

The Texas Commission on Environmental Quality (commission or TCEQ) adopts amendments to §§35.801, 35.802, 35.804, 35.805, 35.807, and 35.808 *without changes* to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1599) and these sections will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bill (HB) 2949, 79th Legislature, 2005, amended Texas Water Code (TWC), §5.515, to allow for authorization of emergency orders to repair or replace roads, bridges, or other infrastructure improvements involving public works projects destroyed during a catastrophe. The TWC previously only authorized emergency orders to allow repair of a facility or control equipment. Amended TWC, §5.515 adds language regarding the contents of the application for an emergency order. The required language in the application pertaining to the reason for allowing the construction and emissions was expanded to include preventing a “loss of a critical transportation thoroughfare.” The purpose of this rulemaking is to reflect these changes in Subchapter K of this chapter.

The adopted rules add language authorizing emergency orders to include repair or replacement of roads, bridges, or other infrastructure improvements to the list of actions that can be authorized by an emergency order. Additionally, the adopted rules authorize an applicant to list loss of a critical transportation thoroughfare as a reason why the construction and emissions are essential. As a point of

clarification, it is noted that the issuance of an emergency order, under the adopted rules, to a rock crusher or concrete batch plant that performs wet batching, dry batching, or central mixing will not be prohibited under TWC, §5.5145, or subject to penalty under TