representations for emissions and opacity. Language has also been added to allow for the compounds or mixtures of air contaminants listed as “other” under §101.211(a)(1)(H) to be treated as a group for estimating emissions. The report should only include facilities that have unauthorized emissions. The commission does not require information about facilities involved in the activity that do not have unauthorized emissions. The phrase “if any” has been added to clarify that the preconstruction authorization and associated emissions limits is applicable only if those exist and are applicable to emissions from that activity. These must only be reported if those emissions were evaluated and included in the authorization. In addition, where the words “experienced,” “incurred,” or “involved” are used in §101.201 and §101.211 regarding reporting of facilities, the commission intends that only those facilities that have unauthorized emissions must be included in the report.

The commission adopts the amendment to §101.211(a)(2)(F) to require the reporting of the expected duration of any maintenance activity. The commission also adopts the amendment to

§101.211(a)(2)(G) to clarify that the duration of the emissions from the scheduled maintenance, startup, and shutdown activity must be reported.

The commission adopts the amendment to §101.211(a)(2)(H) to specify that the estimated opacity and the authorized opacity limit must be reported for those emissions points for which unauthorized opacity is expected.

The commission adopts the amendment to §101.211(b) to separate subsection (b) into two paragraphs, paragraphs (1) and (2). The commission adopts §101.211(b)(1) to outline provisions regarding final records for regulated entities that are required to notify of scheduled maintenance, startup, or shutdown activities. The existing paragraphs in §101.211(b) are relettered as subparagraphs (A) - (K).

Adopted §101.211(b)(2), renumbered as subsection (b)(1)(B), is amended to provide language that requires identification of the commission RN of the regulated entity experiencing the activity. If the regulated entity does not have an RN or air account number, the location of a release and a contact telephone number in notifications and final reports must be reported.

Adopted §101.211(b)(5), relettered as subsection (b)(1)(E), is amended to add “experienced the emissions activity” and accordingly delete “experienced the emissions event” to denote that the associated scheduled maintenance, startup, and shutdown activities are not emissions events, but are emissions activities.

Adopted §101.211(b)(6), renumbered as subsection (b)(1)(F), is amended to require the reporting of the expected duration of any maintenance activity. The commission also adopts the amendment to §101.211(b)(7), renumbered as subsection (b)(1)(G), to clarify that the duration of the emissions from the scheduled maintenance, startup, and shutdown activity must be reported.

Adopted §101.211(b)(8), renumbered as subsection (b)(1)(H), is amended to provide language that requires the reporting of air contaminants involved in the emissions activity, and to allow for the reporting of air contaminants in the final report that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period without speciation, instead these compounds or mixtures of air contaminants may be identified together as “other.”

The commission adopts the amendment to §101.211(b)(9), relettered as subsection (b)(1)(I), to delete the reference to existing paragraph (8) and to refer to the relettered subparagraph (H). Also, the commission adopts the requirement that good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. Language has also been added to allow the compounds or mixtures of air contaminants listed as “other” under §101.211(b)(8) to be treated as a group for estimating emissions. The report should only include facilities that have unauthorized emissions. The commission does not require information about facilities involved in the activity that do not have unauthorized emissions. The phrase “if any” has been added to clarify that the preconstruction authorization and associated emissions limits is applicable only if those exist and are applicable to emissions from that activity. These must only be reported if those emissions were evaluated and included in the authorization. In addition, where the words “experienced,” “incurred,”

or “involved” are used in §101.201 and §101.211 regarding reporting of facilities, the commission intends that only those facilities that have unauthorized emissions must be included in the report.

The commission adopts §101.211(b)(2) to outline the provisions required in records of non-reportable emissions events. The commission also adopts §101.211(b)(2)(A) - (I) to add provisions regarding final records for facilities that were not required to notify of scheduled maintenance, startup, or shutdown activities. The adopted requirements in §101.211(b)(2)(A) - (I) are the same as the requirements in §101.211(b)(1)(A) - (I).

Adopted §101.211(b)(2)(F) is amended to require the reporting of the expected duration of any maintenance activity. The commission also adopts the amendment to §101.211(b)(2)(G) to clarify that the duration of the emissions from the scheduled maintenance, startup, and shutdown activity must be recorded.

The commission adopts §101.211(b)(2)(H) to require the recording of the compound descriptive type of the individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1, that are known through common process knowledge, past engineering analysis, except for boilers or combustion turbines referenced in the definition of RQ in §101.1, and that were unauthorized. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period may be reported without speciation, instead these compounds or mixtures of air contaminants may be identified together as “other.”

In adopted §101.211(b)(2)(I), the commission added the requirements to record the quantities of emissions determined utilizing good engineering practice and methods to provide reasonably accurate representations for emissions and opacity. The commission adopts the amendment to §101.211(b)(2)(I) to add language to allow for the compounds or mixtures of air contaminants listed as “other” under §101.211(b)(2)(H) to be treated as a group for estimating emissions.

The commission adopts the amendment to add language to §101.211(c) to require that reporting for scheduled maintenance, startup, or shutdown activities must also be reported to the appropriate local air pollution agencies with jurisdiction.

In adopted §101.211(d), the proposed language allowing boilers and combustion turbines equipped with a continuous emission monitoring system using fuels with less than 0.02 % hazardous air pollutants or highly reactive volatile organic compounds, are exempt from creating and submitting final records if the information in the initial notification is the same as in the final report, was not adopted.

The commission adopts the amendment to §101.211(e) to require that a copy of the requested technical plan for a scheduled maintenance, startup, or shutdown activity be sent to the local air pollution agency with jurisdiction.

The commission adopts the amendment to §101.211(f) to require annual reporting of emissions resulting from scheduled maintenance, startup, and shutdown activities by regulated entity. The reporting requirement would begin in 2007 to allow for a full year of records following adoption of this

rule. This report is required for owners or operators that are subject to reporting under §101.10, and owners and operators that are not subject to reporting under §101.10 and are located in nonattainment, maintenance, early action compact areas, Nueces County, and San Patricio County, that experience at least one scheduled maintenance, startup, or shutdown activity during the calendar year. For those entities that already submit an emission inventory report, this information would be included in that report. For entities that do not submit an emission inventory report, this report must be submitted electronically, except that small businesses may submit by other viable means. Adopted §101.201(h)(1) specifies that the report must include the total number of reportable and the total number of non-reportable emissions events experienced at the regulated entity. Adopted §101.201(h)(2) specifies that the report must include estimated total quantities for all compounds or mixtures of air contaminants, by compound or mixture that were emitted for each facility, except for compounds or mixtures that have an RQ greater than or equal to 100 pounds and the amount released is less than one pound in a 24-hour period. The commission added requirements to report the quantities of emissions determined utilizing good engineering practice and methods to provide reasonably accurate representations for emissions. Section 101.201(h)(2) does not apply to boilers and combustion turbines referenced in the definition of RQ in §101.1, that must report only the estimated opacities during emissions events and duration of unauthorized opacity. In addition, the citation for the definition of “small business” in §101.211(f)(3) is corrected to refer to Texas Water Code, §5.135(g)(2).

Division 3: Operational Requirements, Demonstrations, and Actions to Reduce Excessive Emissions

Section 101.221 - Operational Requirements

The adopted amendment to §101.221(d) adds the phrase “including New Source Performance Standards (40 Code of Federal Regulations Part 60) and National Emission Standards for Hazardous Air Pollutants (40 Code of Federal Regulations Parts 61 and 63)” to specify particular federal requirements that also regulate emissions from maintenance, startup, and shutdown activities.

The commission adopted the amendment to §101.221(e) to be a general reference to the demonstration criteria in §101.222 instead of listing each by subsection. This change was needed to reflect some of the changes in §101.222.

The commission adopted the deletion of §101.221(g), which concerned expiration of the section.

Section 101.222 - Demonstrations

The commission adopted several changes to §101.222. The changes, in part, address comments made by EPA regarding approval of these rules as a revision to the SIP. These changes meet EPA’s guidance for when an affirmative defense or enforcement discretion can be used with regard to excess emissions. Specifically, the changes reflect the commission’s incorporation of the new category of unplanned maintenance, startup, and shutdown activities, which is newly defined in §101.1(109) with the existing unscheduled maintenance, startup, and shutdown activities, which is defined in Texas Health and Safety Code (THSC), §382.0216. This distinction is incorporated so that these rules meet EPA’s criteria for an affirmative defense. Under state law, maintenance, startup, and shutdown activities are not unscheduled if the emissions are not at least an RQ of unauthorized emissions, and the activity is reported or recorded, as provided in §101.201 and §101.211. This statutory definition does

not limit these activities to those that are sudden, unavoidable, and unpredictable. In other words, scheduled maintenance, startup, and shutdown activities are determined only with regard to reporting requirements, and not as to whether they are those that could be planned. EPA guidance describes scheduled maintenance as a predictable event that can be scheduled at the discretion of the operator, and that can be made to coincide with maintenance on production equipment. EPA views startup and shutdown of process equipment as part of the normal operation of a source that should be accounted for in the design and implementation of the operating procedure for process and control equipment. Therefore, EPA's view of the applicability of an affirmative defense of what types of maintenance, startup, and shutdown activities is narrowly tailored to apply only to those excess emissions that could not have been prevented through careful planning and design, and when bypassing control equipment is unavoidable to prevent loss of life, personal injury, or severe property damage.

Therefore, these distinctions as to categories of maintenance, startup, and shutdown activities are implemented by the new definition of "Unplanned maintenance, startup, or shutdown activity" and the revision to the definition of "Upset event," as well as changes in §101.222(b) - (e) and (h). First, §101.222(b) provides an affirmative defense for non-excessive upset events, rather than all emissions events. This allows for scheduled maintenance, startup, and shutdown activities that are not unplanned maintenance, startup, and shutdown activities to have an affirmative defense if the demonstration criteria are proven. Similarly, §101.222(c) is revised to provide an affirmative defense for unplanned maintenance, startup, and shutdown activities, rather than for scheduled maintenance, startup, and shutdown activities. Because the commission is distinguishing between scheduled and planned activities, maintenance activities have been retained in §101.222(c), rather than be deleted as was

proposed. Similar changes were made for excess opacity in §101.222(d) and (e). In addition, §101.222(h) provides a phased-out affirmative defense for planned maintenance, startup, and shutdown activities, rather than for only scheduled maintenance. Due to the need for the distinction previously discussed, the commission is distinguishing between scheduled and planned activities, by adding startup and shutdown activities to §101.222(h), rather than be omitted as originally proposed.

EPA's limitations on use of an affirmative defense are addressed by these changes as well as the changes in §101.222(h), and in the addition of subsections (i) and (j). Those subsections address the phase-out of an affirmative defense with specific permit application deadlines, and the subsequent use of the commission's enforcement discretion until final action on the application. Section 101.222(h) - (j) also requires the executive director to process the permit applications as provided for in 30 TAC §116.114. These changes regarding applicability of the affirmative defense do not affect the reporting requirements in §101.201 and §101.211. In addition, as part of the revisions to the State of Texas Environmental Electronic Reporting System (STEERS), discussed later in this preamble, the commission is adding a question to the reporting requirements that will allow the reporter to answer "yes" or "no" as to whether the regulated entity asserts the reported event or activity meets the applicable affirmative defense criteria.

Adopted §101.222(b) is revised to designate that this subsection concerns non-excessive upset events, rather than non-excessive emissions events. A sentence has been added to the definition of "Upset event" due to changes in the structure of §101.222(b). Section 101.222(b) had previously covered all emission events, but will now only cover upset events. Upset events are, by definition, a subset of

emissions events. Due to this change, it was important to make clear that a certain set of events that are initially reported as maintenance, startup, or shutdown activities are still covered by §101.222(b). These events are instances where a maintenance, startup, or shutdown activity is reported prior to the beginning of activity and the emissions are estimated, but the emissions exceed the estimated amount by more than an RQ due to an upset-type condition. These types of events have historically been covered by §101.222(b) and this change is meant to ensure that they are still covered under that subsection.

The commission adopted the amendment to §101.222(b)(1) to clarify when the commission will initiate enforcement for failure to report and for the underlying emissions event itself. The amendment also provides that subsection (b) does not apply for minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report. Upon adoption, the commission deleted the words "of a facility" to clarify that these reports are not on a facility by facility basis.

The adopted amendment to §101.222(b)(2) adds the term "unavoidable" for consistency with EPA's affirmative defense criteria. This criteria was also added to §101.222(d)(2).

The adopted amendment to §101.222(b)(3) does not include the proposed reasonableness standard for determining this criteria. The amendment revises the criteria to add that the unauthorized emissions did not stem from any activity or event that could have not only been foreseen and avoided, but also planned for. The adopted amendment also changes the criteria of "could not have been avoided by

good design, operation, and maintenance practices” to “could not have been avoided by better operation and maintenance practices or by technically feasible design consistent with good engineering practice.”

Adopted §101.222(b)(5) is amended to add the requirement that any necessary repairs must be made as expeditiously as practicable. Section 101.222(b)(6) is amended to add the requirement that all possible steps are taken to minimize the impact of the unauthorized emissions on ambient air quality.

The adopted amendment to §101.222(c) changes the applicability of this subsection from scheduled startup and shutdown activities to unplanned maintenance, startup, and shutdown activities. The amendment also deletes language that provides that emissions from scheduled maintenance, startup, and shutdown activities are required to be included in certain permits unless the owner or operator proves the criteria in subsection (c)(1) - (9). The adopted language provides that an affirmative defense is available for all claims in enforcement actions for these emissions, other than claims for administrative technical orders and actions for injunctive relief, if the owner or operator proves that the emissions were from an unplanned activity and also proves the criteria listed in subsection (c)(1) - (9). As required by §101.222(f), the affirmative defense applies only to the emissions from these activities, and does not apply to subsequent or independent obligations, such as recordkeeping or reporting.

Adopted §101.222(c)(1), (d)(1), and (e)(1) is amended by adding language that provides that failure to report information that does not impair the commission’s ability to review the activity or event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim

the affirmative defense unless the owner or operator knowingly or intentionally falsified the information in the report. Section 101.222(c)(1) and (e)(1) require that for scheduled maintenance, startup, and shutdown activities, the owner or operator must demonstrate compliance with §101.211. Additionally, §101.222(c)(1) and (e)(1) has been modified to reflect the fact that unscheduled maintenance, startup, and shutdown activities are now covered under subsections (c) and (e) instead of subsections (b) and (e). By definition, maintenance, startup, or shutdown emissions that are not reported prior to their occurrence are considered unscheduled, and therefore are emissions events. Therefore, because these are a type of unplanned maintenance, startup, and shutdown activities, the appropriate criteria for an affirmative defense are those in §101.222(c), rather than those in §101.222(b). Unscheduled maintenance, startup, and shutdown activities must be reported as emissions events as required by §101.201. In addition, if the owner or operator wants to assert an affirmative defense, the owner or operator must demonstrate not only that the notification requirements of §101.201 were complied with, but also that reporting required under §101.211(a) was not reasonably possible, as well as the remaining criteria in §101.222(c)(2) - (9).

The commission adopted the amendment to §101.222(c)(2), (3), (4), (6), and (8) that replaces “any scheduled maintenance, startup, or shutdown activity” with “any unplanned maintenance, startup, or shutdown activity” to ensure consistency with the new applicability of subsection (c).

The commission adopted the amendment to §101.222(c)(6) that adds the requirement that all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality.

The commission amended the applicability of adopted §101.222(d) to excess opacity events as those due to an upset, rather than applying to all excess opacity events. The commission also adopted §101.222(d)(2), which adds a demonstration criteria that requires that the opacity was caused by a sudden, unavoidable breakdown of equipment of process beyond the control of the owner or operator.

The adopted amendment to §101.222(d)(2), renumbered as subsection (d)(3), does not include the proposed reasonableness standard for determining this criteria. The amendment revises the criteria to add that the unauthorized emissions did not stem from any activity or event that could have not only been foreseen and avoided, but also planned for. The adopted amendment also changes the criteria of “could not have been avoided by good design, operation, and maintenance practices” to “could not have been avoided by better operation and maintenance practices or by technically feasible design consistent with good engineering practice.”

Section 101.222(d)(4), renumbered as subsection (d)(5), is amended to add the requirement that any necessary repairs be made as expeditiously as practicable. Section 101.222(d)(5), renumbered as subsection (d)(6), is amended to add the requirement that all possible steps are taken to minimize the impact of the unauthorized emissions on ambient air quality. The remaining paragraphs in subsection (d) are relettered accordingly.

The adopted amendment to §101.222(e) changes the applicability of this subsection from opacity events resulting from scheduled startup, and shutdown activities to opacity events resulting from unplanned maintenance, startup, and shutdown activities. The adopted amendment to §101.222(e) also deletes the

language that provides that emissions from scheduled maintenance, startup, and shutdown activities are required to meet the requirements of §111.111(a), unless the owner or operator proves the criteria in subsection (e)(1) - (9). The adopted language provides that an affirmative defense is available for all claims in enforcement actions for certain emissions, other than claims for administrative technical orders and actions for injunctive relief, if the owner or operator proves that the excess opacity resulted from an unplanned maintenance, startup, or shutdown activity and also proves the criteria listed in subsection (e)(1) - (9). As required by §101.222(f), the affirmative defense applies only to the emissions from these activities, and does not apply to subsequent or independent obligations, such as recordkeeping or reporting. The adopted amendment to §101.222(e) also removes references to maintenance emissions, which is addressed in §101.222(h).

The adopted amendment to §101.222(f) provides that §101.222(b) - (e) and (h) does not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to an emissions event or a maintenance, startup, or shutdown activity. To comply with EPA policy, subsection (f) is also amended to provide that the affirmative defense is available only for emissions that are reported or recorded. Those entities that are not required by §101.201 and §101.211 to record or report unauthorized emissions may voluntarily comply with the recording requirements of those sections to ensure the availability of the affirmative defense.

The adopted amendment to §101.222(h) revises the applicability of this subsection to maintenance, startup, and shutdown activities that are not unplanned. As previously discussed in this preamble, the commission is adopting a definition of unplanned maintenance, startup, and shutdown activity.

The commission intends to begin allowing authorization of emissions from these types of activities according to the schedule in §101.222(h)(1)(A) - (F). This new schedule, which provides for a seven-year application period depending on the type of facility, replaces the proposed schedule which had provided the affirmative defense be phased out as permits come in for renewal, amendment, or issuance, or in two years for facilities authorized through other mechanisms such as PBRs, standard permits, standard exemptions, and special exemptions. For facilities in major group Standard Industrial Classification (SIC) code 28 (Chemicals and Allied Products), except SIC code 2895, the affirmative defense will expire in two years from the deadline for filing an application. For all other facilities, the affirmative defense will expire one year from the deadline for filing an application. The affirmative defense will continue to apply to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the criteria in §101.222(c)(1) - (9). Opacity events resulting from maintenance activities are also included in §101.222(h) and will be treated in the same way as emissions from planned maintenance, startup, and shutdown activities, subject to meeting the criteria in §101.222(e)(1) - (9). Chapter 101 does not authorize emissions, and therefore the permitting schedule does not authorize emissions from planned maintenance, startup, and shutdown emissions. However, concurrent with this adoption, the commission is proposing rules regarding a variety of options to address concerns about obtaining authorization for historically excess emissions.

Specifically, the schedule for phase out of the affirmative defense in subsection (i) is tied to the schedule for submitting applications. The application submittal schedule is a tiered schedule, tied to certain SIC codes. The first deadline, one year after the effective date of this section, is for facilities in

SIC code 2911 (Petroleum Refining). The second deadline, two years after the effective date of this section, is for facilities in major group SIC code 28 (Chemicals and Allied Products), except SIC code 2895. The deadline for facilities in SIC code 2895 (Carbon Black), is four years after the effective date of this section. The deadline for facilities in SIC code 4911 (Electric Services), is five years after the effective date of this section. The next deadline for facilities in SIC codes 1311 (Crude Petroleum and Natural Gas), 1321 (Natural Gas Liquids), 4612 (Crude Petroleum Pipelines), 4613 (Refined Petroleum Pipelines), 4922 (Natural Gas Transmission), and 4923 (Natural Gas Transmission and Distribution), is six years after the effective date of this section. For all other facilities, the deadline for filing an application is seven years after the effective date of this section.

In addition, adopted §101.222(h)(2) requires, that in addition to meeting the application deadline, the owner or operator must provide prompt responses to the executive director's requests for information regarding an application filed according to the schedule in subsection (h)(1)(A) - (F).

Finally, the adopted amendment to §101.222(h) deletes the current language providing an expiration date for the section.

The commission adopts §101.222(i) to provide the schedule for the phase out of the affirmative defense in §101.222(h). It will expire upon the earlier of one year after the application deadlines in subsection (h)(1)(A) and (C) - (F), or the issuance or denial of a permit applied for under subsection (h)(1)(A) and (C) - (F), or voidance of an application filed under subsection (h)(1)(A) and (C) - (F). The affirmative defense in subsection (h) will expire upon the earlier of two years after the application deadline in

subsection (h)(1)(B) or the issuance or denial of a permit applied for under subsection (h)(1)(B), or avoidance of an application filed under subsection (h)(1)(B). If the permit application remains pending after the affirmative defense expires, the commission will use enforcement discretion for all claims in enforcement actions brought for excess emissions from planned maintenance, startup, or shutdown activities, other than claims for administrative technical orders and actions for injunctive relief for which the owner or operator proves the criteria in the applicable §101.222(c) and (e), until the issuance or denial of a permit applied for under subsection (h)(1), or avoidance of an application filed under subsection (h)(1).

The commission adopts §101.222(j), which provides that the executive director shall process permit applications referenced in subsection (h) in accordance with the schedule set out in §116.114, Application Review Schedule.

Section 101.223 - Actions to Reduce Excessive Emissions

The adopted amendment to §101.223(a)(1) adds the requirement to submit a corrective action plan to the local air pollution agency with jurisdiction to clarify that local air pollution agencies should receive the corrective action plan.

The commission adopted the deletion of §101.223(e), which concerned expiration of the section.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule." The adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments revise the notification and reporting requirements and demonstration criteria for emissions events and scheduled maintenance, startup, and shutdown activities. The adopted rulemaking adds the concepts of unplanned and planned maintenance, startup, and shutdown activities. The adopted rulemaking also provides for an affirmative defense for certain emissions from upset events and unplanned maintenance, startup, and shutdown activities, including excess opacity associated with upset events and unplanned maintenance, startup, and shutdown activities. The adopted rulemaking also revises some of the demonstration criteria for qualifying for an affirmative defense. The adopted rulemaking provides that the affirmative defense for planned maintenance, startup, and shutdown activities would be phased out according to a prescribed permit application schedule, and replaced by enforcement discretion until there is final action on the permit. The adopted rulemaking modifies and adds definitions, and also implements HB 2129, §1. The adopted amendments 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.

In addition, 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. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the commission, but is authorized by specific sections of the THSC and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble. Therefore, this rulemaking 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.

The commission did not receive any public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the adopted amendments. The specific purpose of this rulemaking is to revise the notification and reporting requirements and demonstration criteria for emissions events and scheduled maintenance, startup, and shutdown activities; add the concepts of unplanned and planned maintenance, startup, and shutdown activities; and provide for an

affirmative defense for certain emissions from upset events and unplanned maintenance, startup, and shutdown activities, including excess opacity associated with upset events and unplanned maintenance, startup, and shutdown activities. The adopted rulemaking also revises some of the demonstration criteria for qualifying for an affirmative defense. The adopted rulemaking provides that the affirmative defense for planned maintenance, startup, and shutdown activities would be phased out according to a prescribed permit application schedule, and replaced by enforcement discretion until there is final action on the permit. The adopted rulemaking modifies and adds definitions, and also implements HB 2129, §1. Promulgation and enforcement of the adopted amendments would 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 that restricts or limits an owner's right to the property that would 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 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 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 101.201 - 101.223 are applicable requirements under 30 TAC Chapter 122, Federal Operating Permits Program. Upon the effective date of this rulemaking, owners or operators subject to the Federal Operating Permit Program will be required to certify compliance with amended §§101.201 - 101.223.

PUBLIC COMMENT

Public hearings for this rulemaking were held August 2, 2005, in Austin; August 3, 2005, in Arlington, August 4, 2005, in Houston; August 5, 2005, in Corpus Christi; and August 8, 2005, in Midland. The comment period ended August 8, 2005. Written comments were received from 548 individuals, State Representative Scott Hochberg, Arkema, The Association of Electric Companies of

Texas, Inc. (AECT), Baker Botts L.L.P., on behalf of the Texas Industry Project (TIP), Baker Petrolite Corporation (BPC), BASF FINA Petrochemicals (BASF), Calpine Corporation (Calpine), Devon Energy Corp. (Devon), Dow Chemical Corporation (Dow), Duke Energy Field Services (Duke), DuPont Fluoroproducts (DuPont), Environmental Integrity Project (EIP), on behalf of Galveston-Houston Association for Smog Prevention (GHASP), Community In-Power and Development Association (CIDA), Public Citizen's Texas Office, Citizens for Environmental Justice (CEJ), Texas Public Interest Research Group, Blue Skies Alliance (BSA), ExxonMobil Downstream and Chemical (ExxonMobil Downstream), ExxonMobil Production, Harris County Public Health & Environmental Services (HCPHES), Industry Professionals for Clean Air (IPCA), Kinder Morgan Energy Partners (Kinder Morgan), the Lower Colorado River Authority (LCRA), Mothers for Clean Air (MCA), Occidental Permian LTD (Occidental), Public Citizen, Pure Resources (Pure), Sierra Club - Lone Star Chapter (Sierra Lone Star), Sierra Club - Houston Region (Sierra Houston), Texas Chemical Council (TCC), Texas Oil and Gas Association (TxOGA), Texas Pipeline Association (TPA), TOTAL Petrochemicals USA, Inc. (TOTAL), and EPA. Oral comments were presented by the National Refinery Reform Campaign (NRRC), CEJ, Texas Public Citizen, Seed Coalition (SEED), CIDA (Hilton Kelly), CIDA (Tashika Miles), Sierra Lone Star, BSA, Sierra Houston Club, GHASP, MCA, and two individuals. 546 individuals submitted letters that stated the commission should require that routine predictable emissions be subject to permitting, no routine or predictable emissions should qualify for an exemption or defense to penalties, and all excess emissions should be promptly reported.

BASF, Dow, Duke, Kinder Morgan, ExxonMobil Production, and Arkema endorsed the comments submitted by TIP. Arkema and ExxonMobil Downstream endorsed the comments submitted by TCC.

Devon, Duke, Kinder Morgan, and ExxonMobil Production endorsed the comments submitted by TxOGA. Duke and Kinder Morgan endorsed the comments submitted by the TPA.

MCA commented that it supports the commission's efforts to reduce excess emissions resulting from malfunctions (or upsets), maintenance, startups, and shutdowns, however, more significant changes must be made to the rules for them to result in the improvement of Houston's air quality necessary to meet federal standards to protect human health.

RESPONSE

The commission appreciates the support. However, these rules only address the actions based on receiving reports of unauthorized emissions stemming from emissions events and maintenance, startup, and shutdown activities. Although these rules have provisions for requiring corrective action plans, authorizations, and other measures, the improvement and protection of air quality is attained through a number of measures, including permitting, SIPs, monitoring, and compliance investigations.

GENERAL COMMENTS

TIP, TCC, ExxonMobil Downstream, and EIP commented that they appreciate the commission's efforts to improve episodic emissions reporting requirements, but recommend improvements. TxOGA asked the commission to withdraw this rulemaking and republish in a manner that will allow the commission to fully address the issues surrounding emission events and scheduled maintenance,

startup, and shutdown activities. TxOGA urged the commission to reissue the proposed rules to carry out the letter and intent of HB 2129

RESPONSE

The commission appreciates the support, and specific suggestions are addressed later in this preamble. The commission declines to withdraw this rulemaking. The commission is committed to timely submitting the rules to EPA as a revision to the SIP so that there is no gap in the opportunity to claim an affirmative defense for certain unauthorized emissions. Two sets of stakeholder meetings were held throughout the state prior to the commission's proposed rules were published for comment. Those concerns are addressed by these rules and operational changes which implement the rules. In addition, concurrent with this adoption, the commission is proposing rules regarding a variety of options to address concerns about obtaining authorization for historically excess emissions.

Duke applauds the commission for the proposed changes that are consistent with the spirit of HB 2129, commenting that these changes focus on the environmental benefits instead of reporting format.

RESPONSE

The commission appreciates the support.

EIP commented that the commission should ensure that these rules meet all Federal Clean Air Act (FCAA), EPA, and legislative requirements, and that they provide an effective framework for reducing excess emissions to the maximum extent possible.

RESPONSE

These rules provide an incentive for owners and operators to seek authorization for a significant portion of emissions that are currently unauthorized, allowing for the orderly transition of planned maintenance, startup, and shutdown emissions from a vast number of facilities to become authorized. The transition schedule will allow time for a meaningful review of permit applications. These rules meet the applicable legal requirements and have been revised to ensure approval by EPA as a revision to the SIP.

EPA requested that the commission confirm that it interprets all unauthorized emissions above allowable limitations in permits, rules, and orders a subject to §122.145(2), regarding deviation reporting for sources subject to the commission's Federal Operating Permit Program.

RESPONSE

The commission agrees that owners and operators of facilities that are subject to the Federal Operating Permit Program with unauthorized emissions are subject to deviation reporting.

EIP commented that regulation of excess emissions is essential because a significant quantity of unpermitted air pollutants are released as a result of emissions events and scheduled maintenance,

startup, and shutdown activity. Forty-three individuals requested that the commission abide by the following basic principles when regulating upsets, specifically that all routine or predictable emissions should be subject to all permitting requirements; no routine or predictable emissions should qualify for an exemption from or defense to penalties; large or repeat emitters should automatically face enforcement action; and all excess emissions should be promptly reported. Several individuals voiced concerns regarding air pollution and adverse health effects and others urged the commission to hold regulated entities accountable for all emission episodes. These commenters also suggested that the proposed rules illegally allow emissions from so-called “upsets” to escape punishment. MCA commented that the commission needs to provide a stronger incentive for companies to make significant reductions in predictable excess emissions.

RESPONSE

These rules provide an incentive for owners and operators to seek authorization for a significant portion of emissions that are currently unauthorized, allowing for the orderly transition of planned maintenance, startup, and shutdown emissions from a vast number of facilities to become authorized. The transition schedule will allow time for a meaningful review of permit applications. The rules do not limit the commission’s authority to obtain corrective action and seek injunctive relief. 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. Sections 101.201(h) and 101.211(f) require additional reporting by certain owners or operators of facilities to submit annual emissions event and maintenance, startup, and shutdown activity emissions reporting to ensure more accountability for excess emissions. No specific changes were made to the rules in response to these comments.

BSA, Public Citizen, and Sierra Lone Star commented that some upsets go beyond the effects screening levels (ESLs), and therefore the ESLs should be enforceable standards so that the commission will take enforcement action against a facility emitting air contaminants at levels that harm public health.

RESPONSE

This comment is beyond the scope of this rulemaking. However, as a general response to the comment, ESLs, while not enforceable standards, are used to establish permit limits that are enforceable standards. If an ambient level of a chemical exceeds its ESL, it is highly likely that the permit limit for that chemical was also exceeded. Therefore, enforcement can be taken on that exceedance of the permit limit once a full investigation has been completed. No changes were made to the rules in response to this comment.

BSA, Public Citizen, and Sierra Lone Star commented that modeling for the SIP should include air contaminants from emissions events and maintenance, startup, and shutdown activities, and this is particularly true for modeling for the Dallas-Fort Worth (DFW) SIP. BSA also expressed concern regarding how permit limits, particularly those with 30-day rolling average limits, are included in the

SIP modeling when a huge spike of ozone precursor emissions is an upset, but is not a permit violation.

RESPONSE

Photochemical modeling for the Texas SIP revisions incorporates the reported emissions inventories that include all authorized and unauthorized emissions. In addition, hourly special inventories were developed for the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) SIP attainment modeling demonstrations, providing hourly emissions quantifications and chemical speciation for all deviations from normal operations, including emissions from emissions events and maintenance, startup, and shutdown activities. Additionally, the predecessor of the Comprehensive Compliance Enforcement Database System (CCEDS) was queried for emissions events and added to the hourly inventory if such emissions were not already captured by the hourly special inventory. Future modeling is expected to take advantage of the emissions events data from CCEDS {see Section 3.5.1.1, "Base Case Point Source Modeling Inventory Development" and Appendix D, "Point Source Modeling Inventory Development," of the HGB December 2004 SIP revision for additional information on the special inventories}. Other special inventories may be prepared for the Texas Air Quality Field Study II that is currently taking place (Spring 2005 - October 2006.)

Because of the magnitude and nature of the industries in the DFW area, emission events in the DFW area are not expected to play a role in the majority of high ozone events in the area. However, emissions variability from major oxides of nitrogen sources undoubtedly play a role in

determining the ozone concentrations seen across East Texas, including downwind areas of DFW.

The 30-day rolling average permit limits are applied only to those sources that demonstrate a high level of variability in their load or emissions. For those sources, instead of permitting a high hourly emission limit that the source can comply with under all circumstances, it is preferable for the source to comply with a permit rate that is substantially lower when averaged over a 30-day rolling period. One way the commission addressed this variability is through the use of the Acid Rain Program Database in SIP modeling. These data provide hourly emissions from all large electric generating units in Texas and elsewhere. In addition, the commission has recently undertaken a study of variability in cement kiln emissions and expects to use the results of this study in future modeling applications. No changes were made to the rules in response to this comment.

BSA stated that the commission's scheduling of the rulemaking hearing on a weekday morning was at a time which is not available for most citizens to attend. The commission should start incorporating time for citizen involvement because citizens have the biggest burden to make sure the law is enforced, because the commission and EPA cannot do all of the enforcement.

RESPONSE

With regard to this rule project, due to the schedule, time constraints, and availability and access to appropriate facilities, the commission had limited opportunity to schedule hearings in the evening. The commission strives to give all citizens of Texas appropriate prior notification and several opportunities to comment, including the ability to submit written comments.

EPA requested confirmation that the commission included all emissions from startup, shutdown, maintenance, and malfunction periods when determining compliance with emission limitations in SIP-approved permits, rules, and orders.

RESPONSE

The commission responds that all emissions events and maintenance, startup, and shutdown activities are subject to review for determinations of compliance with all permits, rules, and orders.

An individual commented that an inspection should be conducted after a plant is constructed to make sure that it is meeting its permit requirements.

RESPONSE

The commission responds that in most situations compliance testing is required after startup following the issuance of a permit. Regulated entities are subject to periodic compliance investigations on an ongoing basis.

EIP commented that recent regulatory and operational experience confirms that significant emission reductions are feasible when operators have the proper incentives to deploy the most effective control technology and operating procedures. California's tighter controls on flares and flaring already have resulted in a 75% reduction in flare emissions of volatile organic compounds. Similarly, the proceedings of the Episodic Emissions Reduction Initiative reflect discussions among federal and state

regulators, and industry, on effective ways to control {i.e., predict, monitor, and reduce – episodic emissions}. To enforce these rules, the commission should require video monitoring of flares and data logging of other pertinent data to ensure that emissions events and smoking flares are being accurately reported.

RESPONSE

The commission responds that the commenter’s suggestion to require video monitoring and data logging on flares is beyond the scope of this rulemaking. In addition, there is currently no available video monitoring technology that would allow long-term continuous direct monitoring and quantification of emissions from flares by any practical means. Therefore, direct determination of emissions from flares by video monitoring to verify the occurrence of excess emissions is not possible, and video indicating an increase in flare activity by itself does not necessarily indicate that there are excess emissions or that an emission event has occurred. Also, the commission does not currently accept video monitoring as a method of demonstrating compliance with the visible emission limitations for flares specified in 40 CFR §60.18(c)(1). There are technical and practical issues associated with the suggested monitoring approach that call into question the feasibility and enforceability of implementing video monitoring requirements for flares. No changes were made to the rules in response to this comment.

An individual commented that input flow streams to gas plants should be continuously monitored to ensure that the streams do not exceed designed capacity. Vent streams to any vent stack should be

monitored. These results should be reported to the commission, with deviations resulting in punitive action.

BSA commented that the commission simply isn't able to investigate enough, as demonstrated by the reduction in notices of violation that were issued from 2000 to 2004. There has been a decrease in both budget and staffing, therefore, it is imperative that records be available for the public to review. Sierra Lone Star commented that better field investigation and enforcement of excess emissions that harm the public is necessary in a number of regions. Public Citizen commented that there is lack of enforcement for emissions events, and that the legislature's intent was to get these emissions under control. CIDA supports more enforcement.

RESPONSE

The commission acknowledges that increased review is necessary and has made adjustments to the investigation protocol to ensure a timely and consistent review of all emissions events. No changes were made to the rules in response to this comment.

BSA, Public Citizen, and Sierra Lone Star commented that the commission should fine companies that illegally pollute and ensure that penalties are substantial enough that violators are not profiting from pollution. Otherwise, the compliant companies are at a competitive disadvantage. The commission should levy mandatory fines so that enforcement penalties are easily calculated and collected and require supplemental environmental projects to directly benefit the communities affected by the

associated violations. CEJ commented that companies are not fined for upsets, or, fines are so small that the companies benefit from polluting.

Several individuals commented that fines should be levied regardless of the reason emissions are released and all so called accidental releases should be investigated thoroughly and action taken to keep it from reoccurring; with a second offense, fines should double or be great enough to clean up the air either through emissions reduction or through controls and purification technology; the commission represents the safety of Texans and is responsible for holding entities accountable for their actions/emissions; community service or other donation to society is appropriate to compensate for excess emissions; fines should be based on percentage of gross income; even inadvertent violations should have accountability; no industrial emissions should be allowed to poison the atmosphere; incidents should not go uninvestigated; unenforceable laws are worthless and provide no motivation to change if there is no fear of penalty; economic teeth are needed to ensure monetary gains from evading regulations are offset; stricter, aggressive, and immediate controls are necessary; and the results are what counts.

RESPONSE

No changes were made in response to these comments. These comments are beyond the scope of this rulemaking because these rules do not generally address the enforcement procedures or penalties.

BSA, Public Citizen, and Sierra Lone Star Club commented that the legislature should allow cities and counties the right to sue the commission and companies if laws are not enforced.

RESPONSE

The commission responds that these comments are beyond the scope of this rulemaking because the commission cannot adopt rules directing legislative action. No changes were made to the rules in response to this comment.

An individual expressed concern about the time it takes to respond to a complaint. The commenter stated that by the time someone comes out, the wind has changed and the odor is gone.

RESPONSE

The commission responds that this comment is beyond the scope of this rulemaking. Complaint investigation procedures are in commission protocols, rather than in rules. No changes were made to the rules in response to this comment.

An individual commented that he was told flaring is not handled by the commission, but it should be because we do not know what kind of contaminants are being put into the air.

RESPONSE

The commission responds that emissions from flares are regulated by the commission. For non-emergency flares, authorization limits the type and amount of emissions allowed. For emergency

only flares, a notification and report of what was emitted is required. No changes were made to the rules in response to this comment.

MCA commented that the commission should make predictable, avoidable emissions in excess of permit limits more expensive in terms of fines and injunctive relief.

RESPONSE

The commission is currently seeking comments from stakeholders regarding future rulemaking for 30 TAC Chapter 75, Administrative Penalties, including six stakeholder meetings. More information may be found at

<http://www.tceq.state.tx.us/compliance/enforcement/stkholder/noticedmpen.html>

BSA, Public Citizen, and Sierra Lone Star commented that the commission should increase monitoring at facilities' fence lines, including additional monitoring for facilities that continually report excess emissions.

RESPONSE

Ambient monitoring of air quality is beyond the scope of this rulemaking. However, the commission conducts mobile monitoring of ambient air quality at facility fence lines and in other areas in response to excess emissions and for other reasons. The commission is also incorporating new monitoring technologies, such as infrared camera technology, to identify and assess emissions.

IPCA commented that the commission can and should do more to encourage or require facility operators to reduce excess emissions by making it more expensive for refineries and petrochemical plants to not do all that they can to reduce harmful emissions released during upsets and scheduled maintenance, startup, and shutdown activities. IPCA cited rules adopted by the Bay Area Air Quality Management District (BAAQMD) that require review of flare operations to develop a flare minimization plan as examples of successful episodic emissions minimization efforts. SEED commented that the commission should tighten the startup and shutdown requirements. CIDA expressed concern regarding the amount of emissions from emissions events and scheduled maintenance, startup, and shutdown activities as compared to emissions from routine operations.

RESPONSE

The commission may consider the recent BAAQMD Regulation 12 as a potential control measure in future eight-hour ozone regional control strategy development; however, the application of flare requirements similar to the BAAQMD rules to Chapter 101, Subchapter F is beyond the scope of this rulemaking. These Chapter 101 rules provide incentives for owners and operators to avoid excess emissions, without prescribing operational methods or controls that may be expensive. Also, application of the BAAQMD flare rules on a statewide basis via Chapter 101, Subchapter F is impractical and would place an extreme burden on industry as well as commission resources. In addition to this burden, the commission does not consider it necessary to apply the BAAQMD rules on a statewide basis. The BAAQMD flare rules only apply to a limited number of flares in California. The BAAQMD Environmental Impact Report (July 8, 2005) indicates that 23 flares located at five petroleum refineries in Contra Costa and Solano

Counties are subject to the BAAQMD flare rules. According to BAAQMD's Staff Report, 1.5 full-time employees were necessary to implement the flare rules for these 23 flares. Assuming equivalent staffing demands, over 50 additional full-time employees would be needed for the commission to implement similar rules for the 782 active flares (as of September 2005) in just the HGB and BPA areas. No changes were made to the rules in response to this comment.

Public Citizen commented that its recent report, "Industrial Pollution: Who Pays the Price?," examines the impact of unpermitted air emissions on human health and evaluates the role of the commission in protecting Texas citizens from emissions events. Specifically, the report discusses data that shows there are health concerns, particularly regarding children, often two to four days after emissions events in certain areas of the state, and many of these emissions are carcinogens and other toxins. CIDA expressed concerns about various illnesses due to emissions in the Port Arthur area. CEJ commented on Public Citizen's report, stating that this provides the information that supports the commission protecting public health. CEJ noted that after big upsets, many people are sick. Therefore, CEJ supports permitting emissions from maintenance, startup, and shutdown.

Public Citizen commented that upset emissions can be up to 37 times permitted hazardous air pollutants, and that startup/shutdown emissions can also exceed permitted amounts. Without permitting these emissions, the commission cannot know how much of the ozone precursors are in the nonattainment and near nonattainment areas. Public Citizen wants to ensure that the commission has an adequate emissions inventory.

Several individuals commented that the emphasis on routine and/or predictable emissions allows exploitable wiggle room for any corporation. Citizens are held accountable for motor vehicle accidents, so entities should be held accountable for their accidents. Poor air quality equates to serious health hazards in Texas. BSA questioned whether the commission had researched the health effects on the surrounding community from upset emissions that are less than 5,000 pounds.

RESPONSE

These rules provide an incentive for owners and operators to seek authorization for a significant portion of emissions that are currently unauthorized, allowing for the orderly transition of planned maintenance, startup, and shutdown emissions from a vast number of facilities to become authorized. The transition schedule will allow time for a meaningful review of permit applications for compliance with the requirements of best available control technology and impacts analysis. The commission determined that there is a high probability that no negative health effects would be expected from the 5,000-pound in a 24-hour period level for oxides of nitrogen in areas other than ozone nonattainment areas, ozone maintenance areas, early action compact areas, Nueces County, and San Patricio County. The proposed default RQ of 5,000 pounds for all non-listed compounds within areas other than nonattainment areas, near-nonattainment areas, early action compact areas, and Nueces and San Patricio Counties is not adopted.

TPA commented that the Texas Railroad Commission (RRC), rather than the commission, has jurisdiction of emissions events associated with pipelines.

RESPONSE

The commission acknowledges that the RRC has jurisdiction regarding pipelines, however, the commission has jurisdiction of air contaminants, and is charged with safeguarding the states's air resources from pollution by controlling or abating air pollution and emissions of air contaminants. Therefore, emissions of air contaminants from pipelines, whether authorized or unauthorized, remain subject to the jurisdiction of the commission. This is discussed in detail in the response to comments regarding the definition of "Regulated entity."

Devon commented that TPA acknowledges that the commission may request information under the FCAA regarding pipeline emissions. However, upon receipt of this information, there is no substantive action the commission may exercise over pipelines because releases from pipelines are from equipment and procedures required under federal Department of Transportation (DOT) rules, and therefore beyond the scope of the commission.

RESPONSE

The commission agrees that it has the authority to require reporting of unauthorized emissions, but disagrees that the commission cannot exercise enforcement authority regarding unauthorized emissions from pipelines. Pipelines are not the only facilities that are subject to other governmental regulation, and therefore the fact that DOT regulates certain pipelines does not affect the commission's jurisdiction with regard to corrective action that may be required to abate air pollution from pipelines or associated facilities. Corrective action required by the commission for unauthorized emissions would not be contrary to RRC or DOT requirements.

The issue of jurisdiction is discussed later in this preamble in response to comments regarding the definition of “Regulated entity.”

TCC and ExxonMobil Downstream commented that reporting and evaluation of emissions from emissions events and maintenance, startup, and shutdown activities with emissions only divided up by the emission point number would be consistent with the authorization process. Evaluation of the emissions event by emission point number rather than facility would make it easier to determine which emissions are above the authorized limits, and therefore unauthorized. TCC, ExxonMobil Downstream, and TxOGA commented that a simple listing of affected facilities without assigning emissions should be sufficient.

RESPONSE

The commission revises §101.201(a)(2) and (3) and (b), and §101.211(a)(1)(H) and (2)(H) to require that unauthorized emissions be reported in total for each emission point, and that the facilities experiencing the emissions event be identified in the report. Other subsections of §101.211 retain the requirement to report by emissions point.

TCC and ExxonMobil Downstream commented that determination of reporting requirements based on the total emissions from the event will likely result in additional emission events and maintenance, startup, and shutdown activities being reported.

RESPONSE

There is no requirement that emissions stemming from a common cause must be reported in total for the regulated entity. The commission revised the rule to require that unauthorized emissions be reported in total for each emission point. The determination of whether emissions are reportable shall be based on the comparison of contaminant levels at the emissions point to the RQ for each of the contaminants. It is unknown whether this revision will result in significantly more emissions event reports. However, the revisions to require emissions events reports by common cause for each regulated entity, as opposed to reports for each facility, will significantly reduce the number of required reports.

TIP, TCC, and ExxonMobil Downstream commented that the entire program should be simplified and based on emissions from the event, the cause of the event, and the corrective action for the event, rather than the potentially numerous facilities that could, without benefit, be tied to the event.

RESPONSE

The commission adopted reductions to the notification, reporting, and recordkeeping requirements in the §101.201 and §101.211. These rules now require that a minimum amount of information be reported that allows the commission to make the initial response evaluation and to make final determinations.

SUBCHAPTER A, DEFINITIONS

TxOGA supports the commission's proposed amendment to §101.1(1) - (87) and proposed no other changes to existing language.

RESPONSE

The commission appreciates the comment.

Sierra Houston commented that it supports the addition of the definition of boiler in §101.1(5).

RESPONSE

The commission appreciates the comment.

Sierra Houston commented that it supports the addition of the definition of combustion turbine in §101.1(13).

RESPONSE

The commission appreciates the comment.

Duke supports the proposed definition of an emissions event in §101.1(27).

RESPONSE

The commission appreciates the comment.

Sierra Houston commented that it does not agree with the proposed definition for excess opacity event in §101.1(31). Sierra Houston commented the excess opacity action level should be changed to 5% instead of 15% above the authorized limit for no more than 15 minutes.

RESPONSE

Opacity is not an emission of air contaminants. Opacity may be, but not always, an indirect indication that unauthorized emissions may be occurring. For example, opacity exceeding 5% of an authorized limit may easily be the result of increased particulate size, and not necessarily an increase in the amount of emissions. Opacity at 15% above an authorized level is a point at which the commission requires notification as there may be potential unauthorized emissions or emissions approaching a potential harmful level. Additionally, owners or operators of facilities should be evaluating these emissions to determine if they are an emissions event and subject to the applicable reporting.

Duke supports the proposed definition of a non-reportable emissions event in §101.1(71).

RESPONSE

The commission appreciates the comment.

Arkema is concerned that the commission has not clarified all of the issues surrounding opacity emissions events, especially concerning visible emissions that are not caused by those visible emissions sources that were the subject of 30 TAC §111.111, such as incomplete fuel combustion (i.e., smoke)

or particulate-emitting process activities (i.e., handling dusty materials). Arkema requested that the commission clarify the definition of “Opacity” in §101.1(72) to directly reference the definition of “smoke” to clarify when an opacity event is reportable and when an opacity event that is not caused by smoke is not reportable to the commission. Relief from the definition is allowed for acid gas flares servicing natural gas sweetening processes.

RESPONSE

The definition of the term “opacity” is simply a statement of what opacity is considered and is consistent with the federal definition of opacity. Also, definitions are not the proper location for exemptions. Any potential exemptions should be provided in the specific chapters or permit. As to the comment of when opacity events are reportable under the emissions event rules, those requirements are provided in §101.201 and §101.211. It should be noted that flares, with the exception of acid gas flares, do not have an opacity limit under §111.111, instead the requirement is concerned with visible emissions. Finally, the commenter could have misinterpreted the visible emission requirements of Chapter 111. Section 111.111 establishes visible emission standards for all sources and is considered an all-exclusive rule, in that §111.111(a)(8) establishes an opacity limit for all other sources that have not already been listed in §111.111(a)(1) - (7), however, permits and other regulations may establish lower limits. The commission made no changes to the definition based on this comment.

TPA commented that pipelines are not facilities, as defined in THSC, §382.003(6), that are subject to the requirement to obtain a permit or other authorization under THSC, Texas Clean Air Act (TCAA),

Chapter 382. TPA suggested that the commission delete the last sentence of the definition of regulated entity in §101.1(85), and add a sentence that states that the term excludes transportation pipelines.

Duke supported the proposed definition of regulated entity. However, the definition does not differentiate between DOT pipelines, which are regulated by the Natural Gas Pipeline Safety Act and other gathering lines, or flow-lines, which this definition is targeting. The distinction would help define where the commission's jurisdiction starts and where it stops.

RESPONSE

The commission appreciates the support, and declines to make the suggested changes to the new definition of regulated entity. The last sentence of this definition is adopted verbatim from new THSC, §382.0215(h), added by HB 2129, 79th Legislature.

The commission regulates facilities, defined as a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered a facility. A stationary source is a non-mobile point of origin of air contaminants, whether privately owned or operated. Therefore, pipelines are facilities. The safety jurisdiction of the RRC extends to all gas pipeline facilities and pipelines used in the intrastate transportation and distribution of crude oil, natural gas, hazardous liquids or carbon dioxide; non-rural gathering lines; and all pipeline facilities originating in Texas waters (three marine leagues and all bay areas), including production and flowlines originating at the well. The safety jurisdiction of DOT covers pipelines used in the interstate transportation and distribution of crude oil, natural gas,

hazardous liquids or carbon dioxide. The commission has jurisdiction over emissions from all types of pipelines, and therefore, there is no basis for making a jurisdictional distinction in this definition.

The commission authorizes construction of facilities for air quality purposes, but has historically not elected to utilize its jurisdiction to permit the actual pipeline, or oil and gas wells, because the construction requirements established by RRC and DOT adequately address best available control technology. However, although both the commission and the RRC have jurisdiction to regulate oil and gas processing and gathering plants, and producing sites, the commission requires these facilities to be authorized to emit air contaminants.

Facilities that must have authorization are usually a cluster of emission points associated with gathering and distribution, such as valves, flanges, non-welded joints, pig-stations, tanks, loading racks, distribution terminals, or compressors. Fugitive emissions from the pipelines to loading racks or storage tanks must also be authorized. There are four basic levels of authorizations for these facilities. First, pipeline isolation valve sites are on the commission's "*De Minimis* Facilities or Sources" list, as provided for in §116.119. Larger stations need to claim one or more PBRs, such as 30 TAC §§106.261, 106.262, or 106.355. If the plant includes a compressor station or storage tank, the owner or operator may claim PBRs (30 TAC §106.352 and/or §106.512); or register the plant using the commission's Oil & Gas standard permit. The largest sites or treatment processing stations must obtain permits, and some may be subject to federal prevention of significant deterioration permits.

Unauthorized emissions from facilities associated with pipelines are subject to the reporting and recording requirements of §101.201 and §101.211. Although the commission is not exercising its jurisdiction to require pipelines to have authorizations, any emissions from pipelines of air contaminants to the atmosphere would be unauthorized and are also subject to the reporting requirements of §101.201 and §101.211.

BSA questioned how an RQ is determined for emissions limits in flexible permits, or with limits that are based on 30-day rolling averages.

RESPONSE

The definition of RQ in §101.1(88) is not dependent upon the type of authorization, or even whether the emission is authorized. The RQ is a threshold for identifying unauthorized emissions that are either subject to recordkeeping only or to reporting requirements.

Arkema, Dow, ExxonMobil Downstream, TCC, and TxOGA requested that the definition of “Reportable quantity” in §101.1(88) not be on a facility basis, but instead be for the total emission from a single event and recommended deleting “for each facility.” Arkema requested that the commission maintain consistency between state and federal RQ definitions whenever possible, and that the word “facility” in §101.1(88) for emission events be changed to “regulated entity.” Dow commented that the proposed revision to the RQ definition in §101.1(88) makes the RQ reporting requirements applicable to facilities instead of regulated entities. Where more than one unit is involved

in an emissions event, this change could, in effect, increase the RQ from the current SIP rule. TxOGA suggested that the commission revise the definition to provide that the RQ is for each emissions event or scheduled maintenance, startup, or shutdown emissions activity. TxOGA commented that the proposal is contrary to the legislative intent, which is to eliminate the counterproductive process of “speciating” emissions events by artificial and problematic allocations of emissions to each facility that is in any way involved in the emissions event. TxOGA also commented that such allocations are subjective at best, require much additional work, and produce no benefit at all. TxOGA suggested that the definition be expanded to make it applicable also to scheduled maintenance, startup, or shutdown emissions activities as referenced in §101.211.

RESPONSE

The commission is required by statute, THSC, TCAA, §382.0216, to evaluate each emissions event to determine if it is excessive. In order to make this determination, evaluation on a facility-by-facility basis is required. Therefore, all facilities contributing or emitting unauthorized emissions subject to this rule must be identified. The commenters’ requested changes were not made. However, the commission made some changes in reporting to allow multiple facilities to be included within a single notification and final report, by regulated entity, where there is a common cause for the emissions event. The commission also revised §101.201 and §101.211 to allow emissions to be reported in total from each emission point that have unauthorized emissions resulting from the common cause, as opposed to separating and identifying emissions to each facility contributing to those emissions. During such an emissions event, some facilities may experience emissions events directly from a cause that is not common to other facilities. In this

situation, there must be separate notification and reporting of these emissions by the common cause, and can be included in a single notification and final report by regulated entity as previously described. Finally, the definition of RQ does not need to be expanded to make it applicable to scheduled maintenance, startup, or shutdown emissions activities as referenced in §101.211. Section 101.211(a) already references to the definition of RQ.

EPA commented that by increasing RQ thresholds in §101.1(88) from the existing SIP rule, the commission will receive less information concerning the number of emission events below the RQ at a given facility. EPA is concerned that this change will increase the number of non-reportable emissions events. Therefore, EPA suggested that the commission establish reporting requirements for non-reportable emission events where the frequency of those emissions events at a given source exceeds a threshold number. Also, EPA would like for the commission to explain how it will make excessive emissions event determinations required by §101.222(b).

RESPONSE

Sections 101.201(h) and 101.211(f) include the requirement for an annual emission event reporting of all emissions events, via annual emission inventory report for major sources and annual electronic reporting for non-major sources. This reporting is sufficient to address EPA's comments. It would be extremely difficult to establish a threshold number for each type of source that is regulated by the commission. Furthermore, the establishment of a single threshold number would not only be technically difficult, but would require a thorough public comment process in order that the threshold would not be perceived as arbitrary. As to how the excessive

emissions event determinations are made, all reported emissions events are reviewed to determine if they are considered excessive. For non-reported emissions events, staff conducts records reviews of Title V deviation reports during investigations, or as needed if it is determined that there is a possible recurring pattern with a specific facility or regulated entity.

TxOGA supported the amendment to §101.1(88)(A) and (B)(iii) and proposed no other changes to the existing language. Arkema, ExxonMobil Downstream, and TCC supported the revisions to the RQ for oxides of nitrogen and the determination based on total oxides of nitrogen. Duke supported the 5,000-pound RQ for oxides of nitrogen as the default RQ in attainment areas. TPA suggested a 5,000-pound RQ for oxides of nitrogen as a statewide threshold, stating that there should be no distinction between attainment and nonattainment areas because there is no similar area distinction for other air contaminant compounds.

RESPONSE

Since oxides of nitrogen emissions significantly contribute to the formation of ozone, the commission determined that in ozone nonattainment areas, ozone maintenance areas, early action compact areas, Nueces County, and San Patricio County the RQ for these contaminants should remain at a lower level than 5,000 pounds. The notification of emissions at a lower RQ level is warranted in areas where releases to the atmosphere that could affect efforts to maintain or achieve attainment with the eight-hour NAAQS for ozone. The 100-pound RQs for nitrogen oxide and for nitrogen dioxide were discontinued, and an RQ is established for oxides of nitrogen. In these geographic areas notifications for planned maintenance, startup, and shutdown activities

with emissions predicted to exceed the 200-pound RQ for oxides of nitrogen should be reported in order that the commission can evaluate the plan and determine if additional measures should be taken to further reduce emissions. Notification and reporting of emissions events in these areas should occur when emissions exceed the 200-pound RQ for oxides of nitrogen in order for the commission to determine if these emissions are excessive or whether they may be subject to an affirmative defense.

EPA commented that §101.1(88)(A)(i)(III)(-p-) allows increases in the RQ for nitrogen oxide from 100 pounds in the nonattainment areas to 200 pounds for oxides of nitrogen. At the same time, §101.1(88)(A)(i)(III)(-p-) also increases the nitrogen oxide's RQ from 100 pounds for the rest of the state to 5,000 pounds. Given the recognized significant role of oxides of nitrogen in the regional control strategy (Chapter 117 rules for East and Central Texas) and the ozone nonattainment areas (Chapter 117 rules for attainment demonstration), EPA is concerned that the increase in the RQ could impact related SIP requirements. EPA requested that the state supplement the public record to adequately address technical and economical justifications for these significant increases in the RQs. EIP and IPCA requested an explanation for this rule change and requested that the RQ for the combined oxides of nitrogen remain 100 pounds.

RESPONSE

The commission clarifies that there was no prior established RQ in these rules for oxides of nitrogen. The 100-pound RQ for nitrogen oxide and the 100-pound RQ for nitrogen dioxide have been deleted and instead an RQ is established at 200 pounds for oxides of nitrogen. This revision

is adopted to reduce the requirements for speciating compounds while continuing to provide the commission with the information necessary to evaluate emissions subject to this rule. In ozone nonattainment areas, ozone maintenance areas, early action compact areas, and in Nueces and San Patricio Counties, the commission requires that notifications and reports be provided for relatively low-level emissions of oxides of nitrogen, specifically those emissions that exceed the 200-pound RQ, in order for the commission to make more immediate determinations in these sensitive air quality areas. The increase in the RQ to 5,000 pounds in certain areas of the state does not negatively affect the commission's regional control strategy and other work to protect air quality because it does not provide for additional emissions of these compounds. The commission also determined that there is a high probability that no negative health effects would be expected at the 5,000-pound in a 24-hour period level. This revision does establish a different level above which emissions must be reported to the commission for immediate evaluation. This reduces the administrative burden on the commission to immediately review relatively low-level emissions, however, emissions not exceeding this RQ must continue to be maintained in records and are subject to commission review for excessive determinations.

Regarding SIP requirements, while emissions variability from major oxides of nitrogen sources plays a role in determining the ozone concentrations experienced across East Texas, unauthorized oxides of nitrogen emissions are not common. For electric generating utilities, the largest oxides of nitrogen sources in attainment counties, the commission uses data from the Acid Rain Program Database to characterize emissions, including variability and events, in SIP modeling. Other special inventories may be prepared for the Texas Air Quality Field Study II that is currently

taking place (Spring 2005 - October 2006). These inventories will help provide data needed for analysis of oxides of nitrogen emissions variability due to routine authorized and unauthorized emissions. Future modeling episodes may well be able to use data from the CCEDS, which contains data on emission events.

EPA and EIP commented that §101.1(88)(A)(i)(III)(-q-) - (-ss-), increases the RQ for several of the CFC, HFC, and HCFCs from the default value of 100 pounds to 5,000 pounds. Despite the changes in the RQs, the environment will continue to experience the impact of such releases. EPA is concerned that the streamlined reporting of excess emissions of these chemicals will increase the number of potential releases of these compounds. EPA acknowledged the commission's statements to the effect that these compounds are not criteria pollutants or do not contribute to the ozone nonattainment problem as the rationale for increasing the RQ for these compounds. However, the state's SIP reporting requirements address a wide range of pollutants that affect human health and the environment, not just criteria pollutants. For example, hydrochloric acid is neither a criteria pollutant, nor is known to contribute to the ozone nonattainment problem; however, excess emissions of this compound could potentially have serious health and environmental impacts. EPA and EIP requested that the state supplement the public record to adequately address technical and economical justifications for the significant increases of the RQs for these CFC, HFC, and HCFCs compounds.

RESPONSE

The establishment of specific RQs for CFC, HFC, and HCFC will not result in additional releases of these compounds. This revision establishes a compound-specific RQ above which emissions

must be reported to the commission for immediate evaluation. This reduces the administrative burden on the regulated community for reporting relatively low levels of emissions, and on the commission for having to immediately review these same emissions. However, emissions not exceeding this RQ must continue to be maintained in records and are subject to commission review for excessive determinations. The CFCs, HCFCs, and HFCs compounds are neither listed on EPA's Comprehensive Environmental Responsibility, Compensation and Liability Act (CERCLA) or Emergency Planning and Community Right-to-Know Act (EPCRA) list, nor are they criteria pollutants or precursors of ozone. The commission determined that there is a high probability that no negative health effects would be expected at the 5,000-pound in a 24-hour period level. Therefore, no revision to the rule has been made based on this comment.

Dow commented that the commission should establish a default RQ of 5,000 pounds, for all contaminants that are CFCs, HFCs, or HCFCs. Arkema, Dow, ExxonMobil Downstream, and TCC agreed with the proposal concerning CFCs, HCFCs, and HFCs, however, Dow urged adoption of a default RQ of 5,000 pounds, for any other CFCs, HFCs, or HCFCs that are not specifically listed in the proposed definition of RQ. Duke and Dupont also support the 5,000-pound RQ for CFCs, HFCs, or HCFCs in all areas. They agreed that these compounds are neither criteria pollutants nor precursors of ozone. Furthermore, Dupont suggested that the commission include the following seven fluorocarbon compounds: pentachlorofluoroethane (CFC-111); 1,1,2,2-tetrachlorodifluoroethane (CFC-112); 1,1,1,2-tetrachlorodifluoroethane (CFC-112a); 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113a); 1,1,1-dichlorotetrafluoroethane (CFC-114a); 1-chloro-1,1,2,2-tetrafluoroethane (HCFC-124a); and 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea).

RESPONSE

The requested revisions have not been incorporated. These types of case-specific compounds need to be reviewed on an individual basis, in order to determine whether there is a toxic problem, the compound is a listed criteria pollutant, or if the compound is already listed on the EPA's CERCLA or EPCRA list. The CFCs, HCFCs, and HFCs compounds listed by Dupont are neither listed on EPA's CERCLA or EPCRA list, nor are they criteria pollutants or precursors of ozone. The commission's Toxicology Section reviewed the toxicity of each compound. Each of the listed compounds are relatively non-toxic such that there was a high probability that no health impact would be expected at the 5,000-pound in a 24-hour period level. Therefore, the following compounds have been added to the definition of RQ in §101.1(89)(A)(i)(III):

pentachlorofluoroethane (CFR-111); 1,1,2,2-tetrachlorodifluoroethane (CFR-112); 1,1,1,2-tetrachlorodifluoroethane (CFC-112a); 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113a); 1,1,1-dichlorotetrafluoroethane (CFC-114a); 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a); and 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea). All of the compounds listed in §101.1(88)(A)(i)(III) have been reorganized into alphabetical order.

EPA commented that §101.1(88)(A)(ii) maintains the default RQ for all other air contaminants when there is not a listed RQ for the nonattainment and the early action compact areas at 100 pounds, but such an RQ for all other areas is increased to 5,000 pounds. EPA commented that this proposed change increases certain RQs from those in the currently approved SIP. EPA requested that the commission supplement the public record to adequately address technical and economical justifications for significant increases of the RQs for these air contaminants. EIP objected to the increase in the

default RQ from 100 pounds to 5,000 pounds for areas other than nonattainment, maintenance, early action compact areas, and Nueces and San Patricio Counties. EIP commented that the commission has not justified such an increase, which will significantly reduce the information being reported to the commission regarding unauthorized emissions. EIP requested consideration of unauthorized emissions; in particular toxic emissions and their local impacts.

RESPONSE

The commission had proposed that the default RQ for non-listed compounds within areas other than nonattainment areas, near-nonattainment areas, early action compact areas, and Nueces and San Patricio Counties could be raised from 100 pounds to 5,000 pounds in a 24-hour period. However, following consideration of comments, and following further review of the proposed change, the commission maintains the default RQ of 100 pounds for those compounds not specifically identified or referenced in the proposed rule.

The development of RQs for currently non-listed compounds might, in many cases, support levels higher than the current default of 100 pounds. However, it is not reasonable for the commission to attempt a comprehensive evaluation for each of the non-listed contaminants and to identify compound-specific RQs. In instances where unlisted compounds are common in use and the development of compound-specific RQs is justified, the commission can do so, such as the RQs adopted in this rulemaking for certain refrigerants.

Dow commented that in §101.1(88)(A)(ii) the commission should establish a default RQ of at least 1,000 pounds, for other volatile organic compounds that are not listed in the federal or state RQ lists, and a default RQ of 5,000 pounds, for other non-volatile organic compounds air contaminants in the nonattainment, early action compact areas, and selected counties in Texas. ExxonMobil Downstream, TCC, and TIP commented that the default RQ values should be raised to 5,000 pounds for all unlisted compounds in all areas of the state. The commission should provide specific lower RQs for any compounds it believes are significant issues and such values are rightly lower for compounds that are potentially significant to the ozone issue, but only in ozone nonattainment areas or near-nonattainment areas.

RESPONSE

The commission had proposed that the default RQ for non-listed compounds within areas other than nonattainment areas, near-nonattainment areas, early action compact areas, and Nueces and San Patricio Counties could be raised from 100 pounds to 5,000 pounds in a 24-hour period. However, following consideration of comments, and following further review of the proposed change, the commission maintains the default RQ of 100 pounds for those compounds not specifically identified or referenced in the rule.

Calpine commented that it supported the proposal to raise the default 100-pound RQ for non-CERCLA/EPCRA pollutants to 5,000 pounds in attainment areas found in §101.1(88)(A)(ii).

However, Calpine commented that the commission should consider raising the default RQ in all other areas for those substances that are not volatile organic compounds or reactive compounds from 100

pounds to 5,000 pounds. Releases of less than 5,000 pounds of non-volatile, non-reactive substances do not represent a risk to the public or environment in ozone nonattainment areas, just as in attainment areas.

RESPONSE

The identification of all currently unlisted compounds that would require a specific RQ to address the air quality status of these areas would be technically challenging and a significant burden.

Therefore, the commission did not change the RQ for unlisted compounds in these areas.

Calpine commented that it is not clear why the commission proposed to include near nonattainment, maintenance, and early action compact areas, as well as Nueces and San Patricio Counties, with nonattainment areas in the definitions section. These areas have not been designated as nonattainment for ozone, and therefore should not be subject to the same restrictions on volatile organic compounds RQs as nonattainment areas.

RESPONSE

The commission did not propose to raise the RQ for volatile organic compounds in these additional areas because they are identified as areas at risk for becoming nonattainment. No change has been made in response to this comment.

TxOGA suggested that §101.1(88)(B)(iv) should be revised to include the terms “the hydrocarbons in” before the phrase “natural gas excluding methane and ethane, or air emissions from crude oil are

known to be in an amount greater than or equal to 5,000 pounds or” and add “the” before “associated hydrogen sulfide and mercaptans” and finally add “are” before “in a total amount greater than 100 pounds, whichever occurs first.” TxOGA commented that these changes would clarify language to exclude carbon dioxide, nitrogen, hydrogen, and water vapor that is consistent with interpretations given by most of the commission’s field inspectors. The clarification is needed because there have been inspectors who said that “natural gas” included carbon dioxide and nitrogen for the purposes of this rule.

RESPONSE

The commission agrees with the commenter’s overall suggestion, however, not in the exact wording suggested by the commenter. Section 101.1(88)(B)(iv) is revised to clarify the language to exclude carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen. All of these compounds were already excluded under the definition of unauthorized emissions.

AECT concurred with the proposed revisions to §101.1(88)(C) in the definition of “Reportable quantity” regarding boilers and combustion turbines in §101.1(88)(C) and requested that the commission retain these provisions. AECT commented that failure to do so would be contrary to legislative intent. Calpine, ExxonMobil Downstream, TCC, and TxOGA supported the commission’s proposal to add "gaseous fuels other than natural gas" to the definition of "Reportable quantity" under §101.1(88)(C). However, TCC commented that the very low threshold values may make this addition of very limited value to most sources. Calpine commented that no limit is needed for the combustion of hazardous air pollutants or highly reactive volatile organic compounds and requested that the

commission provide the basis for the 0.02% limit being carried over from the current restriction on the hazardous air pollutants content of fuel oil. If a scientific basis for such a limit was provided, Calpine suggested that the commission consider adding a provision that if the fuel burned in the boiler or turbine contains 0.02% by weight or more of hazardous air pollutants or highly reactive volatile organic compounds, then only the RQs for those hazardous air pollutants or highly reactive volatile organic compounds should apply during those periods. The use of gaseous fuel with more than 0.02% hazardous air pollutants or highly reactive volatile organic compounds does not necessarily result in higher emissions of oxides of nitrogen, carbon dioxide, or other combustion products. Emissions of those products are not tied to the hazardous air pollutants or highly reactive volatile organic compounds content of the fuel, but rather are dependent on such factors as fuel British Thermal Unit value, unit tuning, unit load, ambient temperature, and combustion temperature. Therefore, only emissions that increase as a result of use of the higher hazardous air pollutants and highly reactive volatile organic compounds fuels should be subject to the RQ and reporting requirements of §101.201 and §101.211.

EIP requested deletion of the exemption in §101.1(88)(C), stating it violates the EPA requirement that all excess emissions be reported promptly and the proposed rule contains no justification. The current rule states that opacity is the only RQ applicable to certain boilers and combustion turbines. The rule, therefore, seems to allow such boilers and turbines to emit unlimited amounts of non-opacity pollutants without exceeding an RQ and triggering reporting requirements. EPA commented that proposed §101.1(88)(C) exempts certain boilers and combustion turbines from reporting requirements for all pollutants except unauthorized opacity releases. EPA requested that the commission provide the basis

for exempting these sources from reporting requirements and explain if the proposed rule allows these sources to assert an affirmative defense to emission events for unreported releases.

RESPONSE

With regard to the request from EPA and request that the commission provide the basis for the 0.02% limit for hazardous air pollutants, the commission originally adopted the rule language found in §101.1(88)(C) in 1997, which has previously been approved by EPA. Justification provided (July 29, 1997, issue of the *Texas Register* (22 TexReg 7040)) stated: “The definition of RQ was further modified for boilers and combustion turbines fueled by natural gas, coal, lignite, wood, or fuel oil containing hazardous air pollutants at concentration of less than 0.02% by weight. The only RQ for these units is opacity which is 15 additional percent above applicable limits. This modification is added in recognition of the fact that boiler and combustion turbine emissions consist primarily of carbon dioxide, nitrogen oxides, water, and small amounts of carbon monoxide and are not acutely harmful if unconfined. The figure of 0.02% by weight is significant because trace contaminants, at this concentration or less, that might be present in used oil fired in boilers and combustion turbines will generally result in emissions below an RQ in the event of an upset.” Therefore, the RQ for boilers and combustion turbines as previously listed has not been deleted as suggested. However, §101.222(f) has been revised in response to this comment and to comply with EPA policy. It provides that the affirmative defense is not available for persons that are not required by §101.201 and §101.211 to record or report unauthorized emissions, unless the owner or operator complies with those sections. It provides that the affirmative defense is available only for emissions that are reported or recorded. Those

entities that are not required by §101.201 and §101.211 to record or report unauthorized emissions may voluntarily comply with the recording requirements of those sections to ensure the availability of the affirmative defense.

As for the revision to the RQ concerning “gaseous fuels other than natural gas, provided the hazardous air pollutants or highly reactive volatile organic compounds content of the fuel does not exceed 0.02% by weight,” this language was not adopted. The language was suggested during one of the stakeholder meetings held before the rule revisions were proposed. It was expected that the supporting scientific basis would be provided by commenters during the comment period. Since no scientific basis for the language was provided by commenters and the commission is concerned that the composition of gaseous fuel could vary greatly, the commission removed the phrase in §101.1(88)(C), “or gaseous fuels other than natural gas, provided the hazardous air pollutants or highly reactive volatile organic compound content of the fuel does not exceed 0.02% by weight,” for the RQ for boilers and combustion turbines.

In response to EPA’s comment regarding affirmative defense, §101.222(d) and (e) is the only affirmative defense section for excess opacity events when there is no emissions event. The emissions from boiler and combustion turbines consist primarily of carbon dioxide, nitrogen oxides, water, and small amounts of carbon monoxide and are not acutely harmful if unconfined. In addition to excess opacity events, when boiler and combustion turbines release these contaminants in quantities in excess of authorized limits, the contaminants are unauthorized and are eligible for the affirmative defense in §101.222(b) and (c).

EPA commented that §101.1(88)(D) should be deleted because it would allow the commission to set RQs outside the public participation process. Furthermore, for some pollutants, especially toxics, the stated criteria allow RQs to be set at too high a level. The current rule includes a provision that allows the commission to set site-specific RQs at facilities monitored by continuous emissions monitoring systems. It is the commenter's understanding that only two companies have ever applied for a site-specific RQ and that both applications were withdrawn.

RESPONSE

The commenter is correct in that only two companies have applied for the case-specific RQ at facilities that are monitored by continuous emissions monitoring systems. However, the commenter is incorrect that the stated criteria would allow RQs to be set at too high a level. The modeling and other requirements required under this provision, are stringent and established to protect air quality and human health. In fact, the companies withdrew their request when the required modeling would only support an RQ that would have been lower than what was allowed in other subsections of the definition. No revisions have been made based on the comment.

TxOGA supported the proposed amendment to §101.1(89) and did not propose any additional changes to existing language.

RESPONSE

The commission appreciates the comment.

HCPHES commented that it does not agree with the revised definition of “Scheduled maintenance, startup, shutdown activity” provided in §101.1(90). HCPHES commented that the new language of “by more than an RQ” should be deleted. HCPHES commented that all emissions in excess of a permit or other authorization should not be allowed, and that emissions above allowable limits may cause or contribute to violations of the NAAQS and the HGB region's ability to reach attainment for ozone. HCPHES commented that it appears that this definition allows for an automatic exemption for certain unauthorized emissions. HCPHES also commented that scheduled maintenance is a predictable event that can be scheduled to a large extent at the discretion of the source as part of normal operations and should be incorporated into a source's air permit.

RESPONSE

The term “by more than an RQ” was an addition by HB 2129, 79th Legislature. Therefore, the commenter’s suggestion has not been made. Regarding the comment that scheduled maintenance activities are predictable events that can be scheduled at the discretion of the company as part of normal operations, these rules provide an incentive for authorization of emissions from planned maintenance. In addition, the commission is concurrently proposing rules for authorization of emissions that have not been historically authorized.

Dow, ExxonMobil Downstream, and TCC support the changes regarding the definition of a scheduled maintenance, startup, and shutdown activity. TxOGA commented that §101.1(90) should be revised to add language that would state that the activity is one for which the owner or operator provides notice, whether performing or otherwise affected by the activity. TxOGA’s suggested language clarifies that

the owner or operator of a regulated entity that expects to have unauthorized emissions as the result of maintenance, startup, or shutdown activity, regardless of whether the activity will occur at the regulated entity or at another location (e.g., flaring or venting at an oil production lease due to maintenance at a downstream natural gas processing plant), can provide the required prior notice and be allowed to treat the activity as a scheduled maintenance, startup, or shutdown activity.

RESPONSE

The commission appreciates the support, and agrees with TxOGA's comment. If a regulated entity has knowledge that a maintenance, startup, and shutdown activity is going to occur downstream at another regulated entity that will cause unauthorized emissions at the first regulated entity's facility, the first regulated entity will be allowed to provide a maintenance, startup, and shutdown activity notification. Therefore, the phrase "whether performing or otherwise affected by the activity," has been added to the rule. However, it must be noted, that if the actions by the other regulated entity will cause unauthorized emissions at an upstream regulated entity on a regular and re-occurring basis, the upstream regulated entity should seek authorization for those emissions.

TxOGA also proposed substitution of "that" to replace "for which" in §101.1(90) because the existing language is bad grammar and confuses, rather than clarifies, the meaning of the rule. Furthermore, TxOGA also suggested that the term "timely" is redundant and should be deleted.

RESPONSE

The commission replaced “for which” to “that” in numerous locations in the rule language to conform to the drafting standard in the *Texas Legislative Council Drafting Manual*, November 2004. The commission agrees that the term “timely” is redundant to the specific reporting deadlines already required in §101.211, therefore, the term has been deleted in the definition.

TxOGA supported the proposed amendment to §101.1(91) - (115).

RESPONSE

The commission appreciates the support.

Arkema requested that the commission define “administrative technical orders” in §101.1.

RESPONSE

Administrative technical orders are a common method by which the commission implements technical requirements for a correction action and the term is generally known by the public and affected parties. Therefore, the commission does not agree that the term should be defined in this chapter and no changes have been made based on this comment.

Arkema stated that “sulfur recover plants” are not defined in either §101.1 nor 30 TAC §112.7.

Arkema requested that the commission define “sulfur recovery plant” as a petroleum refinery process unit that recovers sulfur from hydrogen sulfide by a vapor phase catalytic reaction of sulfur dioxide and

hydrogen sulfide. This proposed definition is consistent with the EPA Petroleum Refinery New Source Performance Standard (40 CFR Part 60, Subpart J).

RESPONSE

The commission has not added the suggested definition for “sulfur recovery plants.” The term is not used in any of the sections that are open in this rulemaking. Furthermore, defining a term in this chapter that is used predominantly in another chapter that is not currently open for public comment would be beyond the scope of this rulemaking.

TxOGA commented that a definition for the term “Agency established facility identification number” should be added to §101.1 and defined as follows: “for the purposes of Subchapter F, a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity to which the emission inventory reporting requirements of §101.10 are applicable to each facility at that regulated entity.” This definition is proposed to clarify and regularize the meaning of this term.

RESPONSE

The commission agrees that the suggested definition will provide clarity for the reporting requirement of §101.201 and §101.211. Therefore, the following definition has been added to §101.1: “Agency established facility identification number -- For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that the emission inventory reporting requirements of §101.10 of this title

(relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.”

TxOGA commented that a definition of “root cause” should be added to the definition section: “The specific language provided would limit the applicability to Chapter 101, Subchapter F only, and state that “root cause” is the principal reason for the emission event and without which the emission event would likely not have occurred.” The definition would also provide that a facility located at a regulated entity may be the root cause facility for an emissions event, or the root cause for the event may be associated with an offsite critical support system (e.g., electricity, steam, or water supply, or pipeline capacity for gas production).” TxOGA proposed that in several of the emissions event reporting provisions, that the owner or operator identify and report only that facility at the regulated entity that is the “root cause” of the event. TxOGA commented this would provide a proper focus for understanding and evaluation of the actual cause of the event and would eliminate reporting of unnecessary and possibly misleading information.

RESPONSE

The term “root cause” has a specific meaning to most industries and typically entails a long term review process, which may not be completed within the designated reporting and recording time requirements in §101.201 and §101.211. The commission added the term “best known” and “at the time of the notification,” to existing §101.201(a)(2)(I), relettered as subparagraph (H), and to existing §101.201(a)(3)(D), relettered as subparagraph (C). This revision clarifies that the cause of the emissions event is based on best available information at the time of the notification, which

can include root cause information. Therefore, the commission did not make the suggested addition.

EPA commented that in order to determine applicability and ensure enforceability of Chapter 101 requirements, the rule should include definitions for three widely used terminologies: “startup,” “shutdown,” and “maintenance.” EPA commented that startup, shutdown, and maintenance periods should be defined as discrete periods of limited duration and the definition should clearly distinguish between routine startup, shutdown, and maintenance-related emissions (from normal operation) and nonroutine startup, shutdown, and maintenance-related emissions (from malfunctions or upsets, poor operation, or maintenance).

RESPONSE

These terms are frequently used in this chapter, but they are also used in other chapters.

Because definitions used in the general rule are applicable to other chapters, the commission determined that it is not in the best interest of all affected parties if these terms were added without allowing full public comment on the exact language to be used. Section 101.1,

Definitions, states that “{u}nless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control.” As an example, one common meaning for the terms “startup” and “shutdown” could be taken from EPA’s 40 CFR Part 60, Subpart A definitions, in that “startup” is defined as: “the setting in operation of an affected facility for any purpose.”

The term “shutdown” is also defined in Part 60, Subpart A as: “the cessation of operation of an

affected facility for any purpose.” While the common definition for the term “maintenance” could be taken from the Webster’s New College Dictionary in that “maintenance” is the “to maintain,” or “To preserve or keep in a given existing condition, as of efficiency or good repair.” As to EPA’s comment that the terms should be defined as discrete period of limited duration, EPA’s own definitions in 40 CFR Part 60, Subpart A do not provide a discrete time period. This is because it would be an almost impossible task to take into consideration all of the different types of sources and develop a single discrete time period that would cover all of the types of sources. This is better left to a case-by-case review. Therefore, no changes have been made based on this comment.

Sierra Houston commented that the following terms or phrases, which are used in §§101.201, 101.211, and 101.222 should be defined in §101.1: “good engineering practice,” “viable,” “emissions activities or activity,” “minor omissions or inaccuracies,” “knowingly or intentionally falsified,” “reasonably avoided,” “technically feasible,” “could reasonably have been reported,” “from sudden and reasonably unforeseeable events,” and “immediate corrective action to restore normal operation.”

RESPONSE

Section 101.1 states that “{u}nless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control.” Because the terms and phrases that Sierra Houston suggested to be defined are generally known by the public and affected parties, or can

be found in a dictionary, the commission does not agree that the terms or phrases should be defined in this chapter. Therefore, no changes have been made based on this comment.

Subchapter F: Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities

Division 1: Emissions Events

Section 101.201 - Emissions Event Reporting and Recordkeeping Requirements

TxOGA, TCC, Duke, and ExxonMobil Production commented that notifications required in §101.201(a)(2)(B) and (b)(3)(B), and final records required in §101.201(b)(1)(B) and (2)(B) and (e)(2) should not be required to include both the RN and the air account number. TxOGA and ExxonMobil stated that if a regulated entity has an RN, that this number should allow the identification of the location of the entity and its attributes without the need for an air account number. If the regulated entity does not have an RN, the air account number should be provided instead. TxOGA also recommended that the rule clarify that the location of the release needed for the report is the physical address or driving directions to the regulated entity. TCC recommended that the identification of the site should be identified by providing the RN, the air account number, or the physical location and contact number, in that order. Duke commented that there should be flexibility to report either the RN or the air account number when either exists, or otherwise to report the location name and a contact phone number to satisfy the requirements.

RESPONSE

The commission is transitioning to the use and requirement of RNs in identifying regulated entities. The commission will only require the air account number to be listed when the regulated

entity does not have an RN.

Arkema requested that the commission clarify if speciation of nitrogen oxides is required in the initial notification or in the final emission reports.

RESPONSE

The commission revised §101.1(89)(A)(i)(III)(-p-) to establish an RQ for oxides of nitrogen. The revised definition eliminates the prior requirement to speciate these compounds for notification and reporting requirements.

TOTAL commented that §101.201(b)(1) and (2) should be worded identically, since both provisions identify the components of a final record of an emissions event. Furthermore, each paragraph should appropriately refer to "regulated entity" rather than "facility." TOTAL suggested that §101.201(b)(1) should be revised to read, "The final record of a reportable emissions event must identify for each "regulated entity:", while §101.201(b)(2) should be revised to read, "The final record of a non-reportable emissions event must identify for each regulated entity:".

RESPONSE

The commission revised §101.201(b)(2)(D) to be worded identically to §101.201(b)(1)(D); revises §101.201(b)(2)(G) to be worded identically to §101.201(b)(1)(G); revises §101.201(b)(2)(H) to be worded identically to §101.201(b)(1)(H); renumbers §101.201(b)(2)(I) to become §101.201(b)(2)(J); adds §101.201(b)(2)(I) to be worded identically to §101.201(b)(1)(I); renumbers

§101.201(b)(2)(J) to become §101.201(b)(2)(L); and adds §101.201(b)(2)(K) to be worded identically to §101.201(b)(1)(K). The commission replaced the term “facility” with the term “regulated entity” to be consistent with HB 2129. The legislation was specific and did not affect other sections of the chapter in this regard.

LCRA expressed concern that initial notifications and final reports required under §101.201(a) and (b) give competitive advantage to LCRA competitors or prospective competitors. LCRA suggested adding a subsection (i) that would allow notifications required by subsections (a) and (e), which are marked as confidential competitive information under Texas Government Code, §552.133(b), be submitted only in a manner that ensures protection of the information from disclosure for a limited period of time. This would be confidential only until the emissions event is over and the final report is submitted. LCRA also suggested two alternatives. First, LCRA suggested that the rule be amended and a corresponding change to the commission’s STEERS reporting system that would allow for the submittal of electronic information under a temporary claim of confidentiality. The second recommendation would be the development of another submittal method that ensures confidential treatment of the information until the final report is submitted, which would be a minimal burden on the commission and LCRA to manage the information, and provides for immediate disclosure of the information to members of the public when that information is no longer confidential.

RESPONSE

The commission did not revise the rule in response to these comments. In HB 2912, 77th Legislature, the commission added THSC, §382.0215(g), which provides, in part, that the

commission develop the capacity for electronic reporting and shall incorporate reported emissions events into a permanent centralized database for emissions events, and that database must be accessible to the public. Notifications from entities such as LCRA, which as a public power utility that is subject to the provisions of the Texas Public Information Act (PIA), Texas Government Code, Chapter 552, may have emissions events reporting that may contain information that is exempt from disclosure through the PIA. Although the commission cannot make a determination of whether such information is exempt from disclosure, it will allow these types of entities to notify the commission via fax its Reportable Event/Activity Notification/Reporting Form to the commission's regional office in which the facility is located. The commission may consider the date that the fax is received as the compliance date for meeting the reportable requirement for emissions events reporting. This practice must be limited only to reporting of emissions events that contain information that either LCRA asserts, or the Office of the Attorney General has determined, is exempt from disclosure. Not all emissions events from a public power utility may necessarily meet this test. As required by §101.201(b), a final report must be submitted electronically to the commission through the commission's STEERS reporting system, and the original notification date should be included in the narrative portion of the electronic report. All regulated entities not meeting the exemption through the PIA, as a public power utility, must continue to notify and report emissions events electronically as required by the rules.

HCPHES and Sierra Houston commented that they agreed with the proposed revisions in §101.201(a)(1)(B), (c), and (e) - (h) regarding the requirement for providing notifications, records, and

reports to local air pollution control agencies with jurisdiction. Sierra Houston commented that it supports the similar revisions in §101.211(a), (c), (e), and (f).

RESPONSE

The commission appreciates the support.

NRRC, Public Citizen, Sierra Lone Star Club, and MCA commented that all excess emissions should be promptly reported because communities should have a right to know. EIP stated that unauthorized emissions that do not exceed an RQ may need to be recorded rather than reported. EIP commented that because the proposed rules raise the RQs for a number of air contaminants, they would appear to significantly increase the universe of emissions that will not be promptly reported.

RESPONSE

The notification of emissions events that exceed an RQ are required within 24 hours of discovery. This reporting requirement for these potentially significant emissions is both prompt and protective. The rule adopts RQs for certain refrigerants above the previous default amount of 100 pounds, and raises the RQ for oxides of nitrogen in certain geographic areas. These revisions are made to address less significant emissions of these compounds. Notification of less significant emissions, those that do not exceed an RQ, would not greatly add to the effectiveness of the program. With the exception of certain emissions events reports that may contain information that is exempt from disclosure through the provisions of the PIA, Texas Government Code, Chapter 552, initial notifications will be electronically provided to the public. Scheduled activities

that are reported electronically through STEERS to the commission will be electronically available immediately following the conclusion of the scheduled activity.

BPC, TCC, ExxonMobil Downstream, and TIP commented that reporting should be simplified and the initial notification should only contain key information immediately needed by the commission. TCC commented that the rule should be further revised to eliminate additional reporting requirements, and to require only that information needed to evaluate the emission impact and to determine appropriate enforcement.

RESPONSE

The commission adopts reductions to the notification, reporting, and recordkeeping requirements in §101.201 and §101.211. These rules now require that a minimum amount of information be reported that allows the commission to make the initial response evaluation and to make final determinations.

TCC stated that the current requirement to report emissions from each facility greatly complicates the reporting process, does not add value to the report, and greatly increases the chance for denial of an affirmative defense if reporting is found to be in error. TIP commented that there should be no need to collect facility identification number by facility identification information for every event, just to see if some might be “excessive.”

RESPONSE

In response to these comments and other related comments, the commission reevaluated the need to have emissions reported separately from each of the facilities involved in the emissions event or activity. One of the criteria the commission must evaluate to determine excessive emissions is the impact on human health and the environment. If emissions were reported in total by regulated entity alone, the commission would be unable or limited in its ability to complete this evaluation. Therefore, the commission revised the reporting requirement to allow emissions to be reported in total from multiple facilities, and that those emissions must reported in total and associated with the appropriate emission point(s). This revision was incorporated in §101.201(b)(7), and similarly in §101.201(a)(2) and (3), (b)(1), (1)(G), and (b)(2)(G) and in §101.211(b)(1)(H).

Dow commented that the commission should clarify that only one report is required for each emissions event rather than a report for each facility, even if the emissions occur from multiple emission points.

RESPONSE

Emissions events must be reported by regulated entity, rather than by individual facility, in a single report when they arise from a common cause. However, each facility contributing or emitting unauthorized emissions must continue to be identified. Emissions must be reported in total from each emission point that has unauthorized emissions resulting from the common cause, as opposed to separating and identifying emissions to each facility contributing to those emissions. During such an emissions event, some regulated facilities may experience emissions events directly from a cause that is not common to other facilities. In this situation, these emissions must be

notified and reported separately, by the common cause, and can be included in a single notification and final report by the regulated entity as previously described. For example, lightning could cause a power outage and take two facilities (Facilities 1 and 2) off-line, causing a release of emissions through a flare (Facility 3). During the shutdown of Facilities 1 and 2, an operator might inadvertently and unnecessarily shut down a fourth facility (Facility 4), which also releases unauthorized emissions through Facility 3 (the flare). In this example, the cause for emissions from Facility 4 through the flare would not be common to the cause of other emissions, the lightning strike, and would therefore require separate notification and final report. The first notification and report would identify Facilities 1, 2, and 3. The reported emissions would be totaled and be attributed to the emissions point, Facility 3 (the flare). The reported emissions would include the total of the uncombusted emissions from Facilities 1 and 2, and the products of combustion at Facility 3 attributable directly from the combustion of gases routed from Facilities 1 and 2 to the flare. The second, separate notification for the inadvertent shutdown of Facility 4 must include the total of the uncombusted emissions from Facility 4, and the products of combustion at Facility 3 attributable directly from the combustion of gases routed from Facility 4 to the flare.

TPA, TxOGA, TIP, and Duke commented that §101.201 does not incorporate the intent of HB 2129, to require the reporting of emissions events by the regulated entity, rather than by facility. TxOGA and TIP commented that determining whether or not an RQ is exceeded should be based on the emissions from the regulated entity, rather than emissions from each of the individual facilities. Duke commented that the RQs should be compared to the total emissions from the common cause event, and

not to emissions from each facility involved in an event.

RESPONSE

In response to these comments and other related comments, the commission reevaluated the need to have emissions reported separately from each of the facilities involved in the emissions event or activity. One of the criteria the commission must evaluate to determine excessive emissions is the impact on human health and the environment. If emissions were reported in total by regulated entity alone, the commission would be unable or limited in its ability to complete this evaluation. Therefore, the commission revised the requirements to allow emissions to be reported in total from multiple facilities, and that those emissions must be reported in total and associated with the appropriate emission point(s). This revision was incorporated in §101.201(b)(7), and similarly in §101.201(a)(2) and (3), (b)(1) and (1)(G), and (2)(G) and in §101.211(b)(1)(H). The commission also amended the definition of “Reportable emissions event” and “Non-reportable emissions event” to reflect that RQs are per any emissions point. In response to the comments, the commission revised the definition of RQ by deleting the phrase “by facility.”

TIP commented that a violation should not be issued if a facility involved in an emissions event is failed to be identified, and the facility had no emissions point of its own. The commission should return to its practice of requesting additional information when needed to properly assess an event.

TIP commented that at a minimum the commission should only initiate enforcement if the owner or operator of a regulated entity fails to report or knowingly or intentionally falsifies information.

RESPONSE

The commission, in determining if emissions events are excessive, must evaluate a number of factors including the frequency of a facility's emissions events and the cause of the emissions event. These evaluations require some detailed information on the event, including the individual facilities involved. In addition, THSC, §382.0215(b)(3)(F) identifies that the processes and equipment involved in the emissions event is information necessary to evaluate the emissions event, and that this information must be reported to the commission. However, the rule is revised to reflect that minor omissions in a report that do not impair the ability of the commission to review the emissions event will not be deemed a violation.

Additionally, in some situations the regulated entity responsible for reporting an emissions event will not control or own the emissions point. Due to the complexity of various interrelationships between regulated entities these situations must be examined on a case-by-case basis. The commission will utilize the following two examples as a baseline for making determinations of responsibility for notification and reporting of emission events. Example 1: Regulated entity (RE)-A experiences an upset, and the emissions point is located at RE-B's flare. In this example it is the responsibility of RE-A to make all necessary notifications and report the emissions event. Example 2: RE-A experiences an upset, and feed to RE-2 is curtailed causing RE-2 to go off-line. It is RE-2's responsibility to make all necessary notifications and report the emissions event.

BPC, TCC, Dow, and TIP recommended that the commission establish a reasonable *de minimis* quantity of emissions for which no recordkeeping is required, stating that recording every insignificant

emissions event is an unnecessary and heavy burden for operators and the commission. Dow proposed the following *de minimis* quantities in which no recordkeeping is required: 1) events and activities that result in less than one pound of emissions per 24-hour period for air contaminants with an RQ equal to or greater than ten pounds, but less than 100 pounds; and 2) events and activities that result in less than ten pounds of emissions per 24-hour period for air contaminants with an RQ equal to or greater than 100 pounds. TCC proposed that no recordkeeping or reporting be required for events and activities that result in less than one pound of a contaminant. Arkema proposed that only the time, date, and the emissions should be reported for any emission event where less than 10% of any RQ is emitted. Arkema proposed that only the location of emissions, date, time, duration, and calculated emissions should be reported for events resulting in emissions between 10% and 100% of the RQ of any compound. Arkema stated that any additional recordkeeping for *de minimis* events becomes an inefficient use of regulated entity and commission resources with a *de minimis* impact on air quality.

RESPONSE

The commission previously defined *de minimis* facilities and sources in Chapter 116. That authorization allows facilities or sources that meet the conditions of one or more of the paragraphs in §116.119(a) to be considered *de minimis*, which means that registration or authorization prior to construction is not required. If any emissions are from *de minimis* sources, or facilities that are authorized by a PBR, then the owner or operator can calculate whether emissions from those sources meet the *de minimis* threshold or emission limit, respectively, and determine whether the emissions are authorized and reportable or recordable. The commission is bound by THSC, §382.0215, that requires recordkeeping of all emissions events. Additionally, in

comments to past rulemakings concerning the commission's upset and maintenance rules, EPA commented that all unauthorized emissions must be recorded. However, the commission acknowledges that some minor constituents emitted during an emissions event need not be speciated and may be classified as "other." This change was incorporated into §101.201(b)(1)(G) and (H) and (2)(G) and (H), and §101.211(a)(1)(H) and (I), (b)(1)(H) and (I), and (2)(H) and (I).

ExxonMobil Production recommended that a provision in the rule giving operators a temporary suspension from the mandatory use of STEERS as the reporting system will likely not be ready to accept single notifications and reports from regulated entities required by HB 2129.

RESPONSE

The revisions to the STEERS necessary to implement the changes for reporting by regulated entity and common cause will be extensive and also affect the commission's CCEDS. The commission agrees that these changes will require some time to implement and will not be immediately available. However, because of the number of reports received by the commission, and the statutory requirements to receive the reports through electronic submission, STEERS must continue to be utilized much in its present format. The commission will make its best effort to provide modifications to STEERS reporting on an ongoing basis while working to implement the revised reporting requirements. In the interim period, until a single reporting format by regulated entity is implemented, the information required by the rules must be submitted electronically through STEERS, and failure to report according to the rules can result in a violation.

TCC commented that the initial reporting requirements in §101.201(a) and (b) go beyond that required by the TCAA and what is necessary for initial response. TIP and TCC commented that initial reports should require only: 1) name, address, contact name, and phone number of the regulated entity; 2) common name of the process unit or units experiencing the emissions event; 3) identification of where the emissions are emitted to the atmosphere, such as emission point numbers; 4) estimate of the type and volume of the compounds being emitted that are above an RQ; and 5) date and time of discovery of the event. TIP also commented that there is no need to speciate “VOCs” at this juncture if an event is reportable. Moreover, information as to the cause of the event is likely to be incorrect upon further review. Similarly, information on the actions taken, or being taken, does not appear to be useful for an initial report.

Dow supported the deletion of the requirement to provide the physical location of the point at which emissions to the atmosphere occurred for initial emissions events reporting, and urged the commission to make this change across all other portions (initial reports, final reports, and final records for non-reportable releases) of these rules.

TxOGA commented that for §101.201 and §101.211, information requesting the physical location of the point at which emissions to the atmosphere occurred is unnecessary.

TxOGA proposed that the name of the process unit or facility that caused the emissions event should not have to be listed in the initial 24-hour report because it goes beyond the legislative requirements for the initial report and the practical needs of the commission or the public. The more detailed final

report will provide the commission with the information needed to evaluate whether the emissions event was excessive and whether the owner or operator claim of an affirmative defense is justified.

RESPONSE

The adopted amendments to §101.201 and §101.211 reduce the amount of information required for initial notifications of emissions events to the basic level needed to determine appropriate commission response, including deletion of the requirement to identify the physical location of the emission point. The notification requirements for emissions events do not require the speciation and reporting of compounds other than those that exceeded the RQ. Speciation of all emissions is required only with the final report for evaluation of these events. However, the final report for emissions events and the notification for scheduled maintenance, startup, and shutdown activities are revised to require that compounds or mixtures of air contaminants with an RQ equal or greater than 100 pounds and when the emission is less than ten pounds in a 24-hour period can include these contaminants as “other,” and not speciate. The speciation of air contaminants and the physical location is necessary in order to evaluate impacts from emissions.

TxOGA recommended that the language regarding the notification be revised to reflect that this is an “initial (24-hour) notification.”

RESPONSE

Changes were made to §101.201(a)(2), (2)(H), (3), and (4), (c), (e), and (g) in response to the comment. The commission agrees that the “initial 24-hour notification” should be used

consistently instead of the terms “notification,” “initial notification,” and “24-hour notification.”

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

RESPONSE

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

TCC, TxOGA, and TOTAL commented that the emissions reported for emissions events under §101.201 should only identify quantities of unauthorized emissions. TCC stated that reporting the "total" emissions includes the authorized emission levels and only serves to obscure the significance and impact of the unauthorized emissions. The reporting of authorized emissions is already included in normal emission inventory reporting.

RESPONSE

The commission did not revise the rule based on these comments. One of the criteria the commission must evaluate to determine excessive emissions is the impact on human health and the environment. One of the criteria the commission must evaluate to determine if emissions are subject to an affirmative defense is whether unauthorized emissions caused or contributed to an exceedance of the NAAQS, prevention of significant deterioration, or a condition of air pollution. As many compounds have thresholds and may be safe at levels below their authorized limits, they may be unsafe when that limit is exceeded. However, many permits do not have emissions limitations for the individual compound or mixture, therefore, the commission in order to assess an impact, needs the total emissions for those compounds or mixtures. Similarly, the unauthorized emissions when considered separately may not reach the exceedance of an NAAQS, but the increase over the authorized limitation can cause the total emission to exceed the NAAQS.

Arkema commented that it supported the addition of “best known” and “at the time of notification” in §101.201(a)(2)(H).

RESPONSE

The commission appreciates the supportive comment.

EIP commented that §101.201 should be revised to delete the reference to “if known,” stating that it is unnecessary and makes the provision confusing. BPC commented that submitting initial estimates in the “best known cause” would likely not be accurate and may cause confusion to the public.

RESPONSE

The term “if known” makes notifying as to the cause an option for any regulated entity that is reasonably unable to determine a rational cause of the emissions event within the 24-hour notification period.

TCC commented that the additional language in §101.201 is an improvement in recognizing that the cause of the emissions is likely to be unknown at the time a report is required. The owner or operator should not be required to speculate on the cause just to satisfy this report entry. The person making the report may include an underlying observation (such as a power failure or a compressor trip), but the root cause of the triggering event will most likely not be known. This flexibility should be clarified in the preamble and reporting guidance and the company should not be penalized for not being able to report what it does not know. TOTAL commented that §101.201(a)(2)(H) and (I) should be deleted because, in the 24-hour time frame for making the initial notification a regulated entity will not always be able to provide accurate information to the commission as to the best known cause of the event. Such information should be required only in the final record.

RESPONSE

The term “if known” makes notifying as to the cause an option for any regulated entity that is reasonably unable to determine a rational cause of the emissions event within the 24-hour notification period. However, in most cases it is reasonable to draw an educated conclusion as to the cause, and to verify the root cause in the final report.

TOTAL commented that a description of the actions taken to correct the emissions event and to reduce emissions is more appropriately provided in the final record.

RESPONSE

A decision to respond and conduct an on-site investigation immediately following the initial notification is based on a number of factors. In making this determination, an initial evaluation of the regulated entity's level of response is an important consideration, especially if the event is ongoing.

Duke commented that it supported the commission's proposal of §101.201(a)(3)(D) to remove the requirement to report the facility identification number, emission point number, and authorized emission limits for compounds and mixtures that exceed the RQ.

RESPONSE

The commission appreciates the supportive comment.

EIP recommended revisions to §101.201(a)(2)(E) and (3)(F) and §101.211(a)(2)(G) and (b)(1)(G) to require that sources report both the duration of the event causing the excess emissions and the duration of the excess emissions themselves. Facilities often complain that the duration of the emissions event is not reflective of the amount of time they were actually exceeding emission limits. In addition, such information is sometimes necessary in determining the extent to which short-term emission limits were exceeded. ExxonMobil Downstream, TCC, TIP, and TxOGA commented that the commission should

regulate the reporting and evaluation of emission events and maintenance, startup, and shutdown activities based on the total unauthorized emissions from the event. TCC and ExxonMobil Downstream commented that the comparison of total unauthorized emissions from an extended event should be based on the comparison of the maximum emission in a 24-hour period in the RQ values.

RESPONSE

The definition of a reportable emissions event in §101.1(88) and the notification requirements for maintenance, startup, and shutdown activities in §101.211(a) are based on a 24-hour period. The initial 24-hour notifications for emissions events are estimates often based on limited information. Notifications for maintenance, startup, and shutdown activities are submitted prior to the activity and are only an estimate of the anticipated quantity and duration of emissions. Final reports of these events and activities are more accurate and must identify the overall duration and the quantity of emissions. The commission agrees that, for protection of public health and welfare, the desired information is the duration of the actual unauthorized emissions and makes this suggested clarification. The definition of “emissions event” in THSC, §382.0215 and in §101.1(28) clearly refers to unauthorized emissions. The commission therefore determined that the duration of an emissions event is the duration of the unauthorized emissions. To ensure that the duration of the unauthorized emissions from an emissions event is reported or recorded, §101.201(a)(2)(E) and (3)(F) and (b)(1)(F) and (2)(F) are amended to delete the word “event.” Section 101.211(a)(1)(G) and (2)(G) and (b)(1)(G) and (2)(G) are amended to clarify that the duration of the emissions from a maintenance, startup, and shutdown activity is reported or recorded. In addition to reporting or recording the date and time of a scheduled maintenance,

startup, and shutdown activity, the commission amends §101.211(a)(1)(E) and (2)(F) and (b)(1)(F) and (2)(F), to require reporting or recording the duration or expected duration of any maintenance activity. No changes have been made to the rule in response to this comment requiring making the suggested comparison.

TxOGA proposed that the regulated entity be required to report the air contaminants that are “reasonably expected at the time of the notification” to have “equaled or exceeded” the RQ; as opposed to the requirements to report air contaminants “that are known through common process knowledge, past engineering analysis, or testing to have equaled or exceeded the RQ.”

RESPONSE

Regulated entities are expected to be knowledgeable about their processes and should know what air contaminants or mixtures of contaminants are expected to be released. To provide a description of these emissions based on this knowledge of processes, past engineering analysis, or testing is considered reasonable.

EIP commented that §101.201(a)(2) and (3)(I) should maintain the requirement that initial reports include the authorized emission or opacity limit, and requested that the commission justify the proposed deletions in the required information for initial reports, such as the deletion of the authorized emission limit or opacity limit, will not impede prompt enforcement action, where necessary, prior to submission of the required final report. In addition, EIP commented that the deleted information is important for determining if prompt enforcement action is necessary and proceeding with such action.

RESPONSE

Notifications serve as “notice” to the commission and determine the level of response necessary.

A decision to respond and conduct an on-site investigation immediately following the initial notification is based on a number of factors. In making this determination, an initial evaluation of the regulated entity’s level of response is an important consideration, especially if the event is ongoing. The information required for initial notifications in the rule has been reduced.

However, the requirements include the minimum information necessary to effectively make these decisions, and will not affect the promptness for investigations. Enforcement actions for unauthorized emissions begin after the receipt of the final report, following determinations made by the commission on the reported information and in accordance with the provisions of the rule.

EPA commented that §101.201(a)(2)(G) removes the requirement to report the authorized applicable emission limits or opacity limitation in initial excess emission reports, and recommended that this revision not be adopted in the proposed rule. The proposed rule also allows the initial report to substitute for a final report where “the owner or operator does not submit a record.” Therefore, the authorized emission limit will not be available for any initial reports and will not be available for some final reports. The current SIP reporting rules require reporting of the authorized emission limitation in initial and final reports. EPA questioned how the commission, EPA, or citizens can effectively evaluate the significance of an emissions event without knowing the authorized emission limitation, and how the commission will make determinations required by §101.222 without determining the quantity of unauthorized emissions.

RESPONSE

The adopted amendment to §101.201 reduced the amount of information required for initial notifications of emissions events to the basic level needed to determine appropriate response, such as whether an immediate on-site investigation is advisable. The requirement to provide the authorized emission limit and the authorized opacity limit continues to be required in final records in §101.201(b)(1)(H) for emissions events and in §101.201(e)(8) for opacity events. The authorized emissions limit may be available for some initial reports, and is required for all final reports. Determinations required by §101.222 are conducted by the commission following receipt of the final record.

Sections 101.201 and 101.211 allow initial reports to serve as final records if the information required in the final record does not differ from that submitted in the initial notification. For an initial notification to serve as the final record, the regulated entity must provide information beyond the minimum notification requirements in §101.201(a)(2) for emissions events and §101.201(a)(3) for opacity events. To clarify this, the commission revised adopted §101.201(c).

A similar revision is not necessary to address this issue for final records of opacity events, as §101.201(d) already states that a final record for these events is not required “if the notice submitted under subsection (a) of this section contains the information required under subsection (b) of this section.”

AECT commented that §101.201(a)(3) should be revised to require the identification of each facility

with emissions when its opacity exceeds the applicable opacity limit by equal to or more than 15% that exceed an RQ. AECT stated that this will clarify that for boilers and combustion turbines referenced in the definition for RQ, the only applicable RQ is for opacity. AECT also commented that §101.201(e) should be consolidated into §101.201(a)(3) and that §101.201(a)(3) should be revised so that it reads similarly to §101.211(a)(2).

RESPONSE

The definition of RQ referenced in these rules, specifically the definition in §101.1(89)(C), not only identifies that the RQ is opacity that equals or exceeds 15 additional percentage points above the authorized limit, but includes information on the averaging time, and on the applicable fuels for these units. Rather than repeating or paraphrasing this definition within the rules, the reference to the definition in §101.1 remains without change. The reporting requirements in §101.201(a)(3) apply to opacity from certain boilers and combustion turbines. The reporting requirements in §101.201(e) apply to all other emitters where opacity equals or exceeds 15 additional percentage points above the authorized limit and where emissions are not subject to the reporting requirements of §101.201(a)(2). Therefore, the consolidation of reporting requirements was not implemented. The suggestion to revise §101.201(a)(3) so that the language is similar to that in §101.211(a)(2) was not implemented. Section 101.211(a)(2) addresses opacity from boilers and combustion turbines, and from other emitters expecting to experience only excess opacity. Section 101.201(a)(3) addresses only opacity exceeding the RQ from boilers and combustion turbines. No changes were made to §101.201(a)(3) in response to these comments.

BSA commented that there needs to be more information regarding “best known cause” as required for the initial report in §101.201(a)(3)(C), since it includes only what is known at that time. The complete report needs to be filed and available to the public.

RESPONSE

The information submitted in the initial notification can become the final report if the information in that notification continues to be accurate, remains unchanged, and meets the minimum reporting requirements for a final report. In most instances, the initial notification is preliminary information, requiring the submittal of a final report with the most accurate information available. Both initial notifications and final reports are available to the public.

TxOGA proposed relocating the requirements in §101.201(a)(4) that regulated that entities provide additional detailed information upon request of the executive director, to §101.201(f), the subsection that requires a regulated entity to provide a technical evaluation of emissions events upon the executive director’s request.

RESPONSE

The commission revised the rule according to the commenter in order to provide better organization of similar requirements.

TCC commented that the commission should take full advantage of the information already associated with the RN and the air account number, further streamlining the reporting requirements. The final

report as required by §101.201(b) should be specifically focused on reporting the best known emission information at the time of the required final report. Other information regarding the root cause and supporting the affirmative defense may not be finally determinable by the deadline for the final report. The reporting procedures in STEERS should allow for updates to information after the "final report" as it becomes available.

RESPONSE

The commission recognizes that the initial report may only include best estimates of emissions and other information. And although final reports should include more definitive information, the commission also recognizes that more accurate information may also be defined following the submission of the final report. The commission typically begins an investigation of the emissions event following receipt of the final report. Although there is no mechanism to continuously update the final report through STEERS, and the commission has not pursued any requirement for a second “final report,” regulated entities can continue to supply additional information to the commission throughout the investigation of the event.

TxOGA recommended the deletion of §101.201(b)(1)(K), a requirement to provide the “best known cause” of the emissions event, and the deletion of §101.201(b)(1)(L), a requirement to provide any additional information necessary to evaluate the emissions event. TxOGA stated that the requirement in §101.201(b)(1)(L) imposes a vague requirement and that in the context of information that “must” be identified in the event record, failure to provide some seemingly inconsequential bit of information that commission staff at some later date decides is “necessary to evaluate the emissions event” exposes

the regulated entity to potential enforcement. Absent this requirement, the commission still has the authority in §101.201(f) to obtain additional information about the emissions event. Deletion of this provision does not prevent the inclusion in the report of any additional information that the owner or operator of the regulated entity believes will aid in the evaluation of the emissions event.

RESPONSE

The commission must comply with statutory requirements, including requirements in THSC, §392.0216, to evaluate the cause of emissions events. Because the detailed cause or causes of events may not be fully identified at the time of the final report, the requirement in §101.201(b)(1)(J) and (2)(J) is to identify the “best known cause” of the event “at the time of reporting.” The requirement to provide any additional necessary information to evaluate the event, information beyond the minimum reporting requirements, establishes an obligation for the regulated entity to consider if additional information is available and valuable to that end.

Although additional information may be requested as suggested by the commenter, it is important that this obligation reside with the regulated entity. The commission cannot anticipate all potential information that might be available and necessary, and identify that information within a finite list of minimum reporting requirements. The commission is unaware of any previous enforcement actions such as the described scenario of an after-the-fact determination that additional information was withheld.

TCC stated that the commission proposed significant improvements in the reduced information required for *de minimis* emissions, including the provisions that emissions of compounds with an RQ equal to or

greater than 100 pounds and total emissions less than ten pounds can be reported as a group of "other" contaminants without speciation. However, the RQ criteria could be construed to require that all of the compounds in the group must be identified so that the RQ criteria can be evaluated. The commission should clarify in the preamble that all compounds or mixtures in the less than ten-pound emission status need not be specifically identified, but that process knowledge can be used to determine that compounds or mixtures with RQs of less than 100 pounds are not present. The commission should also consider providing a *de minimis* level such as 1.0 pound below which no recordkeeping or reporting is required.

RESPONSE

Both §101.201 and §101.211 allow for this reporting process when the emissions are determined to consist of compounds or mixtures each with an RQ of 100 pounds or less as determined through common process knowledge or past engineering analyses or testing for the presence of compounds with RQs of less than 100 pounds, or through testing. When emissions of compounds or mixtures classified as “other” through the RQ definition of “other” or those classified as “other” by §101.201 or §101.211 requirements together exceed 100 pounds, notification and reporting are required. The commission, however, is bound by THSC, §382.0215, that requires recordkeeping of all emissions events, and is not able to establish a *de minimis* level of emissions.

Dow supported the proposed changes to §101.201(b)(1)(G) that allow the grouping of certain air contaminants under the heading of “other” in cases where the RQ is greater than 100 pounds, or greater and the amount released is less than ten pounds, in a 24-hour period.

RESPONSE

The commission appreciates the support.

TxOGA commented that it is unnecessary to exclude opacity from boilers and turbines in §101.201(b)(1)(G), since this is already excluded in existing language in subparagraph (G).

RESPONSE

The commission agrees that the reference may be unnecessary, but the reference provides some additional clarity, and therefore no changes have been made in response to this comment.

TCC commented that requiring the same method of estimating emissions for permitting or the applicable rule to be used for emission event reporting is not always appropriate or feasible. For example, cooling tower emissions in permits are based on standard factors such as AP-42, however, emission event estimates are more appropriately based on actual monitoring or process knowledge of a process leak. TCC recommended requiring the same methods as used in authorizations to be utilized only “where feasible and appropriate.” Arkema commented that the method used to obtain authorizations should only be used for estimating emissions “whenever possible,” and requested assurances that the requirement would not restrict the use of better methods to estimate emissions from one-time events. Duke commented that the requirements for the owner or operator to match the calculation methodology in the preconstruction authorizations for a facility involved in an emission event be deleted. Duke commented that emissions from upset events are from non-standard operations that were not contemplated, described, or represented in any construction or modification

authorizations.

EPA agrees with the proposed change that requires methods of estimates of total quantities of emissions released to be consistent with methods used in the applicable permit, application, rule, or order of the commission in final reports. EPA suggested that this provision be included in the reporting requirements for initial reports, especially considering that initial reports may, in some cases, substitute for final reports. Sierra Houston commented that §101.201(b)(1)(H), (2)(H), and (h)(2) should be revised to state that methods of estimates for emissions for facilities with authorizations “must be consistent” with the methods used in the applicable permit application, rule, or order of the commission, instead of the proposed “should be consistent” language.

RESPONSE

The commission acknowledges that not all emissions events result from activities that are comparable to those that were evaluated to authorize emissions under a permit, rule, or order of the commission. However, in many instances this same method of estimation can yield the best estimation of emissions, and modifications to the method can be incorporated as necessary to reflect the conditions of the actual emissions. Where emissions and conditions during an upset are not similar in nature and composition to those in the applicable authorization, and for emissions from facilities that are not authorized, regulated entities must identify and utilize other methods based on good engineering practice. In every instance, it is the regulated entity’s responsibility to utilize good engineering practice and to provide the commission with an accurate representation of these emissions. In response to these comments, the commission added

language to adopted §101.201(b)(1)(H) and (2)(H) and (h)(2) and to §101.211(a)(1)(I) and (b)(1)(I) and (2)(I) to require the use of good engineering practice and methods to provide reasonably accurate representations for emissions and opacity.

EIP commented that the proposed language could be interpreted to require that companies report emissions during malfunctions as if the malfunction were not occurring. EIP commented that pollution control devices will operate more efficiently when brand new, so the emission control factors used in permit applications, rules, and orders most likely presume a higher rate of control than actually occurs. Yet, the proposed language seems to imply that the company must only calculate the emissions on the basis of its permit, since there is no specific guidance in the permit as to when and how to deviate from routine practice when a malfunction occurs. Because the methods required by permits, rules, or orders for estimating emissions may lead to inaccurate emissions estimates, sources should be required to report according to both the method specified in the applicable permit, rule, or order and according to the “best technically feasible methods for measuring emissions, taking into consideration the current condition, actual operating practices and maintenance history of the equipment.” This would ensure that the commission gets the best data possible and is alerted to any inaccurate estimation methods included in permits that may need to be addressed.

RESPONSE

The commission is revising the rule to require that the regulated entity identify and utilize the best method for accurately determining emissions, as opposed to submitting calculations based on a number of methodologies. Although regulated entities must report the basis used for

determining the quantity of air contaminants, under §101.201(b)(1)(I), the commission may require additional information under §101.201(f), as is necessary to determine if the method of estimation was appropriate and satisfactory for estimating the emissions.

EIP commented that while the rule is not the appropriate place to correct methods for estimating emissions, the rule should require the use of the most accurate emissions estimation method available. In addition, EIP commented that the commission must have the authority to amend outdated permits to reflect new information about the emissions associated with authorized sources.

RESPONSE

Emissions authorizations or limitations are based on the appropriate required level of control in effect at the time of approval. When applications for permit amendments are reviewed, the commission uses the best information available to estimate emissions and determine control methods. The TCAA does not authorize the commission to unilaterally amend permits.

TPA urged the commission to delete §101.201(b)(2), because it imposes onerous recordkeeping requirements for non-reportable emissions events. There is no justification for the need to increase reporting for these insignificant emissions.

RESPONSE

TCAA, §382.0215, requires that a regulated entity maintain records of emissions events, and therefore the commission is not making the suggested change. The commission has established

reporting requirements based on RQs in order to reduce the burden of reporting on the regulated entity, and to focus investigations on those emissions that may be of a more immediate risk.

However, these records are periodically evaluated and can lead to corrective action to prevent larger unauthorized emissions releases.

EIP commented that §101.201(b)(2) should be revised to require that records of non-reportable events include the basis for determining the quantity of emissions as well as the actions taken to minimize the emissions.

RESPONSE

The record of non-reportable events must contain the method of estimating quantities according to §101.201(b)(2)(G). Non-reportable emissions are those with compounds or mixtures that do not exceed an RQ, whether by circumstance or stemming from actions taken by the regulated entity. Therefore, there is no requirement to identify actions taken to minimize the emissions. If this information is important, due to site-specific circumstances in a particular investigation, this information can be requested.

EIP stated that all unauthorized emissions should be reported promptly. EPA guidance requires that all excess emissions be reported promptly, citing EPA 1999 Guidance (Attachment pages 4 and 7).

However, the commission's rules, including §101.210(d), include reporting exceptions for certain boilers and turbines, which allow the reporting of only opacity exceedances for those units. These exceptions should be eliminated from the rules.

RESPONSE

The commission originally adopted the language found in §101.1(88)(C) in 1997 (July 29, 1997, issue of the *Texas Register* (22 TexReg 7040)), which has previously been approved by EPA. The commission explained upon adoption that the definition of RQ was further modified for boilers and combustion turbines fueled by natural gas, coal, lignite, wood, or fuel oil containing hazardous air pollutants at concentration of less than 0.02% by weight. The only RQ for these units is opacity, which is 15 additional percent above applicable limits. This modification is added in recognition of the fact that boiler and combustion turbine emissions consist primarily of carbon dioxide, nitrogen oxides, water, and small amounts of carbon monoxide and are not acutely harmful if unconfined. The figure of 0.02% by weight is significant because trace contaminants, at this concentration or less, that might be present in used oil fired in boilers and combustion turbines will generally result in emissions below an RQ in the event of an upset. Therefore, the RQ for boilers and combustion turbines as previously listed has not been deleted as suggested.

A regulated entity is not required to supply information in support of an affirmative defense for unreported emissions from boilers and combustion turbines. The emissions from boiler and combustion turbines consist primarily of carbon dioxide, nitrogen oxides, water, and small amounts of carbon monoxide and are not acutely harmful if unconfined. The commission does require the reporting of opacity that exceeds 15% of the authorized opacity because these reports may indicate increased levels of trace contaminants from fuels, and may be important in establishing patterns of poor operating or maintenance practices.

Calpine commented that it supports the language in §101.201(d), in that owners and operators of certain boilers and combustion turbines are exempt from creating and submitting final records of emissions events under §101.201(b) or (c). However, Calpine suggested that the last sentence of §101.201(d) be revised to state that the notice submitted under subsection (a) must contain the information required under subsection (b) if an initial notice is required. The change would clarify that records and reports generated by a qualifying continuous emission monitoring system are sufficient to meet §101.201 requirements, even if the unit is exempt from submitting an initial notice by the definition of RQ in §101.1.

RESPONSE

To clarify, there is not an exemption from the notification and recordkeeping requirements in §101.201(a) and (b). Section 101.201(d) exempts only the applicable facilities from submitting a final record, if the excess emission reporting provides all of the information required by §101.201(b).

TCC supported the addition for other gaseous fuels in §101.201(d), although the very low threshold values may make this addition of very limited value to most sources.

RESPONSE

The commission appreciates the comment.

TxOGA commented that a regulated entity may experience an excess opacity event without there being

a facility associated with the event, and that §101.201(e)(4) should be revised to reflect this potential.

For example, an exhaust stack for a facility is an “appurtenance other than emission control equipment” for the facility, while a process flare or emergency flare is an emission control device rather than a facility. The report will list the exhaust stack as an emission point.

RESPONSE

In the example provided, the exhaust stack would be an emission point that is part of a facility, and the flare would be a separate facility. Therefore, no changes have been made in response to this comment.

TxOGA commented that §101.201(e)(4) should be changed to allow initial notifications to be submitted either electronically or by any viable means within the 24-hour deadline, a provision currently available to small businesses. TxOGA also recommended that an alternative to electronic reporting be provided for those situations in which the owner’s or operator’s server, as well as the commission’s electronic reporting system, is unavailable due to technical failures or scheduled maintenance.

RESPONSE

Notifications required by §101.201(a), (c), and (e) must be submitted electronically using the commission’s STEERS, with certain exceptions. Because of the number of reports received by the commission, and the need to evaluate this information in a timely manner, electronic reporting is necessary. If the commission’s server is unavailable, reporting may be provided by facsimile to the commission’s regional office. If the regulated entity’s server is unavailable, and

an alternative system is not available, then the report should be submitted by electronic facsimile with an explanation, and an electronic duplicate of the report should be submitted via STEERS as soon as technically possible. Small businesses meeting the definition in Texas Water Code, §5.135(g)(2) are not required to submit electronically as this technology may not be at their disposal.

TxOGA commented that the statutory requirement for electronic reporting of emissions events, found in THSC, §382.0215 is for the commission to develop the capacity for electronic reporting and incorporate reported emissions events into a permanent centralized database for emissions events that is accessible to the public and can be used to identify persons that repeatedly fail to report reportable emissions events. The statutes do not require the initial 24-hour notifications of emissions events required in §101.201(a) to be made electronically. This report normally contains the minimum information needed to alert the commission of an emissions event and would actually be addressed more promptly by the regional office if submitted by telephone, facsimile, or email. Alternative reporting mechanisms will make it easier for operators to comply with initial reporting requirements.

The initial reports should be allowed, but not required, to be made using STEERS. The only meaningful information with regard to the details of emissions events is the final report required in §101.201(c) and (e). The final report is the only report that should be required to be made using STEERS, made accessible electronically by the public, and used for commission evaluations of emissions events. As provided in §101.201(c), an owner or operator that chooses to have the initial report serve as the final report may do so by electronically submitting (via STEERS) all of the elements

required in the final report in the initial report.

RESPONSE

Because of the number of reports received by the commission, and the need to evaluate this information in a timely manner, electronic reporting is necessary. The commission, in practice, has found that electronic reports are a more efficient method of notification to the regional offices, provide a consistent means of receiving this information, and provide a consistent record of these notifications and reports. The commission, for these reasons, does not propose to revise the electronic reporting requirements.

EIP commented that §101.201(g) should be amended to delete the provision allowing sources that report under 30 TAC §327.3 to avoid electronic reporting. Allowing these sources to report on paper, rather than electronically, means that some excess emissions are either not being entered into the electronic system, which is used to track such emissions, or that commission staff are spending time entering such emissions into the system. In addition, the regulations should be amended to require electronic reporting for scheduled maintenance, startup, and shutdown activities. The current regulations only require electronic reporting for emissions events, although it is our understanding that many sources do report scheduled maintenance, startup, and shutdown activities electronically. The commission should require sources to report all emissions events and scheduled maintenance, startup, and shutdown activities electronically to make sure that all such emissions are included in the commission's electronic tracking system.

RESPONSE

The requirement that sources reporting under §327.3 may satisfy the initial reporting requirements under this rule is strictly a provision to reduce duplicative reporting requirements for the regulated community, and at this time the commission has not decided to require the additional electronic reporting requirement. Electronic reporting for scheduled maintenance, startup, and shutdown activities is currently not a rule requirement, but it is the normal means of receiving these notifications and has been encouraged by the commission.

Duke requested the following language, “initial notification may be made by phone, fax, email, or STEERS with STEERS being the preferred method of filing the report,” be added to §101.201(g) in order to give more flexibility for entities that are in remote locations with no access to the internet.

RESPONSE

The commission must comply with the statutory requirement in THSC, §382.0215, which requires electronic reporting for certain notifications. The current reporting requirements of §101.201 comply with THSC, §382.0215.

AECT commented that §101.201(h)(2) and §101.211(f)(2) should be revised to more clearly describe the exemption. In the first sentences of §101.201(h)(2) and §101.211(f)(2), the following words should be deleted: “except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title, that must report only the estimated opacities during the emissions events and durations of unauthorized opacity.” AECT suggested that the following sentences should be added to

the end of §101.201(h)(2) and §101.211(f)(2). For §101.201(h)(2), the new sentence should read:

"This paragraph does not apply to boilers and combustion turbines referenced in the definition of RQ in §101.1 of this title, that must report only the estimated opacities during emissions events and duration of unauthorized opacity." For §101.211(f)(2), the new sentence should read: "This paragraph does not apply to boilers and combustion turbines referenced in the definition of RQ in §101.1 of this title, that must report only the estimated opacities during the scheduled maintenance, startup, and shutdown activity events and durations of unauthorized opacity." In addition, AECT commented that since boilers and combustion turbines referenced in the definition of RQ are exempt from the requirements of proposed §101.201(h)(2) and §101.211(f)(2), there is no need for such boilers and combustion turbines to be subject to any part of proposed §101.201(h) or §101.211(f).

RESPONSE

Sections 101.201(h)(2) and 101.211(f)(2) are revised to not adopt the exemption for boilers or combustion turbines. Boilers and combustion turbines at major sources are required to report emissions annually to the commission's emissions inventory. This also requires these sources at minor facilities located in certain areas to report these emissions annually to emissions inventory.

Dow, Duke, and BPC objected to the proposed requirement in §101.201(h) to submit an annual report for emissions events as an onerous and new reporting requirement. Dow, Duke, BPC, TCC, and Calpine commented that the commission already has access to much of this information. Calpine commented that the proposed requirements of §101.201(h) and §101.211(f) are duplicative and unnecessary. Emissions inventory reporting by facilities already includes emissions events and

scheduled maintenance, startup, and shutdown activity emissions in STEERS reports, on Title V deviation reports, and in the annual emissions inventory report. Requiring companies to submit additional information totaling up information that the commission already has in duplicate is adding additional paperwork requirements to an already burdensome regulatory program. Calpine commented that if the commission needs information about the total amount of maintenance emissions or the total amount of emission events that have occurred at a regulated entity, then surely it can code STEERS to run reports totaling that information on an annual basis. TPA urged the commission to delete §101.201(h) because it does not provide any more useful information to the commission than what is already available. This expands the reporting to include non-reportable events, which are insignificant. TxOGA commented that the provision should be deleted as it is contrary to legislative intent in THSC, §382.0215 and §382.0216.

RESPONSE

Unauthorized emissions that are non-reportable are not captured in STEERS reports to the commission, and only major facilities are required to submit emissions information within the annual emissions inventory reports. As a result, there is no single ready source for the commission to evaluate the summation of all unauthorized emissions. Therefore, the requirement was established as the least burdensome and the most efficient method for addressing this need. Section 101.201(h)(4) provides that those already reporting this information according to §101.10 do not need to submit duplicative reports. The commission has the authority to require reporting of emissions for development of an inventory of emissions of air contaminants. THSC, §382.0215 and §382.0216 do not limit that authority.

Dow, Duke, BPC, and TxOGA commented that with the exception of legislative intent to require emissions event reporting to be based on a regulated entity rather than a facility basis, §101.201(h) would require an annual accounting of the number and magnitude of emissions events on a facility-by-facility basis. TCC commented that the reporting of this information by facility is unnecessary and does not provide any useful information. TCC commented that reporting this information by emission point number is more appropriate for emission planning in SIP programs.

RESPONSE

In response to these comments, §101.201(h)(1) is revised to provide that the number of reports is the total reportable and total non-reportable events experienced at the regulated entity.

TxOGA commented that the requirement in §101.201(h) would cause a sizeable universe of regulated entities, many of them owned or operated by small businesses, that are specifically exempted by THSC, §382.0215 from having to submit reports on non-reportable emissions events, to submit an annual report that includes these non-reportable emissions events in emissions inventory format even though the regulated entities are not now required to provide emissions inventory reports.

RESPONSE

Unauthorized emissions that are non-reportable according to these rules are not captured in STEERS reports to the commission, and only major facilities are required to submit emissions information within the annual emissions inventory reports. As a result, there is no single ready source for the commission to evaluate the summation of all unauthorized emissions. Therefore,

the requirement was established as the least burdensome and the most efficient method for addressing this need. No change was made in response to this comment.

EPA supported the state's requirement in §101.201(h) to require annual reporting of both reportable and non-reportable emission events for certain sources. EPA commented that this information will assist the state in evaluating effective enforcement efforts and will facilitate the state's SIP planning process.

RESPONSE

The commission appreciates the comment.

EIP commented that the annual report in §101.201(h)(2) is a significant step forward and should enable the commission and the public to better scrutinize the operation of each facility. This provision requires sources to report estimated total annual emissions event emissions based upon methods consistent with the methods used in the permit, rule, or order of the commission. This provision should be amended to require, if this estimate differs from the estimate using the best available estimation methods, that estimates using both methods be reported.

RESPONSE

In response to comments, §101.201(h)(2) is revised to provide that good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity.

TPA stated that the first sentence of §101.201(h)(3) is unclear as to whether it is referencing the commission's STEERS system.

RESPONSE

The commission is currently considering the best method for developing a reporting system that will incorporate existing annual emissions inventory reports, not cause duplicative reporting, and incorporate new reports from regulated entities currently not required to submit annual reports. The reporting process and guidance will necessarily have to be provided as the development of the system continues.

EIP commented that the permitting of planned or predictable emissions should ensure that the consequences of predictable excess emissions on air quality and public health are fully evaluated before the emissions occur.

RESPONSE

No revisions to the rule were made in response to this comment, as it relates directly to the commission's permitting procedures and is beyond the scope of this rulemaking.

Dow commented that clarification is needed regarding the definition of excess opacity event and reporting obligations for instances where a gas flare experiences smoke emissions for more than five minutes in a two-hour period. Specifically, Dow questioned whether these instances are to be considered an excess opacity event; if these instances are associated with an RQ exceedance of another

air contaminant from a flare, should the smoke emission be reported with the RQ exceedance of the other air contaminants; and whether smoke emissions from flares excluded from reporting under the Chapter 101 rules and subject to potential deviation reporting (e.g., deviation from the requirements of Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter) under the Title V permitting program for those sites with Title V permits.

RESPONSE

Visible emissions and opacity emissions are two different measurements of compliance. Opacity is defined in §101.1(73) as percent of transitivity of light through a medium. The term “visible emissions” means the ability to detect any visible emissions of contaminants regardless of the opacity. Under the reporting rules in §101.201 and §101.211, excess opacity event notifications or reporting are applicable only to opacity standards, not to visible emissions.

Flares typically, though not always, are subject to visible emissions standards. Exceedances of those standards would not require notification of reporting. However, if the flare has an opacity compliance standard then exceedance of that standard by more than an RQ would require notification and reporting. Reporting and notification for flares will be required when the specific unauthorized compounds or mixtures emitted exceed an RQ.

Division 2: Maintenance, Startup, and Shutdown Activities

Section 101.211 - Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements.

LCRA expressed concern that notifications of scheduled shutdowns in §101.211(a) give competitive advantage to LCRA competitors or prospective competitors. LCRA suggested adding a subsection that would allow that notifications required by subsection (a) of this section, which are marked as confidential competitive information under Texas Government Code, §552.133(b), be submitted only in a manner that ensures protection of the information from disclosure for a limited period of time. This would be confidential only until the scheduled activity is over and the final report is submitted. LCRA also suggested two alternatives. First, LCRA suggested that the rule be amended and a corresponding change be added to the commission's STEERS reporting system that would allow for the submittal of electronic information under a temporary claim of confidentiality. The second suggestion would be the development of another submittal method that ensures confidential treatment of the information until the final report is submitted, which would be a minimal burden on the commission and LCRA to manage the information, and provides for immediate disclosure of the information to members of the public when that information is no longer confidential.

AECT requested that the commission include a statement in the preamble to the final rule confirming that the commission will change its practice or policy of placing shutdown and startup notification information on its public database. AECT commented that this information is having a significant negative economic impact on the owners or operators of electric generating facilities when they shut down their electric generating facilities for maintenance because it puts such owners and operators at a significant competitive disadvantage. This occurs because the shutdown and startup notification information that is disseminated to the public serves to apprise the companies from whom such owners and operators must purchase replacement electricity.

RESPONSE

Notifications from entities such as LCRA, which as a public power utility that is subject to the provisions of PIA, Texas Government Code, Chapter 552, have scheduled activities reports that may contain information that is exempt from disclosure through the PIA. In order to encourage regulated entities to utilize the electronic reporting system, make the information available to the public in a consistent manner, and address the concern regarding competitive business disadvantage, the commission will develop a process that may allow for timely submission of confidential information related to a scheduled maintenance, startup, and shutdown activity that would be posted at a later time for public access.

TxOGA, TCC, Duke, and ExxonMobil Production commented that notifications required under §101.211(a)(1)(B) and (2)(B), and the final records required under §101.211(b)(1)(B) and (2)(B), should not be required to include both the RN and the air account number.

RESPONSE

The commission is transitioning to the use and requirement of RNs in identifying regulated entities. The commission will only require the air account number to be listed when the regulated entity does not have an RN.

TCC, TxOGA, and TOTAL commented that the emissions reported for emissions events under §101.211 should only identify quantities of unauthorized emissions. TCC stated that reporting the "total" emissions includes the authorized emission levels and only serves to obscure the significance

and impact of the unauthorized emissions. The reporting of authorized emissions is already included in normal emission inventory reporting. Additionally, as more emissions from maintenance, startup, and shutdown activities become authorized, it is important that the Chapter 101, Subchapter F rules clearly only require reporting of unauthorized emissions. The reporting of authorized emissions will be covered in normal emission inventory reporting.

RESPONSE

The commission made no changes to the rule based on these comments. One of the criteria the commission must evaluate to determine excessive emissions is the impact on human health and the environment. Most permits do not have emissions limitations for the individual compound or mixture, and therefore the total amount of emissions for those compounds or mixtures is needed to assess the off-property impacts of the emissions. Similarly, when considered separately, the unauthorized emissions may not reach the exceedance of an NAAQS, but the increase over the authorized limitation can cause the total emission to exceed the NAAQS.

TxOGA suggested revisions that for opacity, the exceedance of the emissions or opacity estimate should be based on the regulated entity, and not on a facility-by-facility basis. TxOGA also suggested that if reporting under §101.211 is triggered by exceeding the estimated emissions or opacity estimate, that it should be for exceeding the estimate by the RQ amount. TxOGA also suggested that the language be revised to anticipate that original estimates could be updated prior to the occurrence of the exceedance of the estimate and after commencement of the activity. It is often difficult to accurately predict maintenance, startup, and shutdown emissions, and operators have had to compensate by over-

reporting estimated emissions to avoid having such activities classified as emissions events. This change will allow operators to report more realistic estimates of maintenance, startup, and shutdown emissions in the prior notifications.

RESPONSE

Maintenance, startup, and shutdown activities are planned activities that allow regulated entities ample time to evaluate the potential emissions resulting from these activities. The commission requires prior notice and estimates of emissions in order to assess whether the predicted emissions seem reasonable. This allows the commission staff to coordinate with the owner or operator to identify alternatives that will limit emissions when the predicted quantity of emissions seem excessive. Allowing changes during the course of these activities, even after the described coordination efforts, would not promote the goal of reducing unnecessary emissions. When estimated emissions are exceeded, and the emissions are reported according to §101.211, the commission already provides an opportunity for an affirmative defense.

HCPHES supported the proposed changes to §101.211(a), (c), (e), and (f) regarding the additional language of appropriate local air pollution control agency with jurisdiction.

RESPONSE

The commission appreciates the supportive comment.

NRRC, Public Citizen, Sierra Lone Star Club, and MCA commented that all excess emissions should

be promptly reported because communities should have a right to know.

RESPONSE

Notifications of emissions events that exceed an RQ are required within 24 hours of discovery.

Final reports are required within two weeks following the end of an emissions event. These reporting requirements for potentially significant emissions are both prompt and protective.

Notification of less significant emissions, those that do not exceed an RQ, would not greatly add to the effectiveness of the TCEQ's attention to the emissions that are of most concern on both a short-term and long-term basis. Both initial notifications and final reports are available to the public. No change to the rule was made in response to this comment.

EIP stated that unauthorized emissions that do not exceed an RQ may be recorded rather than reported and that because the proposed rules raise the RQ for a number of air contaminants, it would appear to significantly increase the universe of emissions that will not be promptly reported.

RESPONSE

RQs are established as a means of determining which emissions rise to the level of concern, i.e., those that must be promptly reported in an initial 24-hour notification. This provides the information for determining whether to respond and conduct an on-site investigation immediately following the initial notification based on a number of factors. As previously discussed, the commission adopted a 5,000-pound RQ for oxides of nitrogen, except in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County. The

commission determined that oxides of nitrogen emissions that do not exceed the RQ in these areas do not need to be promptly reported, and must instead follow the recordkeeping requirements of the rules. The commission is not raising the RQ for non-listed compounds from the default level of 100 pounds to 5,000 pounds.

HCPHES commented that it objected to the language in §101.211(a) that states maintenance, startup, or shutdown activities where the actual emissions exceed the emissions in the notification by more than the RQ are emissions events. The emissions notification referenced in this rule is submitted when the unauthorized emissions are expected to equal or exceed the RQ. Adding an additional amount equivalent to the RQ to the unauthorized emissions represented in the notification before the activity is considered an emissions event is less restrictive than the current rule. HCPHES commented that all emissions above the unauthorized emissions represented in the emissions notification should represent an emissions event.

RESPONSE

The commission revised the rule in this respect to directly incorporate provisions of HB 2129.

Dow and Duke supported the proposed changes and agree that additional notifications should only be required if the actual amount emitted exceeds the emissions estimates submitted in the initial notification by more than an RQ.

RESPONSE

The commission appreciates the supportive comments.

TCC commented that the last sentence of §101.211(a) should be revised to clarify that owners and operators of a regulated entity with facilities that exceed the emissions or opacity estimate submitted in the notification only need to report these as emissions events if they have exceeded the estimate by the magnitude of an RQ.

RESPONSE

In response to this comment, and in order to clarify, the last sentence in adopted §101.211(a) is revised to provide that owners and operators of a regulated entity with emissions events shall report such events as emissions events in accordance with the requirements of §101.201 and §101.222.

TCC and ExxonMobil Downstream commented that notifications for maintenance, startup, and shutdown activities are made prior to the activity and only if unauthorized emissions are expected to equal or exceed an RQ. TCC suggested that the commission clarify that these activities are expected to have emissions less than an RQ, and therefore are not required to make prior notifications.

RESPONSE

Emissions event reporting and recordkeeping requirements are addressed in §101.201 while scheduled maintenance, startup, and shutdown reporting and recordkeeping requirements are addressed separately in §101.211. Activities covered in §101.211 can become subject to §101.201

requirements, and become emissions events, when the predicted emissions are exceeded. The emissions from activities addressed in §101.211 are not excluded from becoming emissions events when the actual amount of emissions exceeds the reported amount by more than an RQ. Therefore, the commission declines to make the suggested change.

TCC requested that the phrase “by facility” be deleted in the first sentence of §101.211(a)(1)(H), because emission estimates and comparison to RQs should be by the emission activity, not by facility.

RESPONSE

The commission revised the language in the first sentence in adopted §101.211(a)(1)(H), to read: “for all emission points involved in the emissions activity.” This is consistent with other rule language that requires reporting by emission points.

TCC requested that §101.211(a)(1)(H) be revised to clarify that the notification for a scheduled maintenance, startup, or shutdown activity must only identify the “unauthorized” compounds or mixtures of air contaminants. For prior notifications, the *de minimis* quantity is only an estimate. The intent of subparagraph (H) is unclear regarding what emissions are to be included in the report. The first part indicates that only the unauthorized emissions that are expected to exceed an RQ are required to be reported. The last sentence refers to reporting emissions that are clearly expected to be below an RQ. If the commission’s intent is that once scheduled maintenance, startup, and shutdown activity is expected to have any unauthorized emissions above an RQ, then all of the unauthorized emissions are to be included in the report, this should be made clear in the rule or at least in the preamble. TCC

requested adding “expected to be” in the last sentence after “released is less than ten”

RESPONSE

The notification under §101.211(a)(1)(H) deals entirely with unauthorized emissions. The estimate in the notification is the estimate of all unauthorized emissions. Even if the estimate of these emissions is not exceeded during the activity, the emissions remain unauthorized.

Therefore, the reference to “unauthorized” in §101.211(a)(1)(H) might not provide additional clarity, but rather confuse the issue. Compounds and mixtures of contaminants that are not expected to be present in quantities greater than or equal to 100 pounds, and at a rate of less than ten pounds in a 24-hour period, can be reported as “other.” Alternatively, as is currently required, the notification can include a predicted speciation for these emissions.

TCC commented that requiring the same method of estimating emission be used for emission event reporting as was used in the permitting or applicable rule is not always appropriate or feasible. Many of the maintenance, startup, and shutdown related emissions are special activities that do not occur routinely. TCC recommended adding “where feasible or appropriate” to the end of the sentence that starts “Methods of estimates for facilities”

RESPONSE

The commission acknowledges that not all emissions events result from activities that are comparable to those that were evaluated to authorize emissions under a permit, rule, or order of the commission. However, in many instances this same method of estimation can yield the best

estimation of emissions, and modifications to the method can be incorporated as necessary to reflect the conditions of the actual emissions. Where emissions and conditions during an upset are not similar in nature and composition to those in the applicable authorization, and for emissions from facilities that are not authorized, regulated entities must identify and utilize other methods based on good engineering practice. In every instance, it is the owner or operator's responsibility to utilize good engineering practice and to provide the commission with an accurate representation of these emissions. Therefore, the commission revises §101.201(b)(1)(H) and (2)(H) and (h)(2) and §101.211(a)(1)(I), (b)(1)(I), and (b)(2)(I) to state that good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity.

TCC recommended clarifying §101.211(a)(1)(K) by adding “expected to be” after “the actions.”

RESPONSE

The commission has not made this change to the final rule, however, in clarification the report should include both those actions currently being taken and those actions expected to be taken to minimize the emissions.

Sierra Houston commented that §101.211(a)(1)(I), (b)(1)(L) and (b)(2)(L), and (f)(2) should be revised to state that methods of estimates for emissions for facilities with authorizations “must be consistent” with the methods used in the applicable permit application, rule, or order of the commission, instead of the proposed “should be consistent” language.

RESPONSE

The commission acknowledges that not all emissions events result from activities that are comparable to those that were evaluated to authorize emissions under a permit, rule, or order of the commission. However, in many instances this same method of estimation can yield the best estimation of emissions, and modifications to the method can be incorporated as necessary to reflect the conditions of the actual emissions. Where emissions and conditions during an upset are not similar in nature and composition to those in the applicable authorization, and for emissions from facilities that are not authorized, owners and operators of regulated entities must identify and utilize other methods based on good engineering practice. In every instance, it is the owner and operator's responsibility to utilize good engineering practice and to provide the commission with an accurate representation of these emissions. Therefore, the commission revises §101.201(b)(1)(H) and (2)(H) and (h)(2), and §101.211(a)(1)(I) and (b)(1)(I) and (2)(I) to state that good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity.

TCC recommended changing "experienced" in the first sentence of §101.211(a)(2)(E) to "is expected to experience" and "occurred" to "is expected to occur."

RESPONSE

The commission has not made this change to the final rule. No problems with enforcement regarding notification have been encountered.

TCC recommended revising §101.211(a)(2)(I) by replacing “the actions taken, or being taken, to minimize the emissions from the scheduled maintenance, startup, or shutdown activity” with “the actions taken, or expected to be taken, to minimize the emissions from the scheduled maintenance, startup, or shutdown activity.”

RESPONSE

The commission must evaluate the notification for these events in order to assess whether the proposed activities and resultant predicted emissions are reasonable. In order to do so, it is necessary to evaluate what steps are planned to minimize emissions. Since these activities are scheduled activities, it is not unreasonable to require identification of the actions that are planned to occur. No change was made to the rule in response to this comment.

TxOGA recommended clarifications to §101.211(b)(1) by revising paragraph (1), adopted as subparagraph (A) from “the name of the owner or operator” to “the name of the owners and operators of regulated entities that were required to notify under subsection (a) of this section because the unauthorized emissions from the activity were expected to exceed an RQ.”

RESPONSE

It is clear that the name of the owner and operator refers to the description of the owner and operator defined in §101.211(b), and it is not necessary to refer to a separate subsection. Therefore, the commission declines to make the suggested change.

TCC recommended deleting the word “scheduled,” adding “unauthorized” after “at which,” deleting “will,” and changing “occur” to “occurred” in §101.211(b)(1)(C).

RESPONSE

All emissions subject to these reporting requirements are unauthorized, and therefore this specific suggested change would not add additional clarity to the requirements. However, in response to these comments, the commission changed the phrase “the scheduled point” to “the points.”

TCC recommended adding “unauthorized” after “determining the quantity of” and delete “to be” after “air contaminants” because this record is for estimated unauthorized emissions in §101.211(b)(1)(J).

RESPONSE

All emissions subject to these reporting requirements are unauthorized, and so this would not add additional clarity to the requirements. The deletion of the words “to be” is unnecessary. Even though these are records of estimates, they are also predictions of estimates. No change was made to the rule in response to this comment.

TCC recommended adding “unauthorized” after “taken to minimize the” because this record is for estimated unauthorized emissions in §101.211(b)(1)(K).

RESPONSE

All emissions subject to these reporting requirements are unauthorized, and so this would not add additional clarity to the requirements. No change was made to the rule in response to this comment.

TxOGA proposed the following additional language in §101.211(b)(2) as clarification: “. . .because the unauthorized emissions from the activity were not expected to exceed an RQ.”

RESPONSE

The suggested revisions were not incorporated as the reporting requirements under §101.211(a) refer both to those activities that are expected to exceed an RQ and also to excess opacity events. Instead of repeating the provisions of §101.211(a), the reference remains.

TCC recommended deleting the word “scheduled,” adding “unauthorized” after “at which,” and deleting “will,” and changing “occur” to “occurred” in §101.211(b)(2)(C).

RESPONSE

All emissions subject to these reporting requirements are unauthorized, and therefore this specific suggested change would not add additional clarity to the requirements. However, in response to the comments, the commission changed the phrase “the scheduled point” to “the points.”

TxoGA recommended that §101.211(b)(2)(C) be deleted and subsequent subparagraphs relettered

accordingly. The physical location of the regulated entity is available from the information in §101.211(b)(1)(B).

RESPONSE

In those instances where an activity is scheduled and the owner or operator does not have an assigned RN or air account number, it is not easy to identify the physical location of the site. Section 101.211(b)(1)(B) requires the identification for the location of the regulated entity, or “plant site,” in these instances. Section 101.211(b)(2)(C) requires the location of the emissions point, within the plant site. Therefore, the second sentence in §101.211(b)(1)(B) is revised to require identification of the location of the regulated entity, rather than identifying the location of the release.

TxOGA recommended that §101.211(b)(2)(H) be revised by deleting the requirement to use past engineering methods, and add language that would require the use of past engineering analysis or testing to have been released as a result of the scheduled maintenance, startup, or shutdown activity and that were unauthorized. TxOGA also recommended adding language to limit the exception for boilers and combustion turbines to opacity from boilers and combustion turbines. This is the first instance in which the release is not required by the commission to be broken out by facility. TxOGA concurs with this wording and would object to “by facility” being added.

RESPONSE

The suggested changes seem to limit the evaluation of common process knowledge or past

engineering analyses to the scheduled activity or to the unauthorized portion of those emissions. Instead, all process knowledge and previous analysis that can identify potential compounds and mixtures of air contaminants should be considered. Therefore, no change was made to the rule in response to this comment.

TCC appreciates the commission's reduction of emission details for insignificant quantities. With regard to §101.211(b)(2)(H), the commission should clarify in the preamble that all compounds or mixtures in the less than ten-pound emission need not be specifically identified, but that process knowledge can be used to exclude the compounds or mixtures with less than 100-pound RQs.

RESPONSE

The rule allows for grouping compound or mixtures, with an RQ of 100 pounds or less of air contaminants emissions known through engineering analysis or testing, when the amount emitted of those compounds or mixtures is 100 pounds or less, to be grouped together with the “other” RQ category. When emissions of compounds or mixtures classified as “other” through the RQ definition of “other” or those classified as “other” by §101.201 or §101.211 requirements together exceed 100 pounds, notification and reporting are required. The commission is bound by THSC, §382.0215, which requires recordkeeping of all emissions events.

Arkema supported the proposal to not report emissions of less than one pound of a specific compound in §101.211(b)(9) and supports allowing for small amounts of emissions to be reported as “other.”

Arkema requested an extension of this concept to not require reporting of emissions of less than 1% of

any RQ for any reportable release.

RESPONSE

The commission must comply with THSC, §382.0215, requiring the notification and recordkeeping for unauthorized emissions. The current reporting and recordkeeping requirements of §101.211 comply with THSC, §382.0215. The commission made no change in response to these comments.

TxOGA commented that the word “as” should be deleted from §101.211(c) in the phrase “the owner or operator of the regulated entity shall submit a final record as required by subsection (b) of this section to the commission office for the region in which the regulated entity is located” as it implies that subsection (b) specifies the manner in which the final record is to be submitted to the regional office.

RESPONSE

The commission revised the language as suggested.

EIP commented that §101.211(e) should be amended to clarify that the executive director’s specification of the amount, time, and duration of emissions that will be allowed during scheduled maintenance, startup, and shutdown activity does not authorize emissions that are in excess of permit or rule limits or are otherwise “unauthorized.”

RESPONSE

The rules in Chapter 101, Subchapter F do not authorize emissions or facilities. Rather, the rules in Subchapter F, Division 3 provide for an affirmative defense for unauthorized emissions resulting from unplanned maintenance, startup, and shutdown activities. The commission is able to review the reported activities prior to their occurrence and to coordinate with the owner or operator to make certain that efforts are being utilized to limit those unauthorized emissions. No change was made to the rule in response to this comment.

TCC commented that Subchapter F only deals with unauthorized emissions and §101.211(e) should only address unauthorized emissions. Further emission reductions may be possible by extreme measures, but only feasible methods should be required to be considered. TCC recommended adding “unauthorized” after “and duration of” in the first sentence and after “of the means by which” in the third sentence of subsection (e). TCC also requested adding “feasibly” after the phrase “such emissions cannot” in the last sentence of subsection (e).

RESPONSE

The rules in Chapter 101, Subchapter F do not authorize emissions or facilities. Rather, the rules in Subchapter F, Division 3 provide for an affirmative defense for unauthorized emissions resulting from upset events and certain maintenance, startup, and shutdown activities. The commission is able to review the reported activities prior to their occurrence and to coordinate with the owner or operator to make certain that efforts are being utilized to limit those unauthorized emissions. When reasonable measures are not taken to minimize emissions, the

commission may take enforcement action. Failure to comply with the representations in applications submitted according to the schedule in §101.222(h)(1) or other standard operating procedures in place at the plant may be considered as evidence of whether the owner or operator operated the facilities in a manner consistent with good practices for minimizing emissions, one of the criteria for demonstrating that the affirmative defense in §101.222(b) - (e) is met. The commission made no change in response to these comments.

TxOGA, Dow, and Duke recommended that the requirements for annual reporting of emissions from scheduled activities in §101.211(f) be deleted, for many of the reasons that were provided in comments relating to annual reporting requirements in §101.201(h).

RESPONSE

Unauthorized emissions that are non-reportable under §101.201 and §101.211 are not captured in STEERS reports to the commission, and only major facilities are required to submit this emissions information within the annual emissions inventory reports required by §101.10. As a result, there is no single ready source for the commission to evaluate the summation of all unauthorized emissions. Therefore, the requirement was established as the least burdensome and the most efficient method for addressing this need. No change was made to the rule in response to these comments.

Division 3: Operational Requirements, Demonstrations, and Actions to Reduce Excessive Emissions

Section 101.221 - Operational Requirements

TCC and ExxonMobil Downstream recommended leaving the “shall” and deleting “must” in §101.221(a).

RESPONSE

The commission declines to make the suggested change. The wording change to “must” instead of “shall” is needed to conform to the drafting standard in the *Texas Legislative Council Drafting Manual*, November 2004.

Arkema requested that the commission take all reasonable steps to harmonize federal startup, shutdown, and malfunction obligations with the regulations subject to this rulemaking, yet understands that the commission does not have the authority to unilaterally grant exemptions from federal standards and these actions may or may not be seen as excess emissions under the commission’s regulations.

RESPONSE

It is unclear what steps the commenter is proposing to address this concern. The commission acknowledges that emission limitations may not be consistent between its authorizations, rules, and orders and those in federal law. For example, in 40 CFR §60.49(b), the EPA explicitly requires that nitrogen oxide emissions limits under 40 CFR §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 40 CFR §60.11(d) in order to

mitigate emissions during such activities. Compliance with 40 CFR §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. 40 CFR §60.11(d) workpractice standards, which generally apply during these types of events, effectively include the demonstration criteria that are contained 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). In either NSPS 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. Sections 101.221(d) and 101.222(f) clearly state that the commission's rules do not exempt startup or shutdown emissions from federal requirements or other applicable requirements. No change has been made to the rule in response to this comment.

Arkema stated that clarification is needed to specify that the existing requirements in 30 TAC Chapters 111, 112, 115, and 117 are enforceable only during normal operations. Arkema stated that an explanation is needed to explain the relationship between emission limitations during normal operations, and emissions limitations during startup, shutdown, and malfunction and emission events. Arkema commented that Chapter 101 rules should contain a right to petition the commission clause for relief from fixed emission standards that did not anticipate regulation startup, shutdown, and malfunction emission events during rule development. The petition would describe the startup, shutdown, and malfunction emissions that need to be addressed beyond the normal operations, the anticipated frequency of these emissions events now being documented in the new source review permit process, and a feasibility analysis documenting that the requested emission limits during startup, shutdown, and malfunction events are appropriate. Further, the commission would include language in the new source review permit documenting how a facility can obtain a permit shield during documented startup, shutdown, and malfunction events where such emissions during startup, shutdown, and malfunction events do not constitute an excursion of the underlying emission limits.

RESPONSE

The commission declines to make the suggested change. The petition as described by the commenter essentially contains a request for an alternative authorization mechanism, which is beyond the scope of this rulemaking. These rules do not authorize emissions; authorization must be obtained by meeting the requirements of a PBR, a standard permit, or a new source review permit. Concurrent with this rulemaking, the commission is proposing rules regarding a variety of options to address concerns about obtaining authorization for historically excess emissions.

TCC and ExxonMobil Downstream commented that in §101.221(e) the term “facility” has not been deleted, and the preamble should clarify that proof of meeting the demonstration criteria is to be provided for each emission event or emission activity and not separately for each facility.

RESPONSE

THSC, §382.0216 allows for the commission to establish an affirmative defense to a commission enforcement action if the emissions event meets criteria defined by commission rule. The criteria in §101.222 do not prescribe what specific proof is required. The owner or operator of the facilities makes its own determination of what information it thinks is sufficient to meet its burden of proof. No change was made to the rule in response to these comments.

TxOGA proposed changing the term “facility” to “regulated entity” in §101.221(e) to implement the legislative intent that emissions event reporting focus on root cause. This change would also avoid any possible misinterpretation that detailed information regarding multiple facilities is needed to evaluate the event and would indicate that there are no statutory requirements to evaluate individual facility performance for a maintenance, startup, or shutdown activity.

RESPONSE

The owner or operator of a regulated entity is necessarily the owner or operator of a facility. This change would not, in and of itself, indicate that reporting is based on root cause. The reporting requirements in §101.201 and §101.211 for emissions events and maintenance, startup, and shutdown activities have been modified to reduce some reporting, and the commission’s

implementation of HB 2129, §1 through its STEERS reporting system will also reduce reporting. However, detailed information is still required for the commission to comply with the statutory requirements for evaluating these events and activities. No change was made to the rule in response to this comment.

TCC and ExxonMobil Downstream strongly supported deletion of the expiration clause in §101.221(g).

RESPONSE

The commission appreciates this comment in support of §101.221(g).

Division 3: Operational Requirements, Demonstrations, and Actions to Reduce Excessive Emissions

Section 101.222 - Demonstrations

EIP commented that the affirmative defense for emissions events in §101.222 remains overly broad and should only apply to commission enforcement action. The FCAA gives citizens the right to bring an enforcement action and to seek civil penalties and injunctive relief for the violation of any emission standard, limitation, or order. Neither the commission nor EPA has the authority to limit citizens' right to bring such enforcement action, except as expressly provided by the FCAA. Therefore, the commission rules should clarify that any affirmative defense is an exercise of the commission's enforcement discretion and cannot impact the ability of citizens or the EPA to bring their own enforcement actions as provided by the FCAA. Also, the commission is granted statutory authority to establish an affirmative defense for a commission enforcement action, and the commission cannot

assume the broader authority to create a defense applicable to citizen and EPA enforcement action.

EIP commented that although the proposed rule states that the commission will not exempt sources from complying with any federal requirements, this provision applies to the commission's exemption authority, not the affirmative defense provisions of the rules.

RESPONSE

The commission declines to make the suggested changes in response to this comment. It is not necessary to include language in this rulemaking stating authority of citizens to bring enforcement actions under the FCAA. The commission has stated in previous rulemakings that its rules are not intended to nor do they impact citizens' legal rights under the FCAA. The commission agrees that it is granted statutory authority to establish an affirmative defense and these rules comply with that authority.

EPA commented that excess emissions from startup, shutdown, maintenance, and malfunctions, those in excess of allowable SIP limits, must be considered in determining compliance with emissions limits. EPA commented that assertion of an affirmative defense to an enforcement action does not relieve the source from liability for a violation of the SIP, but instead allows the source to avoid civil penalties when certain criteria are met in a judicial or administrative enforcement action.

RESPONSE

The commission agrees with the commenter.

Houston Sierra commented that it is opposed to allowing an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief because this rule allows non-reportable emissions events to never result in enforcement actions.

RESPONSE

The commission made no change in response to this comment. Non-reportable emissions events are not exempt from enforcement for unauthorized emissions or excessive emissions events determinations. Non-reportable data may indicate a frequent or recurring pattern of unauthorized emissions.

Representative Hochberg commented that a distinction should be drawn between true upset events and events that can be anticipated.

RESPONSE

Changes to §101.222 that distinguish planned and unplanned maintenance, as well as the limitation of the affirmative defense in §101.222(b) to upset events addresses this concern. In addition, the rule provides an incentive for owners and operators to seek authorization for a significant portion of emissions that are currently unauthorized, allowing for the orderly transition of planned maintenance, startup, and shutdown emissions from a vast number of facilities to become authorized. The transition schedule will allow time for a meaningful review of permit applications. This will allow the commission to focus its enforcement resources on the

unpredictable emissions.

EIP commented that the commission should ensure that the criteria for demonstrating an affirmative defense in §101.222 are clear and consistent with EPA narrowly tailored guidance. This clarity assures both that companies are accountable for managing their operations properly at all times, and that the commission does not have to devote scarce legal and enforcement resources to arguing over the interpretation of the affirmative defense criteria on a case-by-case, after-the-fact basis during individual investigations. Instead, to the maximum extent possible, the criteria should be clearly defined by rule. Additionally, clear, narrow limits on qualification for the affirmative defense are necessary because the commission does not count emissions in excess of 1,200 pounds per hour (lbs/hr) toward the annual cap of a facility's emissions of highly reactive volatile organic compounds, based on the assumption that these emissions are unauthorized and, thus, subject to enforcement action as non-excessive emissions events under §101.222(b). However, if a company can claim that its emissions above 1,200 lbs/hr are part of a non-excessive emissions event, it may assert an affirmative defense and, thus, be exempt from serious enforcement action.

RESPONSE

The commission made no specific changes in response to this comment. Changes to the demonstration criteria in §101.222(b) - (e) are discussed elsewhere in this preamble. The criteria for demonstrating that an owner or operator has met an affirmative defense are clear and meet EPA's guidance. Unauthorized emissions of highly reactive volatile organic compounds reported in accordance with this rule are not afforded any additional or separate consideration than other

types of unauthorized emissions. All unauthorized emissions are subject to reporting and recordkeeping requirements and operators have the same opportunity to claim an affirmative defense regardless of whether they are also subject to a cap for highly reactive volatile organic compound or oxides of nitrogen emissions under another rule of the commission.

EIP commented that both current and proposed rules include a requirement that sources demonstrate that any emissions for which they assert an affirmative defense did not cause or contribute to an exceedance of the NAAQS, prevention of significant deterioration increments, or to a condition of air pollution. EIP recommended that the commission clarify that no emissions events that cause releases of volatile organic compounds in the areas may qualify for an affirmative defense. A similar clarification should be considered for the Corpus Christi area. GHASP commented that the affirmative defense cannot apply to excess emissions of certain compounds in areas such as HGB where excess emissions from a limited number of sources will cause exceedances in the federal air quality standards.

RESPONSE

In 2002, the commission adopted lower RQs, and more recently adopted various rules to better control volatile organic compound emissions in the HGB area. The rules regarding control of volatile organic compound emissions are necessary to further prevent the formation of ozone, particularly in the ozone nonattainment areas of HGB and BPA. The affirmative defense criteria, if fully met, include actions that the commission has established as the most important actions to take when there are unauthorized emissions. If unauthorized emissions occur, these criteria provide an incentive to minimize emissions to mitigate enforcement. Industry should

already be controlling releases, and complying with the commission's rules regarding control of volatile organic compound emissions, therefore, removal of the affirmative defense is not warranted. No change has been made to the rule(s) in response to this comment.

EIP commented that the commission declined to apply the same tighter controls on other volatile organic compounds as it does on highly reactive volatile organic compounds in spite of strong evidence demonstrating that several other volatile organic compounds cumulatively account for as much as half of ozone formation in the Houston region. The commission reasons that existing permits adequately control emissions of other volatile organic compounds. However, to the extent the regulations governing emissions events allow plants to routinely exceed their permitted emissions limits during emissions events without facing penalties, existing permits do not adequately control emissions of other volatile organic compounds.

RESPONSE

The commission does not agree that the emissions events rules allow for routine exceedances of permitted emissions limits during emissions events without facing penalties. The evaluation of whether the commission should require additional controls of other volatile organic compound emissions is beyond the scope of this rulemaking, therefore, the commission declines to make the suggested change.

TPA suggested that a new subsection be added to §101.222 that would provide that emissions from transportation pipelines are not reportable emissions events, shall not be the subject of a notice of

violation or a notice of enforcement by the commission, and that no assessment of the pipeline, pressure relief valve, or other root cause be performed by the commission.

RESPONSE

The commission made no change in response to this comment. The commission acknowledges that the RRC has jurisdiction regarding pipelines, however, the commission has jurisdiction of air contaminants, and is charged with safeguarding the states's air resources from pollution by controlling or abating air pollution and emissions of air contaminants. Therefore, emissions of air contaminants from pipelines, whether authorized or unauthorized, remain subject to the jurisdiction of the commission. The commission found no basis to exclude emissions from transportation pipelines into ambient air from regulation as emissions events, nor to provide a blanket exclusion from enforcement action and how violations would be analyzed. However, any corrective action required for emissions events would not conflict with pipeline operation and safety as required by the RRC or federal DOT.

Representative Hochberg commented that the commission should establish specific criteria for the classification of emissions events, not merely repeat the statutory criteria. EIP commented that the commission should retain authority to decide on a case-by-case basis that additional events qualify as "excessive," but the rules should include a bright line standard for what is excessive, such as when emissions of a particular pollutant from an emissions event or emissions events exceed a certain percentage of a facility's most recently reported annual emissions of that pollutant.

RESPONSE

The commission did not propose changes to the criteria for excess emissions events in §101.222(a), and therefore declines to make the suggested changes without the opportunity for comment.

TIP commented that if the commission is having difficulty reconciling the use of the term “regulated entity” throughout THSC, §382.0215 with the fact that the legislature filed to correct the reference in THSC, §382.0216, which directs the commission to establish criteria for determining when emission events are excessive, then it suggested that the commission remove all references to excessive emission determinations from the current rules and go back and begin developing regulations that contain criteria more in keeping with the requirements of THSC, §382.0216. Thus far, the commission has failed to develop rules that contain criteria more in keeping with THSC, §382.0216. TIP commented that the commission should simply exercise good sense to interpret the provisions of THSC, §382.0216 in a reasonable manner, just as it interprets the use of the term “facility” in other contexts, to yield a reasonable result. TIP recommended that the commission begin developing rules that contain criteria more in keeping with the requirements of THSC, §382.0216.

RESPONSE

Section 101.222(a) includes the six statutory criteria from THSC, §382.0216 for determining excessive emissions events. The commission did not propose changes to the criteria for excess emissions events in §101.222(a), and therefore declines to make any suggested changes without the opportunity for comment. Specific thresholds, such as numeric criteria for each of these

under consideration, have not been proposed. This is because of the numerous variables that must be taken into consideration for each emissions event in order to assess whether those emissions are excessive. For example, emissions events stem from a number of causes and from a number of varying sources. Events can occur in nonattainment areas, in heavily populated areas, and within sparsely populated areas. Development of a comprehensive set of criteria, or even multiple sets of criteria, to account for the numerous site/case-specific considerations for these events has therefore not been pursued. Instead, the commission has taken the position that each emissions event will be evaluated based on the facts surrounding the event as they relate to the statutory requirements.

HCPHES commented that the commission should add language to §101.222(a) to include local air pollution control agencies having jurisdiction for determining when emission events are excessive. This would allow the local agency to actively participate in this determination as a partner with the commission and enforce this set of rules while protecting human health and the environment.

RESPONSE

The commission's interpretation of this statutory requirement, when first implemented in 2002, requires the executive director to make these determinations and this rulemaking is not changing that requirement. The commission would appreciate any information a local program wants to provide that would assist in determining what events may be excessive, but declines to add an additional step in the determination process which could delay these determinations until there is consensus by both agencies.

EIP commented that the rulemaking should require sources to reduce excess emissions to the maximum extent possible through review, planning, and good operational practices and controls developed through permitting. Furthermore, the rulemaking should narrowly and clearly define criteria for any affirmative defense for emissions events.

RESPONSE

The commission did not make any specific change in response to this comment. The demonstration criteria accomplish the goal of addressing the most important issues associated with air contaminants. Also, although these rules do not provide any form of authorization for construction of facilities and associated emissions, the phasing out of the affirmative defense for planned maintenance, startup, and shutdown activities in §101.222(h) provides an incentive for the owner or operator to seek authorization and reduce emissions.

TxOGA recommended that §101.222(a) be amended to add language that would provide that an owner or operator of a regulated entity be given an opportunity to meet with the executive director or his delegate to discuss any mitigating factors prior to an initial determination being made that an emissions event is excessive. TxOGA also commented that subsection (a) should be amended to clarify that a determination that an emissions event is excessive must give appropriate weight to all of the specified criteria.

RESPONSE

The excessive determinations are based on historical events, and the owner or operator has had

previous opportunities to provide such information with each emission event report, and any subsequent enforcement, and at any meeting with the executive director or his staff. Owners or operators may have opportunities to meet with commission staff to discuss mitigating factors at several points in the enforcement process. However, if there are mitigating factors that would affect an excessive determination, the commission strongly encourages the regulated entity to submit that information with its initial or final report of the event. It is unclear what the commenter suggests as what would constitute “appropriate weight” for each of the excessive criteria for excessive emissions events criteria. Since the commission did not propose changes to this subsection and there was no opportunity for notice and comment on such changes, the commission declines to make these changes.

TxOGA proposed changes to §101.222(a)(1) - (3) and (5). TxOGA proposed that §101.222(a)(1), (2), and (5) be revised to require that the owner or operator identify and report only that facility at the regulated entity that is the “root cause” of the event, stating that this will provide a proper focus for understanding and evaluation of the actual cause of the event and will eliminate reporting of unnecessary and possibly misleading information. In subsection (a)(3), TxOGA proposed adding the phrase “of the unauthorized emissions” to limit the emission information required for consideration by the executive director. TxOGA reasoned that authorized emissions limits for standard operations in most permits, and particularly in PBRs and standard permits, have no relevance to the emissions from upset events. The emissions from upset events are based on non-standard operations that were not contemplated, described, or represented in the construction or modification authorizations.

RESPONSE

The commission declines to make these changes. As discussed previously in the preamble, the commission needs to have all of the emission information, including information about all emissions, to adequately perform an excessive determination. This is particularly important to determining possible adverse off-property impacts. Emissions events reporting requirements are in §101.201; §101.222(a) lists the criteria for the excessive determination, rather than any reporting requirements. Since the commission did not propose changes to this subsection and there was no opportunity for notice and comment on such changes, the commission declines to make these changes.

Arkema commented that various sections of the proposed rulemaking, such as §101.222(b), state that the affirmative defense is available to all claims in enforcement actions other than claims for administrative technical orders and actions for injunctive relief. Arkema requested that this defense be available for all enforcement actions including administrative technical orders and actions for injunctive relief.

RESPONSE

The commission declines to make this change. EPA policy extends the affirmative defense only to administrative penalties. In addition, although the commission can use its enforcement discretion as to whether corrective action and injunctive relief will be pursued, the commission does not want to permanently waive this type of enforcement authority for emissions events.

Arkema supported the revisions to §101.222(b)(1) and other conforming changes that instruct the commission to not initiate enforcement for minor reporting emissions or inaccuracies. Arkema also supported the commission simplifying the enforcement criteria for emissions events described in the proposal preamble and the modifications deleting the reporting of authorized limits and opacity limits in the emission event reports. Arkema is concerned with the enforcement status of emission events that clearly are not caused by externalities that cannot be predicted, such as acts of God (hurricanes, storms), loss of publicly supplied utilities (electricity, water) or events or incidences in the community. Arkema requested that the commission maintain the affirmative defense for these events and any others initiated outside the control of the facility managing the event.

RESPONSE

The commission appreciates the support. Certain unauthorized emissions that would otherwise be a violation of a statute, rule, or permit within the commission's jurisdiction that 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.

TCC and ExxonMobil Downstream appreciated the effort to clarify in §101.222(b)(1) that minor omissions or inaccuracies that do not impair the commission's ability to review the event should not be cause to invalidate the notification and initiate enforcement. TIP suggested that the rule should be

revised to clarify that formal enforcement is not the appropriate remedy for reports that may inadvertently exclude information or contain imprecise information. TIP recommended that the word “facility” be changed to “regulated entity” so the commission only initiates enforcement if the owner or operator of a facility of a regulated entity fails to report or knowingly or intentionally falsifies information.

TxOGA proposed that the commission add language to §101.222(b)(1) stating specifically that the commission will not initiate enforcement for failure to report, and the owner or operator will not be deemed to be in violation or lose eligibility for an affirmative defense, solely on the basis of minor omissions or inaccuracies that do not materially impair the commission’s ability to review the event.

TxOGA stated that this provision is badly needed because such minor clerical errors have, in the past, resulted in the issuance of notice of violations and/or notice of enforcement and a denial of an affirmative defense claim. Specifically, TxOGA stated that this has been a particular problem with the initial report, which often has to be hurriedly prepared to meet the reporting deadline. These changes will take the pressure off the industry field personnel who need to make weekend or after-hours reports and allow them to focus on addressing the physical problems associated with an emissions event instead of worrying about getting all of the paperwork details exactly correct. Addition of the word “materially” recognizes that a strict interpretation of this provision would cause the denial of virtually every claim for an affirmative defense if the emissions event report contained any error or inaccuracy whatsoever.

RESPONSE

The rule clearly states that failure to report as required by §101.201(a)(2) or (3), (b), or (e) will cause the commission to initiate enforcement, except when the failure consists of minor omissions or inaccuracies that do not impair the commission's ability to review, and it is not intentional falsification or knowing omissions. The commission appreciates the support for the additional language regarding enforcement, but declines to add the word "materially" because the rule specifies that the missing information is limited to minor omissions or inaccuracies that do not impair the commission's ability to review the activity or event. In addition, there is no need to specify in the rule that formal enforcement is not the remedy or that no enforcement will be taken when reports may inadvertently exclude information or contain imprecise information because the enforcement determinations are based on a case-by-case review of the facts. Exclusion of some information could possibly result in formal enforcement. The commission also declines to change the term "facility" to "regulated entity." The commission retains the enforcement flexibility to cite either the facility owner, or the regulated entity, which is the owner or operator of a facility. The new language provides the remedy sought to minimize enforcement for minor omissions and inaccuracies.

AECT supported the commission's proposed revision to §101.222(b)(1), (c)(1), (d)(1), and (e)(1). However, AECT commented that §101.222(b)(1) should be revised as follows to make it more consistent with the proposed sentences in §101.222(c)(1), (d)(1), and (e)(1): "Moreover, failure to include in such a report information that does not impair the commissioner's ability to review the event according to this rule will not result in enforcement and loss of opportunity to claim the affirmative

defense, unless the owner or operator knowingly or intentionally falsified the information in the report.” AECT commented that the revised language would be consistent with THSC, §382.0216(i).

RESPONSE

The commission appreciates the support, but declines to make the suggested changes. The amendment to §101.222(b)(1) moves language from §101.201(h) to better clarify when the commission will initiate enforcement for failure to report and for the underlying emissions event itself. Section 101.222(b) does not apply to minor omissions or inaccuracies that do not impair the commission’s ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report. The commission revised §101.222(c)(1), (d)(1), and (e)(1) to specify that the missing information is limited to minor omissions or inaccuracies that do not impair the commission’s ability to review the activity or event. Therefore, these changes are expected to minimize enforcement actions for minor reporting violations.

EIP commented that the criteria in §101.222(b) should be amended for clarity and consistency with EPA guidance. Specifically, §101.222(b)(2) should be amended to state that the unauthorized emissions were caused by a sudden, unavoidable breakdown of equipment, beyond the control of the owner or operator.

RESPONSE

The commission agrees with EPA and added the term “unavoidable” to §101.222(b)(2). The

commission has limited the scope of emissions eligible for the affirmative defense in §101.222(b) to those which are non-excessive upset emissions, rather than all non-excessive emissions events. Unavoidable breakdowns are those of the emergency type, rather than those that are due to lack of maintenance and planning, and therefore are within the scope of this type of emissions.

TxOGA proposed that §101.222(b)(2) should be amended to provide that the breakdown, rather than the unauthorized emissions, was beyond the control of the owner or operator of the regulated entity making the claim of an affirmative defense. The current language would deny a claim of an affirmative defense in the absence of a sudden breakdown of equipment or process over which the owner or operator of the equipment or process had control. An emissions event at a regulated entity often occurs as the result of a breakdown of some off-site equipment or process under another person's control (e.g., an emissions event at an oil or gas production lease caused by a power failure or by a breakdown at a downstream pipeline or natural gas processing plant).

RESPONSE

Section 101.222(b)(2) states that “the unauthorized emissions were caused by a sudden breakdown of equipment or process, beyond the control of the operator.” The commission clarifies that it is the sudden breakdown of equipment or process that is referenced or described as being beyond the control of the operator. Therefore, no revision of the rule is necessary.

TCC and ExxonMobil Downstream appreciated the improvement in the language in §101.222(b)(3) to assure that the criteria is reasonably achievable. TxOGA proposed language for §101.222(b)(3), which

would provide that the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided, and could not have been reasonably foreseen and avoided by technically feasible design, operation, and maintenance practices consistent with good engineering practice. EIP commented that §101.222(b)(3) should be amended to state that the unauthorized emissions did not stem from any activity or event that could not have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices.

RESPONSE

The commission made some changes in response to these comments. The adopted amendment to §101.222(b)(3) does not include the proposed reasonableness standard for determining this criteria. The commission considers site-specific information, what led to the cause of each event, and the actions taken, such as operator planning and maintenance practices. Adding the term “reasonably” does not establish a new standard or criteria specific threshold that the commission does not already consider, and could add another level of uncertainty in determining whether the criteria are met. The adopted amendment revises the criteria to add that the unauthorized emissions did not stem from any activity or event that could have not only been foreseen and avoided, but also planned for. The adopted amendment also changes the criteria of “could not have been avoided by good design, operation, and maintenance practices” to “could not have been avoided by better operation, and maintenance practices or by technically feasible design consistent with good engineering practice.” This change more properly places the emphasis on action by the operator on operation and maintenance, and the criteria of what is technically feasible and the application of good engineering practices on the design of the facilities.

Arkema requested that the commission clarify in §101.222(b)(3) what constitutes technical feasibility in a manner that includes cost-effectiveness in a technical feasibility determination. Arkema suggested that the commission use existing common industry practices for determining technical feasibility, such as how the commission would evaluate technical feasibility for a control device determination during the new source review permit review process. TxOGA proposed language for §101.222(b)(3), which would provide that the unauthorized emissions could not have been reasonably foreseen and avoided by economically justifiable design, operation, and maintenance practices consistent with good engineering practice.

RESPONSE

The commission declines to make the suggested change to add a reference to the cost-effectiveness as a specific part of the criteria. “Technically feasible” now modifies only the design that must be consistent with good engineering practice. Common industry practices are considered during the analysis for this criteria.

TxOGA stated that §101.222(b)(3) should also provide an economic reasonableness test. It is not reasonable, for instance, for a regulated entity operating in Texas to ensure that there will never be any freezing problems for its external piping by applying the same heating or installation technology as are required to be used for a similar entity operating in Alaska. Similar language was proposed by AECT.

RESPONSE

The commission declines to make the suggested change to add a reference to the cost-effectiveness

as a specific part of the criteria. “Technically feasible” now modifies only the design that must be consistent with good engineering practice. Common industry practices are considered during the analysis for this criteria.

EPA commented that §101.222(b)(3) revises the existing SIP-approved criteria that a source must prove in order to assert an affirmative defense. The requirement to prove that the event could not have been avoided by better operation and maintenance practices is a fundamental principle which EPA considered in drafting its 1999 startup, shutdown, and malfunction guidance. The proposed change adds a level of subjectivity that limits EPA, citizens, and the commission’s enforcement authority. The proposed change also decreases the source’s responsibility to anticipate and eliminate releases of excess emissions. The change is a weakening of the existing SIP provision.

RESPONSE

The commission made some changes in response to these comments. The adopted amendment to §101.222(b)(3) does not include the proposed reasonableness standard for determining this criteria. The commission considers site-specific information, what led to the cause of each event, and the actions taken, such as operator planning and maintenance practices. Adding the term “reasonably” does not establish a new standard or criteria specific threshold that the commission does not already consider, and could add another level of uncertainty in determining whether the criteria is met. The adopted amendment revises the criteria to add that the unauthorized emissions did not stem from any activity or event that could have not only been foreseen and avoided, but also planned for. The adopted amendment also changes the criteria of “could not

have been avoided by good design, operation, and maintenance practices” to “could not have been avoided by better operation, and maintenance practices or by technically feasible design consistent with good engineering practice.” This change more properly places the emphasis on action by the operator on operation and maintenance, and the criteria of what is technically feasible and the application of good engineering practices on the design of the facilities. These changes meet EPA guidance for SIP approval of affirmative defense criteria for upset events.

EIP commented that §101.222(b)(5) should be amended to add that off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that repairs were made as expeditiously as practicable.

RESPONSE

The commission declines to make this change. These factors may be relevant in some cases and will be considered in analyzing for this criteria. The use of off-shift labor and overtime to achieve compliance is not an assurance that the activity will qualify for an affirmative defense.

EIP commented that §101.222(b)(6) should require that emissions were minimized to the maximum extent practicable. EIP commented that §101.222(b)(7) should add the requirement that all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality.

RESPONSE

The commission declines to make the suggested changes to §101.222(b)(6) and (7). However, as

previously discussed, the commission included the suggested change to §101.222(b)(7) as an addition to §101.222(b)(6). The commission determined that, in addition to requiring that the owner or operator minimize the amount and duration of emissions, that all possible steps should be taken to minimize the impact of the unauthorized emissions on ambient air quality.

TxOGA proposed deleting the references to exceedances of the NAAQS and prevention of significant deterioration increments in §101.222(b)(11). TxOGA stated that, based on the definition of “air pollution” in the TCAA, this language is redundant in this demonstration. A strict and literal enforcement of the current provision would require modeling and air quality monitoring data to be submitted for every emissions event. Deleting these terms, as proposed by TxOGA, would give the commission the discretion to determine when such data is actually needed to make the required demonstration without having to require such information in all instances.

RESPONSE

The commission declines to make this change. The commission specifically expanded the existing language previously in §101.11(a)(9) when this language was adopted in 2002. Previously, §101.11(a)(9) was a test of whether the emissions from an event caused or contributed to a condition of air pollution. In 2002, this language was added to address comments made by EPA (September 6, 2002, issue of the *Texas Register* (27 TexReg 8499)). Section 101.222(b)(11) does not require modeling and monitoring data be submitted for every emissions event.

TCC and ExxonMobil Downstream recommended deleting all of §101.222(b)(12), stating that there is

no advantage to willfully not making a notification for a planned maintenance, startup, and shutdown activity. This criteria has no benefit and only serves to create another uncertainty about qualifying for an affirmative defense. Similar comments were made by Dow and Duke.

RESPONSE

The commission did not adopt the language proposed to be added in §101.222(b)(12). This criteria is no longer needed in subsection (b) due to the restructuring of §101.222 to incorporate the concepts of planned and unplanned maintenance, startup, and shutdown activities. By definition, maintenance, startup, or shutdown emissions that are not reported prior to their occurrence are considered unscheduled, and therefore are emissions events. Therefore, because these are a type of unplanned maintenance, startup, and shutdown activities, the appropriate criteria for an affirmative defense are those in §101.222(c), rather than those in §101.222(b). Unscheduled maintenance, startup, and shutdown activities must be reported as emissions events as required by §101.201. Also, if the owner or operator wants to assert an affirmative defense, that owner or operator must demonstrate not only that the notification requirements of §101.201 were complied with, but also that reporting under §101.211(a) was not reasonably possible, as well as the remaining criteria in §101.222(c)(2) - (9).

TCC and ExxonMobil Downstream appreciated the new language in §101.222(c) to add clarity that scheduled startup and shutdown activities that meet the criteria are subject to an affirmative defense.

TCC and ExxonMobil Downstream recommended not deleting the word “maintenance” in the first and second sentences. TxOGA proposed to insert maintenance back into this subsection, stating that it is

not a reasonable approach to separate maintenance from startup and shutdown. Permitting of scheduled maintenance, startup, and shutdown activities should be allowed and encouraged, but the commission should not do away with the affirmative defense for most unpermitted scheduled maintenance, startup, and shutdown activities.

EIP commented that the proposed rule expressly applies the affirmative defense to scheduled startup and shutdown activities. If startup and shutdown activities are part of a normal operation and can be scheduled, the emissions generated should be included within a facility's permit and should not be subject to an affirmative defense.

EIP commented that eliminating the affirmative defense for scheduled maintenance, startup, and shutdown activities will still leave in place the defense for unscheduled maintenance, startup, and shutdown activities in §101.222(b). EIP expressed that it will take time and permitting resources to ensure that emissions from all scheduled maintenance, startup, and shutdown activities is included in permits. Therefore, it is EIP's position that although an affirmative defense for scheduled maintenance, startup, and shutdown activities is illegal, the commission could include in its rules a clear statement that it will exercise its enforcement discretion to not seek penalties for unauthorized emissions due to scheduled maintenance, startup, and shutdown activities during a phase-in period. The rules should clearly state that once a facility's scheduled maintenance, startup, and shutdown activities have been evaluated through permitting, all excess emissions due to scheduled maintenance, startup, and shutdown activities are subject to the full range of possible enforcement action. In addition, the rules should include a schedule that would require those types of facilities that typically

have the largest unauthorized emissions due to scheduled maintenance, startup, and shutdown activities to come in first for permitting.

RESPONSE

The commission made changes in response to this comment. As discussed in the SECTION BY SECTION portion and elsewhere in this preamble, the commission incorporated the concepts of planned and unplanned maintenance into §101.222. Specifically, in §101.222(c), maintenance has been retained, but this subsection has been revised to provide an affirmative defense for unplanned maintenance, startup, and shutdown activities rather than for scheduled maintenance, startup, and shutdown activities. Furthermore, the commission addressed the issue of excess emissions that could be authorized in §101.222(h) - (j).

EIP commented that peaking electric generator units and batch plants are currently required to include emissions from scheduled maintenance, startup, and shutdown activities in their permits. Commission staff have represented that the current rules are fully effective in minimizing emissions during planned startup and shutdown activities when those activities meet the affirmative defense criteria. EIP disagreed that an after-the-fact affirmative defense demonstration is the most practical and effective means of implementing the FCAA requirements that best available control technology be applied and that ambient air quality and health impacts be considered.

RESPONSE

The commission agrees that a case-by-case review of emissions from maintenance, startup, and

shutdown and application of best available control technology (with evaluation of off-property impacts) is preferred over a review of these emissions after the fact. Emissions from planned maintenance, startup, and shutdown activities at certain peaking electric generating facilities and batch plants have already been reviewed and included in those authorizations, and the loss of the ability to claim an affirmative defense for these scheduled activities will provide an incentive for owners or operators to seek authorization for these activities. Due to the large number of facilities that will need to be reviewed for planned maintenance, startup, and shutdown activities, the commission developed the schedule contained in §101.222(h)(1), and is proposing in a concurrent rulemaking, several options for authorizing these activities depending on the quantity and nature of the emissions. However, a permit review is not always a practical option given the predictability of the emissions. In those cases, the commission finds that the affirmative defense criteria are the best option to ensure minimization of the emissions.

EIP stated that the commission has the statutory authority to create only an affirmative defense for emissions events, which includes emissions from upsets and unscheduled maintenance, startup, and shutdown activities (THSC, §382.0216(f) and (g)). Therefore, the commission does not have the authority to create an affirmative defense for scheduled maintenance, startup, and shutdown activities.

EIP requested that the commission eliminate the affirmative defense for scheduled startup and shutdown activities and require that such emissions be considered and limited through permitting. Any affirmative defense for scheduled startup and shutdown activities should be eliminated from the rules. To the extent that the rules maintain an exemption for unscheduled startup and shutdown activities that

is different from that for emissions events, the following changes should be made to the start and shutdown affirmative defense criteria for clarity and consistency with EPA guidance.

AECT commented that it agrees with the proposed revision to §101.222(c). However, AECT suggested that the rule language be revised based on the past statements made by the commission in the January 2, 2004, *Texas Register* (29 TexReg 118). AECT commented that each scheduled maintenance, startup, or shutdown activity that meets the criteria in §101.222(c) is considered by the commission to be authorized by virtue of meeting such criteria. AECT suggested that §101.222(c) be revised to add the language as follows: “Emissions from any scheduled maintenance, startup, or shutdown activity that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by THSC, §382.0518(g), are authorized if the owner or operator proves all of the following criteria are met.”

RESPONSE

The commission declines to make this change. Section 101.222(c), as adopted by the commission on December 17, 2003, which was published in the January 2, 2004, issue of the *Texas Register* (29 TexReg 118) did not provide authorization for these emissions. Rather, the rule provided that the emissions were required to be permitted, unless the demonstration criteria were proven. The rules in Chapter 101, Subchapter F, Division 3, and the predecessor rules in §§101.6, 101.7, and 101.11 (repealed effective September 12, 2002) have not and do not authorize any emissions. All air contaminant emissions are authorized under Chapters 106 and 116.

Duke recommended that the words “maintenance, startup, and shutdown” be added to modify the term “activity” in §101.222(c)(1).

TxOGA recommended that §101.222(c)(1) be revised to add the word “materially” to modify “impair the commission’s ability to review.” TxOGA stated that adding the word “materially” recognizes that a strict interpretation of this provision would cause the denial of virtually every claim for an affirmative defense if the emissions event report contained any error or inaccuracy whatsoever. This change will provide the commission the ability to recognize a minor problem with the report and resolve the problem (e.g., by telephone or email) with the regulated entity owner or operator without the owner or operator receiving a notice of violation/notice of enforcement or forfeiting a claim of an affirmative defense. TCC and ExxonMobil Downstream appreciated the effort to clarify that minor omissions or inaccuracies that do not impair the commission's ability to review the event should not be cause to invalidate the notification and cause a loss of the affirmative defense.

RESPONSE

The commission declines to make this change. Similar language was added to §101.222(b), (c)(1), and (e)(1). The commission revised §101.222(c)(1), (d)(1), and (e)(1) to specify that the missing information is limited to minor omissions or inaccuracies that do not impair the commission’s ability to review the activity or event.

EPA commented on §101.222(c), stating that the proposed criteria deviated significantly from EPA guidance. The changes add a level of subjectivity that limits EPA, citizens, and the commission’s

enforcement authority. The proposed changes also decrease the source's responsibility to anticipate and eliminate releases of excess emissions. EPA strongly recommended that the criteria be revised. Both EPA and EIP commented that §101.222(c)(2) should be revised to provide that periods of unauthorized emissions from the activity were short and infrequent and could not have been prevented through careful planning and design.

RESPONSE

The commission declines to make this change. However, the commission conducts case-by-case reviews of these excess emissions activities, including a review of the length and frequency of the reported activity and similar activities for the facility, taking into consideration the nature of the activity, size of the facility, as well as facts relating to planning and design.

TCC and ExxonMobil Downstream commented that the words "periods of" in §101.222(c)(2) are unnecessary and only raise questions of intent and should be deleted. The prevention criteria should only consider whether feasible planning and design would have prevented the unauthorized emissions, and should not imply that infeasible efforts should have been made, and recommended adding the word "feasible" after the phrase "have been prevented through."

RESPONSE

No changes have been made in response to these comments. The phrase "periods of" clearly refers to a span of time, indicating that the entire period of time for which the unauthorized emissions existed must be considered in determining compliance with this criteria. The

commission does not agree that the rule implies that infeasible efforts should have been made.

TxOGA and AECT suggested that the term “reasonably” be added to modify “have been prevented” in §101.222(c). In addition, TxOGA stated that the rule should also provide an economic reasonableness test. It is not reasonable, for instance, for a regulated entity operating in Texas to ensure that there will never be any freezing problems for its external piping by applying the same heating or installation technology as are required to be used for a similar entity operating in Alaska.

RESPONSE

No changes have been made in response to these comments. The commission considers site-specific information for the activity, including the specific planning for the activity. Adding the term “reasonably” does not establish a new standard or criteria specific threshold that the commission does not already consider, and could add another level of uncertainty in determining whether the criteria is met. In addition, the commission declines to make the suggested change to add a reference to the cost-effectiveness as a specific part of the criteria. “Technically feasible” now modifies only the design that must be consistent with good engineering practice. Common industry practices are considered during the analysis for this criteria.

AECT commented that the commission should revise §101.222(c)(3) to provide that the review of the recurring pattern indicative of design, operation, or maintenance is not inconsistent with good engineering practice.

RESPONSE

The commission made no changes in response to this comment. Not all design, operation, or maintenance is compared to good engineering practice in determining whether they are inadequate. Furthermore, the suggested language is not consistent with EPA’s criteria for an affirmative defense for excess emissions from unplanned maintenance, startup, and shutdown activities.

TCC and ExxonMobil Downstream requested adding language to §101.222(c)(4) that would provide that bypass of control equipment was unavoidable to prevent damage to facilities that would have resulted in even greater unauthorized emissions. TCC and Exxon Downstream stated that this would make this criteria consistent with the prevention of emissions as stated in §101.222(c)(5).

RESPONSE

The commission declines to make this change. Section 101.222(c)(5) and (6) is sufficient to address the issue of emissions minimization requirements.

EPA and EIP recommended that §101.222(c)(5) be revised to state that the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing emissions at all times.

RESPONSE

The commission declines to make the suggested change of adding the phrase “at all times.” This

language could be read to require that control equipment must be in operation at all times. This could make the criteria impossible to meet, and, if fully complied with could result in more emissions in some cases. This criteria must also be considered with the facts that support the criteria in §101.222(c)(4), which require that any bypass of control equipment was unavoidable to prevent loss of life, personal injury, or severe property damage. Therefore, operation of control equipment at all times could conflict with this criteria. The commission does agree that the requirement to operate the facility in a manner consistent with good practices for minimizing emissions should be read to apply at all times.

EPA and EIP recommended that §101.222(c)(6) be revised to state that the frequency and duration of operation in a scheduled startup or shutdown mode resulting in authorized emissions were minimized to the maximum extent practicable. TxOGA, TCC, and ExxonMobil Downstream recommended not deleting the word “maintenance” §101.222(c)(6).

RESPONSE

The commission declines to make the suggested change of adding the phrase “to the maximum extent practicable.” This could make the criteria impossible to meet. The commission reviews these reported activities on a case-by-case basis to determine if the unauthorized emissions were minimized. The commission has added language that adds the requirement that all possible steps were taken to minimize the impact of the unauthorized emissions on air quality. This added language addresses the air quality goal of protecting human health and welfare, animal life, vegetation, and property. The commission revised adopted §101.222(c) to be applicable to

unplanned maintenance, startup, and shutdown activities, as discussed previously in this preamble.

EPA recommended that §101.222(c)(8) be revised to state that the actions of the owner or operator during the period of unauthorized emissions from the activity were documented by properly signed contemporaneous operating logs or other relevant evidence; and all possible steps were taken to minimize impact of excess emissions on ambient air quality.

RESPONSE

The commission declines to make this change. This was addressed by the commission in a previous rulemaking. In commission rules adopted in June 2000, the commission explained that this criteria requires that the operator be able to show documentation on its normal operation logs or computer systems that the event occurred and how the source owner or operator responded to the event. This is what is meant by “contemporaneous operating logs.” The commission agreed with EPA that the term “signed” is unclear as to whose signature is required; therefore, the term has been removed. Furthermore, not all contemporaneous logs would be on paper and be signed (July 14, 2000, issue of the *Texas Register* (25 TexReg 6727)). As discussed in the previous response, the commission adopted the language regarding minimizing ambient air quality impacts in §101.222(c)(6).

EIP and IPCA commented that §101.222(c) should be amended to clarify that to the extent startup and shutdown emissions were considered at the time a source was permitted, such emissions may not

qualify for the affirmative defense.

RESPONSE

The commission declines to make this change. If startup and shutdown emissions were reviewed but not included in a permit, any startup and shutdown emissions that remain unauthorized must still be reported and could be eligible for the affirmative defense. The commission declines to exempt those from the affirmative defense. Compliance with the demonstration criteria is not only an incentive to obtain the defense, but also requires action that could reduce the impact of these unauthorized emissions on air quality.

BSA, NRRC, Public Citizen, and Sierra Lone Star commented that there should be no exemption from or a defense to penalties for routine or predictable emissions. NRRC commented that although the commission is always free to exercise enforcement discretion, the affirmative defense as to penalties for excess emissions in the proposed rules is too broad. In addition, NRRC commented that EPA has warned the commission that these rules do not meet the FCAA. Specifically, EPA has determined that it is inappropriate to provide an affirmative defense for excess emissions resulting from scheduled maintenance, and to excuse these excess emissions from penalties.

RESPONSE

The commission declines to make this change. The commission retains the authority to require corrective action and seek injunctive relief, which have the greater impact on reducing unauthorized emissions. Compliance with the demonstration criteria is not only an incentive to

obtain the defense to penalties, but also requires action that could reduce the impact of these unauthorized emissions on air quality. As previously discussed, the commission incorporated the concepts of planned and unplanned maintenance to address EPA's concerns of the availability of an affirmative defense for emissions from scheduled maintenance activities.

AECT commented that §101.222(d) and (e), rather than §101.222(b) and (c), apply to boilers and combustion turbines referenced in the definition of RQ. AECT requested that §101.222 or the preamble clarify that §101.222(d) and (e), rather than §101.222(b) and (c), apply to such boilers and combustion turbines.

RESPONSE

Section 101.222(d) and (e) is the affirmative defense section only for excess opacity events when there is no emissions event. The emissions from boiler and combustion turbines consist primarily of carbon dioxide, nitrogen oxides, water, and small amounts of carbon monoxide and are not acutely harmful if unconfined. In addition to excess opacity events, when boiler and combustion turbines release these contaminants in quantities in excess of authorized limits, the contaminants are unauthorized and are eligible for the affirmative defense in §101.222(b) and (c). The commission amended §101.222(f) to provide that the affirmative defense is available only for emissions that are reported or recorded. Those entities that are not required by §101.201 and §101.211 to record or report unauthorized emissions may voluntarily comply with the recording requirements of those sections to ensure the availability of the affirmative defense.

AECT commented that the STEERS electronic notification form allows only one of the three boxes for shutdown, maintenance, or startup to be checked. As a result, three STEERS electronic notification forms must be completed and submitted for one combined shutdown, maintenance, and startup event. AECT requested that the commission revise the STEERS electronic notification form so that all three boxes for shutdown, maintenance, and startup can be checked, which would allow a combined shutdown, maintenance, and startup event to be reported on one STEERS electronic notification form. In addition, AECT requested that the commission include a statement in the preamble to the final rule as to whether it will make the requested change to the STEERS electronic notification form, and, if so, when.

RESPONSE

Revisions to STEERS are necessary to implement the changes for reporting by regulated entity and common cause consistent with HB 2129. The commission will consider implementing the requested changes during the development of this reporting process. These changes will require some time to implement and will not be immediately available. The commission will make its best efforts to provide modifications to STEERS reporting on an ongoing basis while working to implement the revised reporting requirements. In the interim period, the information required by the rules must be submitted electronically through STEERS, and failure to report according to the rules can result in a violation.

TxOGA proposed deleting the references to exceedances of NAAQS and prevention of significant deterioration increments in §101.222(c)(9). TxOGA stated that, based on the definition of “air

pollution” in the TCAA, this language is redundant in this demonstration. A strict and literal enforcement of the current provision would require modeling and air quality monitoring data to be submitted for every emissions event. Deleting these terms, as suggested by TxOGA, would give the commission the discretion to determine when such data is actually needed to make the required demonstration without having to require such information in all instances.

TCC and ExxonMobil Downstream recommended revising §101.222(c)(9) by adding the word "significantly" after the phrase “did not cause or” to avoid the extreme interpretation that even the most minute unauthorized emission during the activity would fail this criteria if any exceedance of the NAAQS, prevention of significant deterioration increments, or a condition of air pollution should occur at the same time.

RESPONSE

The commission declines to make these changes. The commission specifically expanded existing language previously in §101.11(a)(9) when this language was adopted in 2002. Section 101.11(a)(9) was a test of whether the emissions from an event caused or contributed to a condition of air pollution. In 2002, this language was added to address comments made by EPA (September 6, 2002, issue of the *Texas Register* (27 TexReg 8499)). Section 101.222(c)(9) does not require modeling and monitoring data be submitted for every emissions event.

Sierra Houston commented that it is opposed to allowing any failure to report information in §101.222(d)(1), stating that clear definitions are needed for consistent decisions rather than adding

such exceptions that will result in arbitrary and capricious decisions.

RESPONSE

The commission declines to make this change. Similar language was added to §101.222(b), (c)(1), and (e)(1). The commission revised §101.222(c)(1), (d)(1), and (e)(1) to specify that the missing information is limited to minor omissions or inaccuracies that do not impair the commission's ability to review the activity or event.

TxOGA recommended that §101.222(d)(1) be revised to add the word “materially” to modify “impair the commission's ability to review.” TxOGA stated that adding the word “materially” recognizes that a strict interpretation of this provision would cause the denial of virtually every claim for an affirmative defense if the emissions event report contained any error or inaccuracy whatsoever. This change will provide the commission with the ability to recognize a minor problem with the report and resolve the problem (e.g., by telephone or email) with the regulated entity owner or operator without the owner or operator receiving a notice of violation/notice of enforcement or forfeiting a claim of an affirmative defense.

RESPONSE

The commission declines to make this change. Similar language was added to §101.222(b), (c)(1), and (e)(1). The commission revised §101.222(c)(1), (d)(1), and (e)(1) to specify that the missing information is limited to minor omissions or inaccuracies that do not impair the commission's ability to review the activity or event.

TCC and ExxonMobil Downstream appreciate the effort to clarify that minor omissions or inaccuracies that do not impair the commission's ability to review the event should not be cause to invalidate the notification and cause a loss of the affirmative defense.

RESPONSE

The commission appreciates the supportive comment.

EPA commented that §101.222(d)(2) revises the existing SIP-approved criteria that a source must prove in order to assert an affirmative defense. EPA's guidance requires that the malfunction could not have been avoided by better operation and maintenance practices. EPA stated that the requirement to prove that the event could not have been avoided by better operation and maintenance practices is a fundamental principle which EPA considered in drafting the 1999 startup, shutdown, and maintenance guidance. The proposed change adds a level of subjectivity that limits EPA, citizens, and the commission's enforcement authority. The proposed change also decreases the source's responsibility to anticipate and eliminate releases of excess emissions. The change is a weakening of the existing SIP provision.

RESPONSE

The commission agrees in part and has made changes in response to this comment. Adopted §101.222(d)(2), renumbered as §101.222(d)(3), does not include the proposed reasonableness test. The commission considers site-specific information and performs a case-by-case review of whether the emissions could have been avoided by better operation and maintenance practices, or

by technically feasible design. Adding the term “reasonably” does not establish a new standard or criteria specific threshold that the commission does not already consider, and could add another level of uncertainty in determining whether the criteria is met. The amendment revises the criteria to add that the unauthorized emissions did not stem from any activity or event that could have not only been foreseen and avoided, but also planned for. The adopted amendment also changes the criteria of “could not have been avoided by good design, operation, and maintenance practices” to “could not have been avoided by better operation, and maintenance practices or by technically feasible design consistent with good engineering practice.” This change more properly places the emphasis of action by the operator on operation and maintenance, and the criteria of what is technically feasible and the application of good engineering practices on the design of the facilities.

AECT supported the commission’s decision to add a reasonableness standard to §101.222(d)(2). However, AECT suggested that §101.222(d)(2) be revised to add a reasonableness test for what could be foreseen and avoided. TxOGA suggested revising §101.222(d)(2) to provide that the design, operation, and maintenance practices be preceded by the phrase “and economically justifiable.” It is not reasonable, for instance, for a regulated entity operating in Texas to ensure that there will never be any freezing problems for its external piping by applying the same heating or installation technology as are required to be used for a similar entity operating in Alaska.

Arkema requested that the commission clarify in §101.222(d)(2) what constitutes technical feasibility in a manner that includes cost-effectiveness in a technical feasibility determination. Arkema suggested

that the commission use existing common industry practices for determining technical feasibility, such as how the commission would evaluate technical feasibility for a control device determination during the new source review permit review process.

RESPONSE

Proposed §101.222(d)(2) is renumbered as §101.222(d)(3). No changes have been made in response to these comments. The commission considers site-specific information for the activity, including the specific planning for the activity. Adding the term “reasonably” does not establish a new standard or criteria specific threshold that the commission does not already consider, and could add another level of uncertainty in determining whether the criteria is met. In addition, the commission declines to make the suggested change to add a reference to the cost-effectiveness as a specific part of the criteria. “Technically feasible” now modifies only the design that must be consistent with good engineering practice. Common industry practices are considered during the analysis for this criteria.

TCC and ExxonMobil Downstream commented that the prevention criteria should only consider whether technically feasible design, operation, and maintenance practices consistent with good engineering practice would have prevented the unauthorized emissions, and should not imply that infeasible efforts should have been made.

RESPONSE

The commission does not agree that the rule implies that infeasible efforts should have been

made.

TCC and ExxonMobil Downstream recommended that the commission add the word "significantly" after the phrase "did not cause or" in §101.222(d)(9) to avoid the extreme interpretation that even the most minute unauthorized emission during the activity would fail this criteria if any condition of air pollution should occur at the same time.

RESPONSE

No change has been made in response to this comment. The criterion does not suggest that an extreme interpretation will be used in the evaluation of whether the owner or operator meets its burden of proof.

EIP suggested that the commission clarify how opacity exceedances are treated under the rules and to ensure that opacity exceedances are treated the same as exceedances of air contaminant limits. In addition, EIP requested clarification that all unauthorized opacity emissions are violations. The rule defines excess opacity events to be those that result in opacity exceeding the applicable limit by at least 15%. Excess opacity events must be reported within 24 hours, but it is not clear that there are recording requirements specified for opacity events that exceed the applicable limit by less than 15%.

RESPONSE

The commission agrees that all unauthorized opacity emissions are violations, but unauthorized opacity does not necessarily mean that there is a corresponding violation of emission limits for air

contaminants. Opacity is not an emission of air contaminants. Opacity may be, but not always, an indirect indication that unauthorized emissions may be occurring. For example, opacity exceeding 5% of an authorized limit may easily be the result of increased particulate size, and not necessarily an increase in the amount of emissions. Opacity at 15% above an authorized level is a point at which the commission requires notification, as there may be potential unauthorized emissions or emissions approaching a potential harmful level. Additionally, owners or operators of facilities should be evaluating these emissions to determine if they are an emissions event and subject to the applicable reporting. Reporting of opacity and claiming an affirmative defense for an opacity event does not protect an owner or operator against enforcement for unauthorized particulate matter emissions. Any unauthorized particulate matter emissions should be evaluated against their applicable RQ and reported or recorded as appropriate. As discussed elsewhere in this preamble, the reporting requirements for excess opacity are in §101.201 and §101.211. Additionally, opacity exceedances at facilities that are subject to the Federal Operating Permit Program are subject to deviation reporting and should be reported to the commission under that program. The commission made no changes to the rule based on this comment.

TCC and ExxonMobil Downstream appreciate the new language in §101.222(e) to add clarity that scheduled startup and shutdown activities that meet the following criteria are subject to an affirmative defense. The separation of scheduled maintenance is discussed in §101.222(h). TxOGA, TCC, and ExxonMobil Downstream recommended not deleting the word “maintenance” in the first and second sentences.

RESPONSE

The commission made changes in response to these comments. As discussed in the SECTION BY SECTION portion and elsewhere in this preamble, the commission incorporated the concepts of planned and unplanned maintenance into §101.222. Specifically, in §101.222(e), maintenance has been retained, but adopted §101.222(e) has been revised to provide an affirmative defense to opacity events resulting from unplanned maintenance, startup, and shutdown activities rather than from scheduled maintenance, startup, and shutdown activities.

TxOGA recommended that §101.222(e)(1) be revised to add the word “materially” to modify “impair the commission’s ability to review.” TxOGA stated that the adding of the word “materially” recognizes that a strict interpretation of this provision would cause the denial of virtually every claim for an affirmative defense if the emissions event report contained any error or inaccuracy whatsoever. This change will provide the commission with the ability to recognize a minor problem with the report and resolve the problem (e.g., by telephone or email) with the regulated entity owner or operator without the owner or operator receiving a notice of violation/notice of enforcement or forfeiting a claim of an affirmative defense.

RESPONSE

The adopted rule clearly states that failure to report as required by §101.201(a)(2) or (3), (b), or (e) will cause the commission to initiate enforcement except when the failure consists of minor omissions or inaccuracies that do not impair the commission’s ability to review, and it is not intentional falsification or knowing omissions. The commission appreciates the support for the

additional language regarding enforcement, but declines to add the word “materially” because the rule specifies that the missing information is limited to minor omissions or inaccuracies that do not impair the commission’s ability to review the activity or event. In addition, there is no need to specify in the rule that formal enforcement is not the remedy or that no enforcement will be taken when reports may inadvertently exclude information or contain imprecise information because the enforcement determinations are based on a case-by-case review of the facts. Exclusion of some information could possibly result in formal enforcement.

Sierra Houston commented that it is opposed to allowing any failure to report information in §101.222(e)(1), stating that clear definitions are needed for consistent decisions rather than adding such exceptions that will result in arbitrary and capricious decisions.

RESPONSE

The commission declines to make this change. Similar language was added to §101.222(b), (c)(1), and (d)(1). The commission revised §101.222(c)(1), (d)(1), and (e)(1) to specify that the missing information is limited to minor omissions or inaccuracies that do not impair the commission’s ability to review the activity or event.

AECT commented that it agrees with the proposed revision to §101.222(c). However, AECT suggested that the rule language should be revised based on the past statements made by the commission in the January 2, 2004, issue of the *Texas Register* (29 TexReg 118). AECT commented that each scheduled maintenance, startup, or shutdown activity that meets the criteria in §101.222(c) is

considered by the commission to be authorized by virtue of meeting such criteria. AECT suggested that §101.222(c) be revised to add the language as follows: “Emissions from any scheduled maintenance, startup, or shutdown activity that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by THSC, §382.0518(g), are authorized if the owner or operator proves all of the following criteria are met.”

RESPONSE

The commission declines to make this change. Section 101.222(c), as adopted by the commission on December 17, 2003, which was published in the January 2, 2004, issue of the *Texas Register* (29 TexReg 118) did not provide authorization for these emissions. Rather, the rule provided that the emissions were required to be permitted, unless the demonstration criteria were proven. The rules in Chapter 101, Subchapter F, Division 3, and the predecessor rules in §§101.6, 101.7, and 101.11 (repealed effective September 12, 2002) have not and do not authorize any emissions. All air contaminant emissions are authorized under Chapters 106 and 116.

AECT commented that §101.222(e) does not provide for protection from enforcement in situations where a scheduled maintenance, startup, or shutdown activity causes opacity in excess of an opacity limit in any rule other than §111.111(a), or in any permit or order, even if the criteria in §101.222(e) are demonstrated to be satisfied for the event. AECT suggested the following revision: “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 limitations in rules, permits, or orders of the

commission unless the owner or operator proves all of the following criteria are met”:

TCC and ExxonMobil Downstream appreciated the effort to clarify that minor omissions or inaccuracies that do not impair the commission's ability to review the event should not be cause to invalidate the notification and cause a loss of the affirmative defense.

RESPONSE

The commission appreciates the supportive comment.

TCC and ExxonMobil Downstream stated that the words "period of" in §101.222(e)(2) are unnecessary, should be deleted, and only raise questions of intent. The prevention criteria should only consider whether feasible planning and design would have prevented the unauthorized emissions, and should not imply that infeasible efforts should have been made, and recommended adding the word “feasible” after the phrase “been prevented through.”

RESPONSE

No changes have been made in response to these comments. The phrase “periods of” clearly refers to a span of time, indicating that the entire period of time for which the unauthorized emissions existed must be considered in determining compliance with this criteria. The commission does not agree that the rule implies that infeasible efforts should have been made.

TxOGA recommended that the term “reasonably” be added to modify “have been prevented” in

§101.222(e)(2). In addition, TxOGA stated that the rule should also provide an economic reasonableness test. It is not reasonable, for instance, for a regulated entity operating in Texas to ensure that there will never be any freezing problems for its external piping by applying the same heating or installation technology as are required to be used for a similar entity operating in Alaska.

RESPONSE

No changes have been made in response to these comments. The commission considers site-specific information for the activity, including the specific planning for the activity. Adding the term “reasonably” does not establish a new standard or criteria specific threshold that the commission does not already consider, and could add another level of uncertainty in determining whether the criteria is met. In addition, the commission declines to make the suggested change to add a reference to the cost-effectiveness as a specific part of the criteria. “Technically feasible” now modifies only the design that must be consistent with good engineering practice. Common industry practices are considered during the analysis for this criteria.

AECT commented that the commission should add language to §101.222(e)(2) and (3) to provide that the opacity was not part of a recurring pattern indicative of design, operation, or maintenance that was inconsistent with good engineering practice, rather than based on inadequate design, operation, or maintenance.

TCC and ExxonMobil Downstream requested adding to the end of §101.222(e)(4) the phrase “, or damage to the facilities that would have resulted in even greater opacity” because it is consistent with

the prevention of opacity emissions as stated in §101.222(e)(5).

TCC and ExxonMobil Downstream recommended not deleting the word “maintenance” in §101.222(e)(6). The separation of scheduled maintenance is discussed in §101.222(h).

TxOGA suggested that §101.222(e)(6) retain the term “maintenance.”

TCC and ExxonMobil Downstream requested adding the word "significantly" after the phrase “did not cause or” in §101.222(e)(9) to avoid the extreme interpretation that even the most minute opacity emission during the activity would fail this criteria if any condition of air pollution should occur at the same time.

EPA supported the revision to §101.221(d) providing that the commission will not exempt sources from compliance with any federal requirements, including new source performance standards or national emission standards for hazardous air pollutants. However, this change does not fully address concerns raised in EPA’s limited approval of the current version of this rule. EPA strongly recommended that the state adopt an addition to §101.222(f), Obligations, that states, in effect, §101.222(b), (c), (d), or (e) do not provide an affirmative defense to violations of federally promulgated standards. For example, the rule may contain an applicability section which defines standards that may be subject to an affirmative defense, or the rule may state that certain violations are not subject to an affirmative defense. EIP requested that the commission clarify that the affirmative defense applies only to exceedances of emissions limits established by the SIP because it cannot

provide a defense to enforcement action or penalties for violations of other federal requirements.

GHASP commented that the affirmative defense is overly broad in its application. The rule should specify that the affirmative defense is available only with respect to enforcement of the SIP provisions and not when it comes to sentences or enforcement of other federal requirements.

RESPONSE

The commission agrees that neither §101.221(d) nor §101.222(f) fully address the applicability of the affirmative defense and revised §101.222(f). Section 101.222(f) provides that any affirmative defense provided by §101.222(b), (c) - (e), and (h) apply only to violations of SIP requirements.

An affirmative defense cannot apply to violations of federally promulgated performance of technology-based standards, such as those found in 40 CFR Parts 60, 61, and 63.

GHASP commented that the phrase out of the affirmative defense “maintenance activity” should be defined.

RESPONSE

The commission declines to define maintenance activity for use solely with the affirmative defense. In a concurrent rulemaking, the commission is proposing a definition of “normal operations” of which planned and predictable maintenance, startup, and shutdown are components. The commenter will have the opportunity to comment on that proposed definition.

EPA strongly recommended that the state establish an alternative approach of enforcement discretion

for excess emissions from scheduled maintenance during this transition period. EPA commented that it cannot approve a blanket affirmative defense for scheduled maintenance activities. Instead, EPA strongly recommended that the commission establish an enforcement discretion approach for excess emissions from scheduled maintenance during this transition period. This approach generally requires the source to demonstrate that the excess emissions could not have been reasonably avoided through better maintenance and operational procedures, why the maintenance is needed, and how the emissions were minimized in order to avoid an enforcement action.

Notwithstanding the previous comment, EPA stated it will evaluate these provisions for consistency with the FCAA and EPA-related policy and guidance.

RESPONSE

The commission made changes in response to these comment. As discussed elsewhere in this preamble, the commission revised §101.222 to accommodate the definition of unscheduled maintenance, startup, and shutdown activities in THSC, §382.0215, and unplanned maintenance, startup, and shutdown activities. In addition, although the affirmative defense is retained for planned activities, it is phased out according to a specific schedule by facility SIC code. This schedule will provide for the orderly and thorough review of applications for authorization of these emissions. Accordingly, the affirmative defense is scheduled to be phased out one year after the deadline for application submission. If the application remains pending after one year, the commission may use enforcement discretion until final action is taken on the application. In addition, the criteria for unplanned maintenance, startup, and shutdown activities has been

revised in §101.222(c) to meet EPA guidance. For all other facilities, the affirmative defense will expire one year from the deadline for filing an application.

Accordingly, for facilities in major group SIC code 28 (Chemicals and Allied Products), except SIC code 2895, the affirmative defense is scheduled to be phased out two years after the deadline for application submission. For all other facilities, the affirmative defense will expire one year after the deadline for application submission. If the application remains pending after one year, the commission may use enforcement discretion until final action is taken on the application. In addition, the criteria for unplanned maintenance, startup, and shutdown activities has been revised in §101.222(c) to meet EPA guidance.

EPA commented that §101.222(h) should repeat, rather than merely reference the criteria listed in §101.222(c)(1) - (9), and that any changes to the criteria in §101.222(c) should be incorporated into §101.222(h). EPA also recommended the addition of criteria to clarify that the source has the burden to prove that the maintenance activity arose from sudden and reasonably unforeseeable events that were beyond the control of the operator, and that immediate corrective action was necessary in order to restore normal operations. EPA recommended that the state consider other criteria as necessary to appropriately limit application of these provisions to nonroutine and emergency circumstances (i.e., to prevent a malfunction). EPA strongly recommended that these limitations be placed in the criteria, rather in the body of the rule, to ensure that the source or operator bears the burden to prove those limitations have been met before the affirmative defense may be asserted.

RESPONSE

The commission made no changes in response to these comments. Rather, as discussed elsewhere, the commission revised §101.222 to ensure that the emissions that are subject to an affirmative defense are those that are eligible under EPA guidance. The referencing of the criteria in §101.222(c)(1) - (9) is adequate to specify what has to be proven.

GHASP stated that affirmative defense should not be allowed for scheduled startup/shutdown, which instead should be permitted. GHASP stated that EPA instructed that entities that do not permit these maintenance, startup, and shutdown emissions will be subject to enforcement for any emissions over limits established by a permit or rule. GHASP expressed that such emissions are predictable and quantifiable. GHASP commented that it does not support a phase-out of the affirmative defense for such emissions and stated that it is inconsistent with EPA guidelines, and recommended not seeking enforcement during a permitting phase that does not exceed one year.

EIP commented that the affirmative defense for maintenance emissions should be deleted. TxOGA suggested that the commission delete proposed §101.222(h). Permitting of scheduled maintenance, startup, and shutdown activities should be allowed and encouraged, but the commission should not do away with the affirmative defense for most unpermitted scheduled maintenance, startup, and shutdown activities.

TCC and ExxonMobil Downstream recommended that the commission delete §101.222(h), drop the separation of maintenance activities from §101.222(c) and (e), and continue to provide the option for

an affirmative defense. Providing an affirmative defense for maintenance activities still leaves the owner or operator with a violation and Title V deviation. This alone is sufficient encouragement to incorporate maintenance activities into permits or other authorizations without the special expiration proposed. If the rule must include a phase-out of the affirmative defense for maintenance activities to satisfy EPA concerns, then the commission should provide all necessary resources to expedite the processing of permits for adding maintenance emissions. Where these emissions can be shown to have been occurring and previously reported to the commission, the emission should not be considered as new, and not be required to provide offsets.

RESPONSE

The commission declines to make these changes. As discussed elsewhere in this preamble, the commission revised §101.222 to ensure that the affirmative defense and enforcement discretion provided meets EPA guidance, and has provided a schedule that will allow an orderly, meaningful review of applications for authorization of emissions from planned maintenance, startup, and shutdown activities. In addition, the commission is concurrently proposing authorization mechanisms to provide flexibility for authorization of these emissions. Whether offsets will be required for authorization of these types of emissions is an issue associated with authorization, which is beyond the scope of this rulemaking because Chapter 101 does not authorize emissions.

TCC and ExxonMobil Downstream commented that the commission should not preclude the use of the affirmative defense for maintenance emissions even after regulated entities have had the opportunity to

authorize maintenance emissions by a PBR or permitting. As proposed, this option will only remain for maintenance emissions that arise from reasonably unforeseen events. This adds an air of uncertainty that may preclude using the affirmative defense for coverage until such time as these events can be covered by a PBR or permitting, if the regulated entity has previously added maintenance emission to its permits. For example, a new facility might include maintenance emissions based upon design information and any previous experience with similar units. As experience grows with operation of the unit, additional maintenance activities become known that were not authorized, and need the opportunity to use an affirmative defense if the emission cannot be authorized. This would allow the authorization and the affirmative defense option to be used as a temporary cushion for necessary operations until the authorization is received. Owners and operators would much prefer to have such activities authorized by permit rather than rely on a PBR or an affirmative defense.

TPA recommended that the commission continue the affirmative defense for maintenance emissions while encouraging the permitting of maintenance emissions. TPA commented that is unreasonable for the commission to expect all maintenance emissions for sources authorized by standard permits and PBRs to be permitted within two years, particularly for companies with tens of sites and operations where there may be hundreds or thousands of facilities.

TCC, ExxonMobil Downstream, Pure, and Occidental commented that permitting maintenance emissions should be encouraged, but not mandated. TIP commented that the commission should consider the ramifications of its requirement to permit maintenance emissions.

Representative Hochberg commended the commission's efforts to bring emissions resulting from scheduled maintenance events into the permitting process. Representative Hochberg commented that some number of shutdown/startup activities should also be brought into the permitting process.

Representative Hochberg also commented that if a plant operator can build in the cost of these emissions into an operating budget, then the plant should be able to reasonably estimate the resulting emissions and include them in the permit.

Duke commented that the commission should encourage the permitting of scheduled maintenance, startup, and shutdown activities by providing guidance for permitting those activities and by facilitating the application of existing rules to bring those activities into the permitting process.

TCC and ExxonMobil Downstream expressed concern that the rule mandates that most maintenance emissions be authorized by PBR or permits. TCC agreed that authorization by PBR or permits is the best way to handle maintenance emissions, however, the commission has not yet implemented viable guidance to provide this coverage.

Dow supported the idea of authorizing maintenance emissions in permits and other types of authorizations. However, Dow expressed concern that a mandate to permit is being included in these rules without any information as to how this requirement will be implemented. Dow recommended that the commission develop additional permitting mechanisms and policies prior to adopting this rulemaking subsection regarding maintenance activities and the loss of an affirmative defense after two years.

Dow expressed concern with several issues regarding maintenance. The commission's policy is that the maintenance emissions must occur at least once every 12 months, which limits the ability to permit maintenance activities that are associated with plant turnaround that occur at two- to five-year intervals. Longer intervals make more business sense and result in lower emissions. The commission's PBR for maintenance activities, §106.263, presents an obstacle to authorizing all of the emissions at larger sites. Current permitting practice for maintenance emissions requires the applicant to be specific with respect to the maintenance activities that one is allowed to conduct. Dow suggested that the commission define maintenance scenarios in a general manner. Dow commented that review of best available control technology and off-site impacts from maintenance activities remains very much a case-by-case review. Dow strongly suggested that the commission ensure that any attempt to permit all scheduled maintenance emissions is done in a manner that truly allows the vast majority of such activities to be authorized.

TxOGA, Pure, and Occidental commented that requirements to permit scheduled maintenance, startup, and shutdown activities may trigger a prevention of significant deterioration or nonattainment area review that could take years to complete. Requiring all scheduled maintenance, startup, and shutdown activities for sources under standard permits and PBRs to be permitted within two years is also not reasonable for even a medium size company with tens of sites and operations. Such a requirement could lead to many facilities now authorized under PBRs or standard permits to have to be permitted, creating a workload that current permitting vehicles cannot handle. In addition, the process of estimating emissions due to scheduled maintenance is very difficult. Many types of maintenance activities are performed on a predictive, rather than on a strictly scheduled or planned basis. With

predictive maintenance, some type of monitoring or testing is used to indicate when maintenance needs to be performed. In one year that may mean a particular activity is performed once, the next year it may need to be done three times, and in the next two years it may not need to be done at all.

Predictive maintenance is preferable to planned maintenance if the intent is to minimize emissions, because with predictive maintenance an operator can delay an activity if parameters warrant or accelerate an activity to avoid a catastrophic failure if necessary.

TxOGA, Pure, and Occidental also commented that permitting all maintenance activities will not decrease the environmental impact of this work. Companies must have the flexibility to both establish and manage priorities in a dynamic environment. Facilities must be able to identify and perform work when it is needed, and practical to be performed, without being penalized for not adhering to an unrelated schedule. Working on equipment that has no environmental impact at the time of needed work must not be hindered.

Arkema requested that the commission clarify that the two-year time limit is only for sources not covered by a new source review permit, such as sources covered by a PBR, standard, permit, etc. and that sources covered by a new source review permit may use the affirmative defense for maintenance emissions until a revised new source review permit is issued. To better manage internal commission resources during this transition period, Arkema recommended that instead of the two-year cycle, the commission incorporate this change to the new source review permit at its five-year renewal cycle or earlier when another reason requires the permit to be amended. Arkema also requested that the commission provide an application shield to facilities that apply for new source review permit

amendments before any deadline so that a facility may continue to use the maintenance affirmative defense until the commission takes final action.

EPA requested further information on the state's plans to begin authorizing and implementing maintenance-related emissions that are regular and quantifiable, such as plant turnarounds and preventive maintenance such as routine replacement of facility parts, into permitting programs. EPA commented that the commission should explain how the phase-in period established in this rule relates to that change.

EIP commented that best practices would suggest that some pieces of duplicate equipment, such as pumps, can be serviced without startup and shutdown. Emissions from the maintenance portion of maintenance, startup, and shutdown should be predictable, and should only get lower with improved processes.

GHASP stated that it is imperative that these facilities are held accountable for their emissions that are predictable and quantifiable in accordance with the federal law. GHASP also commented that any reference to maintenance should include associated startup and shutdown associated with that maintenance.

EIP acknowledged that there may be valid reasons for a plant to operate with a higher rate of emissions during startup and shutdown activities, however, this reality does not excuse those activities from regulatory review, as they are foreseeable. When a company correctly ensures that all its emissions

are authorized by permit, then presumably the permit review process has included consideration of the available technologies and operating practices that may be used to reduce emissions during these activities.

EPA commented that its policy for maintenance emissions, other than those immediately necessary to address an upset, should be included in permits. For turnaround maintenance, the period between turnarounds should be predictable for each type of operating unit. Every turnaround will have a startup and shutdown, but each may be different – if, for nothing else, because the mix of equipment being maintained in a given turnaround will be different every time. But the facility should be able to predict, for permitting purposes, the maximum emissions for a turnaround involving a particular piece of equipment based on the maximum inventory capacity of the equipment.

BSA commented that, based on the report prepared by Public Citizen, upsets are not accidents, but rather are planned. BSA, Public Citizen, and Sierra Lone Star supported permitting of all routine or predictable emissions. NRRC supports submitting all the routine and predictable emissions from scheduled maintenance, startup, and shutdown activities to all permitting requirements, but these rules do not require that.

HCPHES commented that scheduled maintenance is a predictable event that can be scheduled to a large extent at the discretion of the source as part of normal operations and should be incorporated into a source's air permit. Furthermore, HCPHES commented that it understands the need for an interim measure to incorporate the associated emissions into an air permit. However, HCPHES commented

that all emissions in excess of a permit or other authorization should not be allowed. Emissions above allowable limits may cause or contribute to violations of the NAAQS and the HGB region's ability to reach attainment for ozone.

RESPONSE

The commission agrees that companies should be accountable for all of their emissions. The commission's emissions inventory rules and the reporting required by §101.201 and §101.211, including adopted §101.201(h) and §101.211(f) are some of the ways the commission collects this information. This type of reporting is used for air quality planning as well as to determine compliance with authorized emissions limits. The commission made changes to §101.222 to phase out the ability to claim an affirmative defense for emissions from planned startup and shutdown activities in addition to maintenance activities. This is one incentive to obtain authorization of emissions which have generally not been authorized, particularly in new source review permits.

Section 101.222 does not require permitting of emissions from maintenance, startup, and shutdown activities. However, because the ability to claim an affirmative defense for planned maintenance, startup, and shutdown emissions will be phased out, the commission anticipates that the owners and operators of these facilities will submit applications for new source review authorizations for these emissions. Currently, there are more than 14,000 active NSR permits in Texas. The commission has one of the nation's largest minor source permitting programs, as well as a large number of major sources. The opportunity to seek authorization for planned maintenance, startup, and shutdown emissions is not limited to major sources. Due to this large

number of active permits, the commission is evaluating options for authorizing certain maintenance, startup, and shutdown emissions. These options include PBRs, standard permits, and case-by-case permits or permit amendments. In a concurrent rulemaking, the commission is proposing various authorization mechanisms to provide authorization flexibility, depending on the amount and nature of the emissions. Authorization of planned maintenance, startup, and shutdown emissions will involve a case-by-case review of best available control technology and off-site impacts for facilities that cannot be authorized using PBRs or standard permits. The commission's air permitting staff has limited experience permitting emissions from planned maintenance, startup, and shutdown activities, and therefore this case-by-case review will involve developing an understanding of the methods and techniques available to minimize the emissions from these activities.

Texas is one of the most industrial states in the country, and has large numbers of very diverse industries. The state has several international ports, and one of the nation's largest complexes of refining and petrochemical companies. Furthermore, as the second largest state in the nation, there are a wide variety of industries in the state, including a large number of oil and gas facilities. The schedule in §101.222(h) will provide time for the commission to gain a better understanding and development of best available control technology, and conduct impact analyses. Requiring companies in various industries to submit applications at the same time as those from similar facilities will allow the commission to compare how companies plan to control planned maintenance, startup, and shutdown emissions. This will facilitate an understanding of the best ways to control and minimize these emissions.

In addition, the schedule allows for review of the most important emissions, starting with those facilities that are large, or have frequent unauthorized emissions or have emissions with a greater possibility for off-site impacts. This schedule will decrease the likelihood that these emissions of concern are not adequately reviewed, for best available technology and protection of public health and physical property.

The commission modified the schedule for the phasing out of the ability to claim an affirmative defense. The adopted schedule is in §101.222(i) and is based on the level of excess emissions reported by industry type in the 2002 emissions inventory. The SIC codes specifically listed in the revised phase-out schedule in §101.222(h)(1) are those that reported more than 98% of the total excess emissions reported to the commission's emissions inventory for calendar year 2002.

The commission will make every effort to review applications to permit emissions associated with planned maintenance, startup, and shutdown activities before the loss of the ability to claim an affirmative defense according to the schedule contained in §101.222(i). However, because the actual number of applications that may be submitted is unknown at this time, final action may not occur for all applications before the expiration of the ability to claim an affirmative defense for planned maintenance, startup, and shutdown activities. Therefore, for those actions that may still be pending, the commission will continue to use its enforcement discretion when reviewing excess emissions from planned maintenance, startup, and shutdown activities. In addition, the commission added §101.222(j), which references §116.114. Section 101.222(j) requires that the executive director meet certain application processing deadlines. It also requires applicants to

make good faith efforts to submit, in a timely manner, adequate information that demonstrates that the requirements for obtaining a permit or permit amendment are met in response to any deficiency notification issued by the executive director.

AECT commented that the commission should not revise its rules to require that shutdown and startup emissions from electric generating facilities be authorized by a permit because electric generating facilities are unique relative to other types of facilities. AECT commented that electric generating facilities are unique in that their shutdowns and startups are scheduled by the Electric Reliability Council of Texas, Southwest Power Pool, or similar authorities, based on the customer electric consumption and reliability needs of the state. As a result, electric generating facilities' owners and operators cannot usually predict the frequency of startups and shutdowns of their electric generating facilities, especially given electricity deregulation. This makes permitting of shutdowns and startups of many electric generating facilities difficult, if not impossible.

RESPONSE

The adoption of these rules will not directly require the authorization of startups and shutdowns. However, the commission recognizes that the loss of the ability to claim an affirmative defense will result in the desire to authorize the emissions associated with most planned maintenance, startup, and shutdown activities. In a concurrent rulemaking, the commission is proposing various authorization mechanisms to provide flexibility in authorizing planned maintenance, startup, and shutdown activities, depending on the amount and nature of the emissions. Some planned maintenance, startup, and shutdown activities will require a case-by-case review because

of the quantity or nature or their emissions. The case-by-case authorization of these activities is something that the commission has very little experience with and will take some time to develop. The commission recognizes that electric generating facilities present some unique challenges in that some of their startup and shutdown activities are beyond their control. The commission staff will take this into account when determining if, or how, these activities will be reviewed and/or authorized. The permit application deadline for electric generating facilities is five years after the effective date of this rule so there will be time to resolve the AECT's concerns.

AECT commented that if the commission does not delete proposed §101.222(h) as suggested, then AECT suggested minor revisions to §101.222(h), including adding the term “events” after the term “emissions” in §101.222(h).

RESPONSE

The commission declines to make these changes. As previously discussed, the commission revised §101.222(h) to be applicable to planned maintenance, startup, and shutdown activities, and has added §101.222(i), which provides a schedule for phase-out of the affirmative defense for facilities in certain industries with the designated SIC codes.

EIP stated that Texas permits and regulations often require little or no monitoring after a piece of control equipment passes compliance testing, and therefore from that date forward, self-reported emissions data, and consequently compliance determinations, are generally based on the exact same information that was used to establish the permit limits. Essentially this means that it is often logically

impossible for an operator to ever violate its permit limits, regardless of how the facility is operated.

RESPONSE

The commission made no changes in response to this comment because it is beyond the scope of this rulemaking.

An individual commented that general engineering design process needs to be improved so that plants take into account, upset events, startup and shutdown events, and other foreseeable misuse events that might occur. An individual commented that an engineering review should be made to ensure continued adequacy of the design.

RESPONSE

As previously discussed, the commission plans to take a careful look at the applications submitted for authorization of these historically unpermitted emissions, including the design of the control equipment.

An individual commented that, for gas treatment plants, four pounds per hour of emission allowable for hydrogen sulfide is extremely high; this number should be closer to zero. The individual commented that incinerating hydrogen sulfide creates sulfur dioxide which also causes harm, and should be re-injected into a properly designed well and not vented to the atmosphere. An individual commented that American Petroleum Institute Recommended Practices Numbers 49, 59, and 55 show the effects of hydrogen sulfide and sulfur dioxide.

RESPONSE

This comment concerns authorization of gas treatment plants. Although these rules require minimizing emissions to the atmosphere, the rules do not prescribe mechanisms for doing so. Therefore, this comment is beyond the scope of this rulemaking.

An individual expressed concern that the gas processing plant by that individual's residence was granted a PBR in 15 days. This PBR is too vague. Concern was expressed that no public notice was given to them or their neighbors as to the construction of the plant. An individual commented that more time should be allowed or taken to approve any permit that has the potential for off-site emissions. An impact statement should take into consideration what the plant will do to our health, the effects on the community, and the general health and safety of the people. An individual commented that a 1/4 mile limit for the plant is too short.

RESPONSE

This PBR is beyond the scope of this rulemaking. However, the commission developed PBRs and standard permits as a mechanism to authorize similar types of facilities. When developing these PBRs and standard permits, the commission must review the impacts from these types of facilities to ensure that they are protective of public health and the environment if the facility is operated in accordance with the requirements of the authorization. If an individual believes that a particular facility is not operating in accordance with its authorization, the individual can contact the commission in one of four ways. The appropriate commission regional office can be contacted, a complaint can be made by using our online form (found at

<http://163.234.20.106/compliance/complaints/index.html>), the commission can be reached toll-free at 1-888-777-3186, or individuals can e-mail the commission at complaint@tceq.state.tx.us.

Division 3: Operational Requirements, Demonstrations, and Actions to Reduce Excessive Emissions

Section 101.223 - Actions to Reduce Excessive Emissions

EIP commented that the rules should be amended to clearly reflect that THSC, §382.0216(e) requires that emissions events resulting from the lack of preventive maintenance or from operator error, or emissions that are part of a recurring pattern of emissions events indicative of inadequate design or operation be subject to corrective action plan requirements.

RESPONSE

The commission declines to make this change. The statutory provision is self-implementing. Furthermore, the demonstration criteria for excessive emissions in §101.222(a) requires the commission to evaluate the cause, frequency, and four other criteria that address the specific concerns raised by EIP. Emissions determined to be excessive either results in the requirement to provide a corrective action plan, or that the owner or operator obtain an authorization.

BSA, Public Citizen, and Sierra Lone Star commented that the commission should require facilities to perform maintenance and have better employee training. The commission must force companies that regularly have repeat upsets to install equipment to prevent such events from reoccurring.

RESPONSE

The commission declines to make any changes in response to these comments. Section 101.221(a) requires that all pollution emission capture equipment and abatement equipment 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. As previously discussed in this preamble, and in the preamble to the rules implementing statutory changes adopted by the legislature in 2001, when the executive director determines that emissions are excessive, and the emissions from a facility are sufficiently frequent, quantifiable, and predictable, the facility owner or operator has a choice between filing a corrective action plan or requesting permit authorization. Therefore, emission capture and abatement equipment may be required by authorization or by a cap on emissions (September 6, 2002, issue of the *Texas Register* (27 TexReg 8499)).

EIP commented that the commission should include a bright-line trigger for corrective action plan requirements. For example, if unauthorized emissions of a pollutant due to emissions events exceed a certain percentage of the facility's most recently reported annual emissions of that pollutant, the corrective action plan requirements should be triggered. In addition, the commission should maintain discretion to determine on a case-by-case basis whether other events are excessive. The proposed rule should be amended to automatically subject the facility operator to the corrective action plan requirements for events for which it is determined that the excess emissions were caused by lack of preventive maintenance or operator error, or that are part of a recurring pattern indicative of

inadequate design or operation.

RESPONSE

No change was made in response to these comments. The commission did not propose language that would establish a bright-line trigger for corrective action plan requirements, and therefore declines to make any suggested changes without the opportunity for comment. THSC, §382.0216 provides the owner or operator of a facility that has excessive emissions events the option of filing a corrective action plan or a letter of intent to obtain authorization for emissions, and therefore the commission declines to delete the authorization option. This was specifically addressed in these rules for the implementation of HB 2912, 77th Legislature, effective September 12, 2002, as follows: “The commission modified §101.223(a)(1) to indicate ‘when a CAP is required’ that the provisions regarding CAPs will apply. The commission recognizes that when emissions from emissions events are sufficiently frequent, quantifiable, and predictable, the facility owner or operator has a choice between filing a CAP or requesting permit authorization. However, if the commission determines that the emissions are not sufficiently frequent, quantifiable, or predictable, the facility must file a CAP.”

EIP commented that the proposed rule should require additional monitoring for excess emissions.

Extensive evidence already familiar to the commission suggests that emissions from flares are being underestimated and under-reported, even when properly operated.

RESPONSE

Corrective action plans are evaluated on a case-by-case basis, and monitoring may not be an appropriate corrective action for all events associated with flares. The commission continues to consider monitoring where it determines that is appropriate corrective action.

HCPHES supported the changes in §101.223(a)(1) regarding the additional language of appropriate local air pollution control agency with jurisdiction.

RESPONSE

The commission appreciates the support.

HCPHES commented that §101.223(a)(2) should be revised to include the local air pollution control agency with jurisdiction, because the local agency should have the opportunity to officially comment and approve a corrective action plan within the local agency's jurisdiction. Sierra Houston supported adding local agency to §101.223(a)(1).

RESPONSE

The commission declines to make the changes. The commission has statutory deadlines, incorporated in §101.223, to act on corrective action plans, and therefore must begin and end its review timely. Adding an additional approval mechanism may make those deadlines difficult to meet. Local pollution control agencies may obtain copies of corrective action plans by contacting the commission or the owner or operator of the facility, and may submit comments to the commission regarding the plan.

SUBCHAPTER A: GENERAL RULES

§101.1

STATUTORY AUTHORITY

The amendment is 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 THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's 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's air; §382.014, concerning Emission Inventory, which authorizes the commission to require submittal of information regarding emissions of air contaminants; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring, monitoring, and maintaining records of emissions of air contaminants; §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; and §382.085, concerning Unauthorized Emissions

Prohibited, which prohibits emissions of air contaminants except as authorized by commission by rule or order.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0215 and 382.0216.

§101.1. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Account**--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) **Acid gas flare**--A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) **Agency established facility identification number**--For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that the emission inventory reporting requirements of §101.10 of this title (relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.

(4) **Ambient air**--That portion of the atmosphere, external to buildings, to which the general public has access.

(5) **Background**--Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(6) **Boiler**--Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) **Capture system**--All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(8) **Captured facility**--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous

manufacturing complex.

(9) **Carbon adsorber**--An add-on control device that uses activated carbon to adsorb volatile organic compounds from a gas stream.

(10) **Carbon adsorption system**--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(11) **Coating**--A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(12) **Cold solvent cleaning**--A batch process that uses liquid solvent to remove soils from the surfaces of metal parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(13) **Combustion unit**--Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(14) **Combustion turbine**--Any gas turbine system that is gas and/or liquid fuel fired with

or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft will be treated as one unit.

(15) **Commercial hazardous waste management facility**--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility that disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(16) **Commercial incinerator**--An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(17) **Commercial medical waste incinerator**--A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(18) **Component**--A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves that has the potential to leak volatile organic compounds.

(19) **Condensate**--Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(20) **Construction-demolition waste**--Waste resulting from construction or demolition projects.

(21) **Control system or control device**--Any part, chemical, machine, equipment, contrivance, or combination of same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(22) **Conveyorized degreasing**--A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of metal parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(23) **Criteria pollutant or standard**--Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(24) **Custody transfer**--The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(25) **De minimis impact**--A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the following specified amounts.

Figure: 30 TAC §101.1(25)

AIR CONTAMINANT	ANNUAL	24-HOUR	8-HOUR	3-HOUR	1-HOUR
Inhalable Particulate Matter (PM ₁₀)	1.0 µg/m ³	5 µg/m ³			
Sulfur Dioxide	1.0 µg/m ³	5 µg/m ³		25 µg/m ³	
Nitrogen Dioxide	1.0 µg/m ³				
Carbon Monoxide			0.5 mg/m ³		2 mg/m ³

(26) **Domestic wastes**--The garbage and rubbish normally resulting from the functions of life within a residence.

(27) **Emissions banking**--A system for recording emissions reduction credits so they may be used or transferred for future use.

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

(29) **Emissions reduction credit**--Any stationary source emissions reduction that has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(30) **Emissions reduction credit certificate**--The certificate issued by the executive director that indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(31) **Emissions unit**--Any part of a stationary source that emits, or would have the potential to emit, any pollutant subject to regulation under the Federal Clean Air Act.

(32) **Excess opacity event**--When an opacity reading is equal to or exceeds 15 additional percentage points above an applicable opacity limit, averaged over a six-minute period.

(33) **Exempt solvent**--Those carbon compounds or mixtures of carbon compounds used as solvents that have been excluded from the definition of volatile organic compound.

(34) **External floating roof**--A cover or roof in an open top tank that rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them.

(35) **Federal motor vehicle regulation**--Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(36) **Federally enforceable**--All limitations and conditions that are enforceable by the

United States Environmental Protection Agency administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under 40 CFR §52.21 or under regulations approved under 40 CFR Part 51, Subpart 1, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(37) **Flare**--An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and that is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(38) **Fuel oil**--Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(39) **Fugitive emission**--Any gaseous or particulate contaminant entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(40) **Garbage**--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(41) **Gasoline** – Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater that is produced for use as a motor fuel, and is commonly called gasoline.

(42) **Hazardous waste management facility**--All contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of hazardous waste. The term includes a publicly or privately owned hazardous waste management facility consisting of processing, storage, or disposal operational hazardous waste management units such as one or more landfills, surface impoundments, waste piles, incinerators, boilers, and industrial furnaces, including cement kilns, injection wells, salt dome waste containment caverns, land treatment facilities, or a combination of units.

(43) **Hazardous waste management unit**--A landfill, surface impoundment, waste pile, boiler, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or land treatment unit, or any other structure, vessel, appurtenance, or other improvement on land used to manage hazardous waste.

(44) **Hazardous wastes**--Any solid waste identified or listed as a hazardous waste by the

administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.*, as amended.

(45) **Heatset (used in offset lithographic printing)**--Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(46) **High-bake coatings**--Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(47) **High-volume low-pressure spray guns**--Equipment used to apply coatings by means of a spray gun that operates between 0.1 and 10.0 pounds per square inch gauge air pressure.

(48) **Incinerator**--An enclosed combustion apparatus and attachments that is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device that burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period is considered to be an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually is also considered to be an incinerator. An open-trench type (with closed ends) combustion unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood

scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any rule within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(49) **Industrial boiler**--A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(50) **Industrial furnace**--Cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and other devices the commission may list.

(51) **Industrial solid waste**--Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial

solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 and §335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class 3 Waste Determination).

(52) **Internal floating cover**--A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(53) **Leak**--A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower; or the dripping or

exuding of process fluid based on sight, smell, or sound.

(54) **Liquid fuel**--A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(55) **Liquid-mounted seal**--A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(56) **Maintenance area**--A geographic region of the state previously designated nonattainment under the Federal Clean Air Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under 42 United States Code, §7505a. The following are the maintenance areas within the state:

(A) Victoria Ozone Maintenance Area 60 (*Federal Register* (FR) 12453) - Victoria County; and

(B) Collin County Lead Maintenance Area (64 FR 55421) - Portion of Collin County. Eastside: Starting at the intersection of South Fifth Street and the fence line approximately 1,000 feet south of the Exide property line going north to the intersection of South Fifth Street and Eubanks Street; Northside: Proceeding west on Eubanks to the Burlington Railroad tracks; Westside: Along the Burlington Railroad tracks to the fence line approximately 1,000 feet south of the Exide property line; Southside: Fence line approximately 1,000 feet south of the Exide property line.

(57) **Maintenance plan**--A revision to the applicable state implementation plan, meeting the requirements of 42 United States Code, §7505a.

(58) **Marine vessel**--Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(59) **Mechanical shoe seal**--A metal sheet that is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(60) **Medical waste**--Waste materials identified by the Department of State Health Services as "special waste from health care-related facilities" and those waste materials commingled and discarded with special waste from health care-related facilities.

(61) **Metropolitan Planning Organization**--That organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 United States Code (USC), §134 and 49 USC, §1607.

(62) **Mobile emissions reduction credit**--The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state rules) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter E or F of this title (relating to Low Emission

Vehicle Fleet Requirements and Vehicle Retirement and Mobile Emission Reduction Credits), and that has been banked in accordance with Subchapter H, Division 1 of this chapter.

(63) **Motor vehicle**--A self-propelled vehicle designed for transporting persons or property on a street or highway.

(64) **Motor vehicle fuel dispensing facility**--Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(65) **Municipal solid waste**--Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste except industrial solid waste.

(66) **Municipal solid waste facility**--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(67) **Municipal solid waste landfill**--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 Code of Federal Regulations §257.2. A municipal solid

waste landfill (MSWLF) unit also may receive other types of Resource Conservation and Recovery Act Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(68) **National ambient air quality standard**--Those standards established under 42 United States Code, §7409, including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(69) **Net ground-level concentration**--The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(70) **New source**--Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(71) **Nonattainment area**--A defined region within the state that is designated by the United States Environmental Protection Agency (EPA) as failing to meet the national ambient air quality standard for a pollutant for which a standard exists. The EPA will designate the area as

nonattainment under the provisions of 42 United States Code, §7407(d). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations Part 81 and pertinent *Federal Register* (FR) notices. The following areas comprise the nonattainment areas within the state for all national ambient air quality standards (NAAQS). EPA has indicated that it will revoke the one-hour ozone standard in full, including the associated designations and classifications, on June 15, 2005, which is one year following the effective date of the designations for the eight-hour NAAQS of June 15, 2004.

(A) Carbon monoxide (CO). El Paso CO nonattainment area (56 FR 56694)--Classified as a Moderate CO nonattainment area with a design value less than or equal to 12.7 parts per million. Portion of El Paso County. Portion of the city limits of El Paso: That portion of the City of El Paso bounded on the north by Highway 10 from Porfirio Diaz Street to Reynolds Street, Reynolds Street from Highway 10 to the Southern Pacific Railroad lines, the Southern Pacific Railroad lines from Reynolds Street to Highway 62, Highway 62 from the Southern Pacific Railroad lines to Highway 20, and Highway 20 from Highway 62 to Polo Inn Road. Bounded on the east by Polo Inn Road from Highway 20 to the Texas-Mexico border. Bounded on the south by the Texas-Mexico border from Polo Inn Road to Porfirio Diaz Street. Bounded on the west by Porfirio Diaz Street from the Texas-Mexico border to Highway 10.

(B) Inhalable particulate matter (PM₁₀). El Paso PM₁₀ nonattainment area (56 FR 56694)--Classified as a Moderate PM₁₀ nonattainment area. Portion of El Paso County that comprises the El Paso city limit boundaries as they existed on November 15, 1990.

(C) Lead. No designated nonattainment areas.

(D) Nitrogen dioxide. No designated nonattainment areas.

(E) Ozone (one-hour).

(i) Houston-Galveston-Brazoria (HGB) one-hour ozone nonattainment area (56 FR 56694) - Classified as a Severe-17 ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) El Paso one-hour ozone nonattainment area (56 FR 56694) - Classified as a Serious ozone nonattainment area. Consists of El Paso County.

(iii) Beaumont-Port Arthur (BPA) one-hour ozone nonattainment area (69 FR 16483) - Classified as a Serious ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iv) Dallas-Fort Worth one-hour ozone nonattainment area (63 FR 8128) - Classified as a Serious ozone nonattainment area. Consists of Collin, Dallas, Denton, and Tarrant Counties.

(F) Ozone (eight-hour).

(i) HGB eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Moderate ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) BPA eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Marginal ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iii) Dallas-Fort Worth eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Moderate ozone nonattainment area. Consists of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(iv) San Antonio eight-hour ozone nonattainment area (69 FR 23936) - Classified under the Federal Clean Air Act, Title I, Part D, Subpart 1 (42 United States Code, §7502), nonattainment deferred to September 30, 2005, or as extended by EPA.

(G) Sulfur dioxide. No designated nonattainment areas.

(72) **Non-reportable emissions event**--Any emissions event that in any 24-hour period does not result in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(73) **Opacity**--The degree to which an emission of air contaminants obstructs the

transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(74) **Open-top vapor degreasing**--A batch solvent cleaning process that is open to the air and that uses boiling solvent to create solvent vapor used to clean or dry metal parts through condensation of the hot solvent vapors on the colder metal parts.

(75) **Outdoor burning**--Any fire or smoke-producing process that is not conducted in a combustion unit.

(76) **Particulate matter**--Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(77) **Particulate matter emissions**--All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by United States Environmental Protection Agency Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(78) **Petroleum refinery**--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(79) **PM₁₀**--Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on 40 Code of Federal Regulations (CFR) Part 50, Appendix J, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(80) **PM₁₀ emissions**--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(81) **Polychlorinated biphenyl compound**--A compound subject to 40 Code of Federal Regulations Part 761.

(82) **Process or processes**--Any action, operation, or treatment embracing chemical, commercial, industrial, or manufacturing factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(83) **Process weight per hour**--"Process weight" is the total weight of all materials introduced or recirculated into any specific process that may cause any discharge of air contaminants into the atmosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will

be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, excluding any time during that the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(84) **Property**--All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(85) **Reasonable further progress**--Annual incremental reductions in emissions of the applicable air contaminant that are sufficient to provide for attainment of the applicable national ambient air quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(86) **Regulated entity**--All regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flowlines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation of emissions events.

(87) **Remote reservoir cold solvent cleaning**--Any cold solvent cleaning operation in

which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(88) **Reportable emissions event**--Any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(89) **Reportable quantity (RQ)**--Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures by name or Chemical Abstracts Service (CAS) number, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) Part 302 ,
Table 302.4, the column “final RQ”;

(II) listed in 40 CFR Part 355, Appendix A, the column
“Reportable Quantity”; or

(III) listed as follows:

(-a-) acetaldehyde - 1,000 pounds, except in the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (71)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-b-) butanes (any isomer) - 5,000 pounds;

(-c-) butenes (any isomer, except 1,3-butadiene) - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (71)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-d-) carbon monoxide - 5,000 pounds;

(-e-) 1-chloro-1,1-difluoroethane (HCFC-142b) - 5,000 pounds;

(-f-) chlorodifluoromethane (HCFC-22) - 5,000 pounds;

(-g-) 1-chloro-1-fluoroethane (HCFC-151a) - 5,000 pounds;

(-h-) chlorofluoromethane (HCFC-31) - 5,000 pounds;

(-i-) chloropentafluoroethane (CFC-115) - 5,000 pounds;

(-j-) 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124) -
5,000 pounds;

(-k-) 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a) -
5,000 pounds;

(-l-) 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC
43-10mee) - 5,000 pounds;

(-m-) decanes (any isomer) - 5,000 pounds;

(-n-) 1,1-dichloro-1-fluoroethane (HCFC-141b) - 5,000
pounds;

(-o-) 3,3-dichloro-1,1,2,2-pentafluoropropane (HCFC-
225ca) - 5,000 pounds;

(-p-) 1,3-dichloro-1,1,2,2,3-pentafluoropropane
(HCFC-225cb) - 5,000 pounds;

(-q-) 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFR-114) -

5,000 pounds;

(-r-) 1,1,- dichlorotetrafluoroethane (CFC-114a) - 5,000

pounds;

(-s-) 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a) -

5,000 pounds;

(-t-) 1,1-difluoroethane (HFC-152a) - 5,000 pounds;

(-u-) difluoromethane (HFC-32) - 5,000 pounds;

(-v-) ethanol - 5,000 pounds;

(-w-) ethylene - 5,000 pounds, except in the HGB and

BPA ozone nonattainment areas as defined in paragraph (71)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-x-) ethylfluoride (HFC-161) - 5,000 pounds;

(-y -) 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea);

(-z-) 1,1,1,3,3,3-hexafluoropropane (HFC-236fa) - 5,000

pounds;

(-aa-) 1,1,1,2,3,3-hexafluoropropane (HFC-236ea) - 5,000

pounds;

(-bb-) hexanes (any isomer) - 5,000 pounds;

(-cc-) isopropyl alcohol - 5,000 pounds;

(-dd-) mineral spirits - 5,000 pounds;

(-ee-) octanes (any isomer) - 5,000 pounds;

(-ff-) oxides of nitrogen - 200 pounds in ozone

nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County, and 5,000 pounds in all other areas of the state, which should be used instead of the RQs for nitrogen oxide and nitrogen dioxide provided in 40 CFR Part 302, Table 302.4, the column "final RQ";

(-gg -) pentachlorofluoroethane (CFR-111) - 5,000

pounds;

(-hh-) 1,1,1,3,3-pentafluorobutane (HFC-365mfc) - 5,000

pounds;

(-ii-) pentafluoroethane (HFC-125) - 5,000 pounds;

(-jj-) 1,1,2,2,3-pentafluoropropane (HFC-245ca) - 5,000

pounds;

(-kk-) 1,1,2,3,3-pentafluoropropane (HFC-245ea) - 5,000

pounds;

(-ll-) 1,1,1,2,3-pentafluoropropane (HFC-245eb) - 5,000

pounds;

(-mm-) 1,1,1,3,3-pentafluoropropane (HFC-245fa) - 5,000

pounds;

(-nn-) pentanes (any isomer) - 5,000 pounds;

(-oo-) propane - 5,000 pounds;

(-pp-) propylene - 5,000 pounds, except in the HGB and

BPA ozone nonattainment areas as defined in paragraph (71)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-qq-) 1, 1, 2, 2-tetrachlorodifluoroethane (CFR -112) -
5,000 pounds;

(-rr-) 1,1,1,2-tetrachlorodifluoroethane (CFC-112a) -
5,000 pounds;

(-ss-) 1,1,2,2-tetrafluoroethane (HFC-134) - 5,000
pounds;

(-tt-) 1,1,1,2-tetrafluoroethane (HFC-134a) - 5,000
pounds;

(-uu-) 1,1,2-trichloro-1,2,2-trifluoroethane (CFR-113) -
5,000 pounds;

(-vv-) 1,1,1-trichloro- 2,2,2- trifluoroethane (CFC-113a) -
5,000 pounds;

(-ww-) 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123) -

5,000 pounds;

(-xx-) 1,1,1-trifluoroethane (HFC-143a) - 5,000 pounds;

(-yy-) trifluoromethane (HFC-23) - 5,000 pounds; or

(-zz-) toluene - 1,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (71)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound that equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture that equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in

subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or the associated hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines as defined in this section fueled by natural gas, coal, lignite, wood, fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; or

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model,

that would be reported prior to ground level concentrations reaching at any distance beyond the closest regulated entity property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission

limitations.

(90) **Rubbish**--Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(91) **Scheduled maintenance, startup, or shutdown activity**--For activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity that the owner or operator of the regulated entity whether performing or otherwise affected by the activity, provides prior notice and a final report as required by §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in §101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification by more than an RQ. For activities with

unauthorized emissions that are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by §101.211 of this title. Expected excess opacity events as described in §101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by §101.211 of this title.

(92) **Sludge**--Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(93) **Smoke**--Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(94) **Solid waste**--Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under the

Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land, if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended (42 United States Code, §§6901 *et seq.*).

(95) **Sour crude**--A crude oil that will emit a sour gas when in equilibrium at atmospheric pressure.

(96) **Sour gas**--Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more than 30 grains of total sulfur per 100 cubic feet.

(97) **Source**--A point of origin of air contaminants, whether privately or publicly owned or

operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(98) **Special waste from health care-related facilities**--A solid waste that if improperly treated or handled, may serve to transmit infectious disease(s) and that is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(99) **Standard conditions**--A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals). Pollutant concentrations from an incinerator will be corrected to a condition of 50% excess air if the incinerator is operating at greater than 50% excess air.

(100) **Standard metropolitan statistical area**--An area consisting of a county or one or more contiguous counties that is officially so designated by the United States Bureau of the Budget.

(101) **Submerged fill pipe**--A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or, when applied to a tank that is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(102) **Sulfur compounds**--All inorganic or organic chemicals having an atom or atoms of

sulfur in their chemical structure.

(103) **Sulfuric acid mist/sulfuric acid**--Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as H_2SO_4 and must include sulfuric acid liquid mist, sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(104) **Sweet crude oil and gas**--Those crude petroleum hydrocarbons that are not "sour" as defined in this section.

(105) **Total suspended particulate**--Particulate matter as measured by the method described in 40 Code of Federal Regulations Part 50, Appendix B.

(106) **Transfer efficiency**--The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(107) **True vapor pressure**--The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(108) **Unauthorized emissions**--Emissions of any air contaminant except carbon dioxide,

water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act, §382.0518(g).

(109) **Unplanned maintenance, startup, or shutdown activity**--For activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is:

(A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or

(B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

(110) **Upset event**--an unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

(111) **Utility boiler**--A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(112) **Vapor combustor**--A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system that can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(113) **Vapor-mounted seal**--A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(114) **Vent**--Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(115) **Visible emissions**--Particulate or gaseous matter that can be detected by the human eye. The radiant energy from an open flame is considered to be a visible emission under this definition.

(116) **Volatile organic compound**--As defined in 40 Code of Federal Regulations

§51.100(s), except §51.100(s)(2) - (4), as amended on November 29, 2004 (69 FR 69290).

(117) **Volatile organic compound (VOC) water separator**--Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

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

DIVISION 1: EMISSIONS EVENTS

§101.201

STATUTORY AUTHORITY

The amendment is 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 THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's 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's air; §382.014, concerning Emissions Inventory, which authorizes the commission to require submittal of emissions data; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring, monitoring, and maintaining records of emissions of air contaminants; §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; and §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions of air contaminants except as authorized by commission by rule or order.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0215, and 382.0216.

§101.201. Emissions Event Reporting and Recordkeeping Requirements.

(a) The following requirements for reportable emissions events apply.

(1) As soon as practicable, but not later than 24 hours after the discovery of an emissions event, the owner or operator of a regulated entity shall:

(A) determine if the event is a reportable emissions event; and

(B) notify the commission office for the region in which the regulated entity is located, and all appropriate local air pollution control agencies with jurisdiction, if the emissions event is reportable.

(2) The initial 24-hour notification for reportable emissions events, with the exception of emissions from boilers or combustion turbines referenced in the definition of reportable quantity (RQ)

in §101.1 of this title (relating to Definitions) for each regulated entity, must at a minimum, identify for each emissions point with emissions that exceed an RQ:

(A) the name of the owner or operator of the regulated entity experiencing an emissions event;

(B) the commission Regulated Entity Number of the regulated entity experiencing an emissions event, if a Regulated Entity Number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the common name of the process units or areas, the common name of the facilities that incurred the emissions event, and the common name of the emission points where the unauthorized emissions exceeded an RQ were released to the atmosphere;

(D) the date and time of the discovery of the emissions;

(E) the estimated duration of the emissions;

(F) the compound descriptive type of the individually listed compounds or mixtures of air contaminants released during the emissions event, in the definition of RQ in §101.1 of this title that are known through common process knowledge, past engineering analysis, or testing to

have equaled or exceeded the RQ;

(G) the estimated total quantities for those compounds or mixtures described in subparagraph (F) of this paragraph;

(H) the best known cause of the emissions event at the time of the initial 24-hour notification, if known; and

(I) the actions taken, or being taken, to correct the emissions event and minimize the emissions.

(3) The initial 24-hour notification for reportable emissions events for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title must identify for each emission point with excess opacity that exceeds the RQ by more than 15%:

(A) the name of the owner or operator of the regulated entity experiencing an emissions event;

(B) the commission Regulated Entity Number of the regulated entity experiencing an emissions event, if a Regulated Entity Number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the best known cause of the emissions event, if known at the time of notification;

(D) the common name of the process units or areas, the common name of the facilities that experienced the emissions event, and the common name of the emission points where the unauthorized opacity that exceeded the RQ occurred;

(E) the date and time of the discovery of the emissions event;

(F) the estimated duration or expected duration of the emissions;

(G) the estimated opacity; and

(H) the actions taken, or being taken, to correct the emissions event and minimize the emissions.

(4) The owner or operator of a regulated entity experiencing a reportable emissions event that also requires an initial notification under §327.3 of this title (relating to Notification Requirements) may satisfy the initial 24-hour notification requirements of this section by complying with the requirements under §327.3 of this title.

(b) The owner or operator of a regulated entity experiencing an emissions event shall create a final

record of all reportable and non-reportable emissions events as soon as practicable, but no later than two weeks after the end of an emissions event. Final records must be maintained on-site for a minimum of five years and be made readily available upon request to commission staff or personnel of any air pollution program with jurisdiction. If a regulated entity is not normally staffed, records of emissions events may be maintained at the staffed location within Texas that is responsible for the day-to-day operations of the regulated entity.

(1) The final record of a reportable emissions event must identify for all emission points involved in the emissions event:

(A) the name of the owner or operator of the regulated entity experiencing an emissions event;

(B) the commission Regulated Entity Number of the regulated entity experiencing an emissions event, if a Regulated Entity Number and air account number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the physical location of the points at which emissions to the atmosphere occurred;

(D) the common name of the process units or areas, the common name and the agency-established facility identification number of the facilities that experienced the emissions event, and the common name and the agency-established emission point numbers where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points that the agency has not established facility identification numbers or emission point numbers for are not required to provide the facility identification numbers and emission point numbers in the report, but are required to provide the common names in the report.

(E) the date and time of the discovery of the emissions event;

(F) the estimated duration of the emissions;

(G) the compound descriptive type of all individually listed compounds or mixtures of air contaminants in the definition of RQ in §101.1 of this title, from all emission points involved in the emissions event, that are known through common process knowledge or past engineering analysis or testing to have been released during the emissions event, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period, are not required to be specifically listed in the report, instead these compounds or mixtures of air contaminants may be identified together as “other”;

(H) the estimated total quantities for those compounds or mixtures described in

subparagraph (G) of this paragraph; the preconstruction authorization number or rule citation of the standard permit, permit by rule, or rule, if any, governing the facilities involved in the emissions event; and the authorized emissions limits, if any, for the facilities involved in the emissions events, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title, which record only the authorized opacity limit and the estimated opacity during the emissions event. Good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. Estimated emissions from compounds or mixtures of air contaminants that are identified as “other” under subparagraph (G) of this paragraph, are not required for each individual compound or mixture of air contaminants, however, a total estimate of emissions must be provided for the category identified as “other”;

(I) the basis used for determining the quantity of air contaminants emitted, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title;

(J) the best known cause of the emissions event at the time of reporting;

(K) the actions taken, or being taken, to correct the emissions event and minimize the emissions; and

(L) any additional information necessary to evaluate the emissions event.

(2) Records of non-reportable emissions events must identify:

(A) the name of the owner or operator of the regulated entity experiencing an emissions event;

(B) the commission Regulated Entity Number and air account number of the regulated entity experiencing an emissions event, if a Regulated Entity Number and air account number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the physical location of the points at which emissions to the atmosphere occurred;

(D) the common name of the process units or areas, the common name and the agency-established facility identification number of the facilities that experienced the emissions event, and the common name and the agency-established emission point numbers where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points that the commission has not established facility identification numbers or emission point numbers for are not required to provide the facility identification numbers and emission point numbers in the report, but are required to provide the common names in the report;

(E) the date and time of the discovery of the emissions event;

(F) the estimated duration of the emissions;

(G) the compound descriptive type of the individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1 of this title, from all emission points involved in the emissions event, that are known through common process knowledge or past engineering analysis, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title and that were unauthorized. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period, are not required to be specifically listed in the report, instead these compounds or mixtures of air contaminants may be identified together as “other”;

(H) the estimated total quantities and the authorized emissions limits for those compounds or mixtures described in subparagraph (G) of this paragraph; the preconstruction authorization number or rule citation of the standard permit, permit by rule, or rule, if any, governing the facilities involved in the emissions event; and the authorized emissions limits, if any, for the facilities involved in the emissions events, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title, which record only the authorized opacity limit and the estimated opacity during the emissions event. Good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. Estimated emissions from compounds or mixtures of air contaminants that are identified as “other” under subparagraph (G) of this paragraph, are not required for each individual compound or mixture of air contaminants, however, a total estimate of emissions must be provided for the category identified as “other”;

(I) the basis used for determining the quantity of air contaminants emitted, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title;

(J) the best known cause of the emissions event at the time of recording;

(K) the actions taken, or being taken, to correct the emissions event and minimize the emissions; and

(L) any additional information necessary to evaluate the emissions event.

(c) For all reportable emissions events, if the information required in subsection (b) of this section differs from the information provided in the initial 24-hour notification under subsection (a) of this section, the owner or operator of the regulated entity shall submit a copy of the final record to the commission office for the region in which the regulated entity is located and to appropriate local air pollution agencies with jurisdiction no later than two weeks after the end of the emissions event. If the owner or operator does not submit a record under this subsection, the information provided in the initial 24-hour notification under subsection (a) of this section will be the final record of the emissions event, provided the initial 24-hour notification was submitted electronically in accordance with subsection (g) of this section.

(d) The owner or operator of a boiler or combustion turbine, as defined in §101.1 of this title, fueled by natural gas, coal, lignite, wood, or fuel oil containing hazardous air pollutants at a

concentration of less than 0.02% by weight, that is equipped with a continuous emission monitoring system that completes a minimum of one operating cycle (sampling, analyzing, and data recording) for each successive 15-minute interval, and is required to submit excess emission reports by other state or federal requirements, is exempt from creating, maintaining, and submitting final records of reportable and non-reportable emissions events of the boiler or combustion turbine under subsections (b) and (c) of this section if the notice submitted under subsection (a) of this section contains the information required under subsection (b) of this section.

(e) As soon as practicable, but not later than 24 hours after the discovery of an excess opacity event, as defined in §101.1 of this title, where the owner or operator was not already required to provide an initial 24-hour notification under subsection (a)(2) or (3) of this section, the owner or operator shall notify the commission office for the region in which the regulated entity is located, and all appropriate local air pollution control agencies with jurisdiction. In the notification, the owner or operator shall identify:

(1) the name of the owner or operator of the regulated entity experiencing the excess opacity event;

(2) the commission Regulated Entity Number and air account number of the regulated entity experiencing an opacity event, if a Regulated Entity Number and air account number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a

contact telephone number;

- (3) the physical location of the excess opacity event;
- (4) the common name of the process units or areas, the common name of the facilities where the excess opacity event occurred, and the common name of the emission points where the excess opacity event occurred;
- (5) the date and time of the discovery of the excess opacity event;
- (6) the estimated duration of the excess opacity;
- (7) the estimated opacity;
- (8) the authorized opacity limit for the facilities having the excess opacity event;
- (9) the best known cause of the excess opacity event at the time of the notification; and
- (10) the actions taken, or being taken, to correct the excess opacity event.

(f) The owner or operator of any regulated entity subject to the provisions of this section shall perform, upon request by the executive director or any air pollution control agency with jurisdiction, a

technical evaluation of each emissions event. The evaluation must include at least an analysis of the probable causes of each emissions event and any necessary actions to prevent or minimize recurrence. The evaluation must be submitted in writing to the executive director and to the appropriate local air pollution agencies with jurisdiction within 60 days from the date of request. The 60-day period may be extended by the executive director. Additionally, the owner or operator of a regulated entity experiencing an emissions event must provide, in writing, additional or more detailed information regarding the emissions event when requested by the executive director or any air pollution control agency with jurisdiction, within the time established in the request.

(g) On and after January 1, 2003, notifications and reports required in subsection (c) of this section must be submitted electronically to the commission using the electronic forms provided by the commission. On and after January 1, 2004, notifications required in subsections (a) and (e) of this section must be submitted via commission's secure Web server, facsimile, or electronic mail to the commission using electronic forms provided by the commission. Notwithstanding the requirement to report initial 24-hour notifications electronically after January 1, 2004, the owner or operator of a regulated entity experiencing a reportable emissions event that also requires an initial notification under §327.3 of this title, is not required to report the event electronically under this subsection provided the owner or operator complies with the requirements under §327.3 of this title and in subsections (a) and (c) of this section. If the initial notification is not submitted by using an online form on the commission's secure Web server, the owner or operator must submit the identical information on the commission's secure Web server within 48 hours of discovery of the event. In the event the commission's server is unavailable due to technical failures or scheduled maintenance, events may be

reported via facsimile to the appropriate regional office. The commission will provide an alternative means of notification in the event that the commission's electronic reporting system is inoperative. Electronic notification and reporting is not required for small businesses that meet the small business definition in Texas Water Code, §5.135(g)(2) and to appropriate local air pollution control agencies with jurisdiction. Small businesses shall provide notifications and reporting by any viable means that meet the time frames required by this section.

(h) Annual emissions event reporting: beginning in calendar year 2007, on or before March 31 of each calendar year or as directed by the executive director, each owner or operator of a regulated entity, as defined in §101.1 of this title that is subject to reporting under §101.10 of this title (relating to Emissions Inventory Requirements), and those that are not subject to reporting under §101.10 of this title, but are located in nonattainment, maintenance, early action compact areas, Nueces County, and San Patricio County, that experienced at least one emissions event during the calendar year shall report to the executive director, and all appropriate local air pollution control agencies with jurisdiction, the following:

(1) the total number of reportable and the total number of non-reportable emissions events experienced at the regulated entity;

(2) the estimated total quantities for all compounds or mixtures of air contaminants, by compound or mixture, in the definition of RQ in §101.1 of this title that, by facility, were emitted during emissions events at the regulated entity. Compounds or mixtures of air contaminants, that have

an RQ greater than or equal to 100 pounds and the amount released is less than one pound in a 24-hour period, are not required to be included in the report. Good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. This paragraph does not apply to boilers and combustion turbines referenced in the definition of RQ in §101.1 of this title that must report only the estimated opacities during emissions events and duration of unauthorized opacity; and

(3) owners and operators of regulated entities that are not subject to reporting under §101.10 of this title must provide annual emissions event reporting electronically by using an online form on the commission's secure Web server. The commission will provide an alternative means of reporting in the event that the commission's electronic reporting system is inoperative. If the commission's server is unavailable due to technical failures or scheduled maintenance, the annual reports may be provided through alternative means to the executive director. Annual electronic reporting is not required for small businesses that meet the small business definition in Texas Water Code, §5.135(g)(2) and to appropriate local air pollution control agencies with jurisdiction. Small businesses shall provide annual reporting by any viable means that meet the time frames required by this section.

(4) owners and operators of regulated entities that are subject to reporting under §101.10 of this title must provide the information required by this subsection as part of their reporting under §101.10 of this title.

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

DIVISION 2: MAINTENANCE, STARTUP, AND SHUTDOWN ACTIVITIES

§101.211

STATUTORY AUTHORITY

The amendment is 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 THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's 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's air; §382.014, concerning Emissions Inventory, which authorizes the commission to require submittal of emissions data; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring, monitoring, and maintaining records of emissions of air contaminants; §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; and §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions of air contaminants except as authorized by commission by rule or order.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0215, and 382.0216..

§101.211. Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements.

(a) The owner or operator of a regulated entity conducting a scheduled maintenance, startup, or shutdown activity shall notify the commission office for the region in which the regulated entity is located and all appropriate local air pollution control agencies with jurisdiction at least ten days prior to any scheduled maintenance, startup, or shutdown activity that is expected to cause an unauthorized emission that equals or exceeds the reportable quantity (RQ) as defined in §101.1 of this title (relating to Definitions), by emissions point in any 24-hour period and/or an activity where the owner or operator expects only an excess opacity event as defined in §101.1 of this title. If notice cannot be given ten days prior to a scheduled maintenance, startup, or shutdown activity, notification must be given as soon as practicable prior to the scheduled activity. Maintenance, startup, or shutdown activities where the actual emissions exceed the emissions in the notification by more than an RQ or for which a notification was not submitted prior to the activity are either upsets or unplanned maintenance, startup, or shutdown activities, depending upon the reason for exceeding the estimate. Excess opacity

events where unauthorized emissions result are emissions events. Owners and operators of a regulated entity with emissions events shall report such events as emissions events in accordance with the requirements in §101.201 of this title, or this section as applicable and §101.222 of this title (relating to Demonstrations).

(1) The notification for a scheduled maintenance, startup, or shutdown activity, except for boilers and combustion turbines referenced in the definition of RQ in §101.1 of this title, must identify:

(A) the name of the owner or operator;

(B) the commission Regulated Entity Number of the regulated entity, if a Regulated Entity Number and air account number exist(s), or if there is not a Regulated Entity Number, the air number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the physical location of the points at which emissions from the scheduled maintenance, startup, or shutdown activity will occur;

(D) the type of scheduled maintenance, startup, or shutdown activity and the reason for the scheduled activity;

(E) the expected date and time of the scheduled maintenance, startup, or shutdown

activity, and expected duration of any maintenance activity;

(F) the common name of the process units or areas, the common name and the agency-established facility identification number of the facilities that will be involved in the emissions activity, and the common name and the agency-established emission point numbers where the unauthorized emissions may be released to the atmosphere. Owners or operators of those facilities and emission points that the agency has not established facility identification numbers or emission point numbers for are not required to provide the facility identification numbers and emission point numbers in the report, but are required to provide the common names in the report;

(G) the expected duration of the emissions from the scheduled maintenance, startup, or shutdown activity;

(H) the compound descriptive type of the individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1 of this title, for all emission points involved in the emissions activity, that through common process knowledge or past engineering analysis or testing are expected to equal or exceed the RQ. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period, are not required to be specifically listed in the report, instead these compounds or mixtures of air contaminants may be identified together as “other”;

(I) the estimated total quantities for those compounds or mixtures described in

subparagraph (H) of this paragraph; the preconstruction authorization number or rule citation of the standard permit, permit by rule, or rule, if any, governing the facilities involved in the activity; authorized emissions limits, if any, for the facilities involved in the emissions activity, and, if applicable, the estimated opacity and the authorized opacity limit. Good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. Estimated emissions from compounds or mixtures of air contaminants that are identified as “other” under subparagraph (H) of this paragraph, are not required for each individual compound or mixture of air contaminants, however, a total estimate of emissions must be provided for the category identified as “other”;

(J) the basis used for determining the quantity of air contaminants to be emitted;

and

(K) the actions taken to minimize the emissions from the scheduled maintenance, startup, or shutdown activity.

(2) The notification for a scheduled maintenance, startup, or shutdown activity involving a boiler or combustion turbine referenced in the definition of RQ in §101.1 of this title, or where the owner or operator expects only an excess opacity event and the owner or operator was not already required to provide a notification under paragraph (1) of this subsection, must identify:

(A) the name of the owner or operator;

(B) the commission Regulated Entity Number of the regulated entity, if a Regulated Entity Number and air account number exist(s), or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the physical location of the scheduled maintenance, startup, or shutdown activity;

(D) the type of scheduled maintenance, startup, or shutdown activity and the reason for the scheduled activity;

(E) the common name of the process units or areas, the common name and the agency-established facility identification numbers of the facility that experienced the excess opacity event, and the common name and the agency-established emission point numbers where the excess opacity event occurred. Owners or operators of those facilities and emission points that the agency has not established facility identification numbers or emission point numbers for are not required to provide the facility identification numbers and emission point numbers in the report, but are required to provide the common names in the report;

(F) the expected date and time of the scheduled maintenance, startup, or shutdown activity, and expected duration of any maintenance activity;

(G) the estimated duration of the emissions from the scheduled maintenance, startup, or shutdown activity;

(H) the estimated opacity and the authorized opacity limit for those emission points that unauthorized opacity is expected; and

(I) the actions taken, or being taken, to minimize the emissions from the scheduled maintenance, startup, or shutdown activity.

(b) The owner or operator of a regulated entity conducting a scheduled maintenance, startup, or shutdown activity shall create a final record of all scheduled maintenance, startup, and shutdown activities with unauthorized emissions, or with opacity exceedances from boilers and combustion turbines referenced in the definition of RQ in §101.1 of this title. The final record must be created as soon as practicable, but no later than two weeks after the end of each scheduled activity. Final records must be maintained on-site for a minimum of five years and be made readily available upon request to commission staff or personnel of any air pollution program with jurisdiction. If a regulated entity is not normally staffed, records of scheduled maintenance, startup, and shutdown activities may be maintained at the staffed location within Texas that is responsible for day-to-day operations of the regulated entity. Such scheduled activity records must identify:

(1) for owners and operators of regulated entities that were required to notify under subsection (a) of this section:

(A) the name of the owner or operator;

(B) the commission Regulated Entity Number of the regulated entity, if a Regulated Entity Number and air account number exist(s), or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the regulated entity and a contact telephone number;

(C) the physical location of the scheduled points at which emissions from the maintenance, startup, or shutdown activity occurred;

(D) the type of scheduled maintenance, startup, or shutdown activity and the reason for the scheduled activity;

(E) the common name of the process units or areas, the common name and the agency-established facility identification number of the facilities that experienced the emissions activity, and the common name and the agency-established emission point numbers where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points that the agency has not established facility identification numbers or emission point numbers for are not required to provide the facility identification numbers and emission point numbers in the report, but are required to provide the common names in the report;

(F) the date and time of the scheduled maintenance, startup, or shutdown activity,

and the duration of any maintenance activity;

(G) the duration of the emissions from the scheduled maintenance, startup, or shutdown activity;

(H) the compound descriptive type of all individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1 of this title, involved in the emissions activity, that are known through common process knowledge or past engineering analysis or testing to have been released during the scheduled maintenance, startup, or shutdown activity, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period, are not required to be specifically listed in the report instead these compounds or mixtures of air contaminants may be identified together as “other”;

(I) the estimated total quantities and the authorized emissions limits for those compounds or mixtures described in subparagraph (H) of this paragraph; the preconstruction authorization number or rule citation of the standard permit, permit by rule, or rule, any, governing the facilities involved in the scheduled maintenance, startup, or shutdown activity; authorized emissions limits, if any, for the facility involved in the scheduled maintenance, startup, or shutdown activity, and, if applicable, the estimated opacity and authorized opacity limit, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title that record only the authorized opacity limit and the estimated opacity during the emissions event. Good engineering practice and methods

must be used to provide reasonably accurate representations for emissions and opacity. Estimated emissions from compounds or mixtures of air contaminants that are identified as “other” under subparagraph (H) of this paragraph are not required for each individual compound or mixture of air contaminants; however, a total estimate of emissions must be provided for the category identified as “other”;

(J) the basis used for determining the quantity of air contaminants to be emitted, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title; and

(K) the actions taken to minimize the emissions from the scheduled maintenance, startup, or shutdown activity.

(2) for owners and operators of regulated entities that were not required to notify under subsection (a) of this section:

(A) the name of the owner or operator;

(B) the commission Regulated Entity Number of the regulated entity if a Regulated Entity Number and air account number exist(s), or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the physical location of the scheduled points at which emissions from the maintenance, startup, or shutdown activity occurred;

(D) the type of scheduled maintenance, startup, or shutdown activity and the reason for the scheduled activity;

(E) the common name of the process unit or areas, the common name and the agency-established facility identification numbers of the facilities that experienced the emissions activity , and the common name and the agency-established emission point numbers where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points that the agency has not established facility identification numbers or emission point numbers for are not required to provide the facility identification numbers and emission point numbers in the report, but are required to provide the common names in the report;

(F) the date and time of the scheduled maintenance, startup, or shutdown activity, and the duration of any maintenance activity;

(G) the duration of the emissions from the scheduled maintenance, startup, or shutdown activity;

(H) the compound descriptive type of the individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1 of this title, that are known through common process knowledge, past engineering analysis, except for boilers or combustion turbines

referenced in the definition of RQ in §101.1 of this title and that were unauthorized. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period, are not required to be specifically listed in the record instead these compounds or mixtures of air contaminants may be identified together as “other”; and

(I) the estimated total quantities and the authorized emissions limits for those compounds or mixtures described in subparagraph (H) of this paragraph. Good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. Estimated emissions from compounds or mixtures of air contaminants that are identified as “other” under subparagraph (H) of this paragraph are not required for each individual compound or mixture of air contaminants, however, a total estimate of emissions must be provided for the category identified as “other.”

(c) For any scheduled maintenance, startup, or shutdown activity for which an initial notification was submitted under subsection (a) of this section, which does not provide all the information required in subsection (b) of this section or if the information has changed from the prior notification, the owner or operator of the regulated entity shall submit a final record as required by subsection (b) of this section to the commission office for the region in which the regulated entity is located and to appropriate local air pollution agencies with jurisdiction no later than two weeks after the end of the scheduled activity. If the owner or operator does not submit a record under this subsection, the information provided under subsection (a) of this section will be the final record of the scheduled

activity.

(d) The owner or operator of a boiler or combustion turbine as defined in §101.1 of this title fueled by natural gas, coal, lignite, wood, or fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, that is equipped with a continuous emission monitoring system that completes a minimum of one operating cycle (sampling, analyzing, and data recording) for each successive 15-minute interval, and is required to submit excess emissions reports by other state or federal rules, is exempt from creating, maintaining, and submitting final records of scheduled maintenance, startup, and shutdown activities with unauthorized emissions under subsections (b) and (c) of this section, if the notice submitted under subsection (a) of this section contains the information required under subsection (b) of this section.

(e) The executive director may specify the amount, time, and duration of emissions that will be allowed during the scheduled maintenance, startup, or shutdown activity. The owner or operator of any source subject to the provisions of this section shall submit a technical plan for any scheduled maintenance, startup, or shutdown activity when requested by the executive director with a copy to the appropriate local air pollution agencies with jurisdiction. The plan must contain a detailed explanation of the means by which emissions will be minimized during the scheduled maintenance, startup, or shutdown activity. For those emissions that must be released into the atmosphere, the plan must include the reasons such emissions cannot be reduced further.

(f) For annual scheduled maintenance, startup, and shutdown activity reporting on or before

March 31 of each calendar year beginning in calendar year 2007, or as directed by the executive director, each owner or operator of a regulated entity site, as defined in §101.1 of this title that is subject to reporting under §101.10 of this title (relating to Emissions Inventory Reporting), and those that are not subject to reporting under §101.10 of this title but are located in nonattainment, maintenance, early action compact areas, Nueces County, and San Patricio County, that experienced at least one scheduled maintenance, startup, and shutdown activity during the calendar year must report to the executive director, and all appropriate local air pollution control agencies with jurisdiction:

(1) the number of reportable and non-reportable scheduled maintenance, startup, and shutdown activities experienced at the regulated entity; and

(2) the estimated total quantities for all compounds or mixtures, by compound or mixture, of air contaminants, in the definition of RQ in §101.1 of this title that, by facility, emitted during scheduled maintenance, startup, and shutdown activities at the regulated entity. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than one pound in a 24-hour period, are not required to be included in the report. Good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. This paragraph does not apply to boilers and combustion turbines referenced in the definition of RQ in §101.1 of this title, that must report only the estimated opacities during emissions events and duration of unauthorized opacity; and

(3) owners and operators of regulated entities that are not subject to reporting

under §101.10 of this title must report annual total emissions resulting from all scheduled maintenance, startup, and shutdown activities electronically by using an online form on the commission's secure Web server. The commission will provide an alternative means of reporting in the event that the commission's electronic reporting system is inoperative. If the commission's server is unavailable due to technical failures or scheduled maintenance, the annual reports may be reported to the executive director. Annual electronic reporting is not required for small businesses that meet the small business definition in Texas Water Code, §5.135(g)(2) and to appropriate local air pollution control agencies with jurisdiction. Small businesses shall provide annual reporting by any viable means that meet the time frames required by this section; and

(4) owners and operators of regulated entities that are subject to reporting under §101.10 of this title must provide the information required by this subsection as part of their reporting under §101.10 of this title.

**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 THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's 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's air; §382.014, concerning Emissions Inventory, which authorizes the commission to require submittal of emissions data; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring, monitoring, and maintaining records of emissions of air contaminants; §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; and §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions of air contaminants except as authorized by commission by rule or order.

The adopted amendments implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0215, and 382.0216.

§101.221. Operational Requirements.

(a) All pollution emission capture equipment and abatement equipment must be maintained in good working order and operated properly during facility operations. Emission capture and abatement equipment must 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, 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 unless specifically required by a particular rule.

(d) Sources emitting air contaminants that cannot be controlled or reduced due to a lack of technological knowledge may be exempt from the applicable rules when so determined and ordered by the commission. The commission may specify limitations and conditions as to the operation of such exempt sources. The commission will not exempt sources from complying with any federal requirements, including New Source Performance Standards (40 Code of Federal Regulations Part 60) and National Emission Standards for Hazardous Air Pollutants (40 Code of Federal Regulations Parts 61 and 63).

(e) The owner or operator of a facility has the burden of proof to demonstrate that the applicable criteria identified in §101.222(relating to Demonstrations) are satisfied.

(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.

§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 upset events. Upset events that are determined not to be excessive emissions events 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, 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). In the event the owner or operator

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

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

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

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

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

(6) the amount and duration of the unauthorized emissions and any bypass of pollution

control equipment were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

- (7) all emission monitoring systems were kept in operation if possible;
- (8) the owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;
- (9) the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;
- (10) the percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high; and
- (11) the unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.

(c) Unplanned maintenance, startup, or shutdown activity. Emissions from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator

proves the emissions were from an unplanned maintenance, startup, or shutdown activity, as defined in §101.1 of this title (relating to Definitions), and all of the following:

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

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

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

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

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

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

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

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

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

(d) Excess opacity events. Excess opacity events due to an upset that are subject to §101.201(e) of this title, or for other opacity events where there was no emissions event, 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, 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. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

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

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

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

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

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

ambient air quality;

- (7) all emission monitoring systems were kept in operation if possible;
- (8) the owner or operator actions in response to the opacity event were documented by contemporaneous operation logs or other relevant evidence;
- (9) the opacity event was not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance; and
- (10) the opacity event did not cause or contribute to a condition of air pollution.

(e) Opacity events resulting from unplanned maintenance, startup, or shutdown activity. Excess opacity events, or other opacity events where there was no emissions event, that result from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves the opacity resulted from an unplanned maintenance, startup, or shutdown activity, as defined in §101.1 of this title, and all of the following:

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

excess opacity events that result from an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of §101.201 of this title and demonstrates that reporting pursuant to §101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

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

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

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

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

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

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

opacity were minimized;

- (8) all emissions monitoring systems were kept in operation if possible;
- (9) the owner or operator actions during the opacity event were documented by contemporaneous operating logs or other relevant evidence; and
- (10) the opacity event did not cause or contribute to a condition of air pollution.

(f) Obligations. Subsections (b) - (e) and (h) of this section do not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to an emissions event or a maintenance, startup, or shutdown activity. Any affirmative defense provided by subsections (b) - (e) and (h) applies only to violations of state implementation plan requirements. An affirmative defense cannot apply to violations of federally promulgated performance or technology based standards, such as those found in 40 Code of Federal Regulations Parts 60, 61, and 63. The affirmative defense is available only for emissions that have been reported or recorded.

(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) Planned maintenance, startup, or shutdown activity. Unauthorized emissions or opacity events

from a maintenance, startup, or shutdown activity that are not unplanned that have been reported or recorded in compliance with §101.211 of this title are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the criteria listed in subsection (c)(1) - (9) of this section for emissions, or subsection (e)(1) - (9) of this section for opacity events and the following:

(1) the owner or operator has filed an application to authorize the emissions or opacity by the following dates:

(A) for facilities in Standard Industrial Classification (SIC) code 2911 (Petroleum Refining), one year after the effective date of this section;

(B) for facilities in major group SIC code 28 (Chemicals and Allied Products), except SIC code 2895, two years after the effective date of this section;

(C) for facilities in SIC code 2895 (Carbon Black), four years after the effective date of this section;

(D) for facilities in SIC code 4911 (Electric Services), five years after the effective date of this section;

(E) for facilities in SIC codes 1311 (Crude Petroleum and Natural Gas), 1321 (Natural Gas Liquids), 4612 (Crude Petroleum Pipelines), 4613 (Refined Petroleum Pipelines), 4922 (Natural Gas Transmission), 4923 (Natural Gas Transmission and Distribution), six years after the effective date of this section; and

(F) for all other facilities, seven years after the effective date of this section.

(2) an owner or operator who filed an application listed in paragraph (1) of this subsection has provided prompt response for any requests by the executive director for information regarding that application.

(i) The affirmative defense in subsection (h) of this section will expire upon the earlier of one year after the application deadlines in subsection (h)(1)(A) and (C) - (F) of this section, or the issuance or denial of a permit applied for under subsection (h)(1)(A) and (C) - (F) of this section, or voidance of an application filed under subsection (h)(1)(A) and (C) - (F) of this section. The affirmative defense in subsection (h) of this section will expire upon the earlier of two years after the application deadline in subsection (h)(1)(B) of this section or the issuance or denial of a permit applied for under subsection (h)(1)(B) of this section, or voidance of an application filed under subsection (h)(1)(B) of this section. If the permit application remains pending after the affirmative defense expires, the commission will use enforcement discretion for all claims in enforcement actions brought for excess emissions from planned maintenance, startup, or shutdown activities, other than claims for administrative technical orders and actions for injunctive relief for which the owner or operator proves the criteria in subsections (c) and

(e) of this section, until the issuance or denial of a permit applied for under subsection (h)(1) of this section, or voidance of an application filed under subsection (h)(1) of this section.

(j) The executive director shall process permit applications referenced in subsection (h) of this section in accordance with the schedule set out in §116.114 of this title (relating to Application Review Schedule).

§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 must 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 and local air pollution agency with jurisdiction 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 must, 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 must 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 regulated entity 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 regulated entity has chronic excessive emissions events. Orders issued by the commission under this section will 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 regulated entity has chronic excessive emissions events after considering the following factors:

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

(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 will 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.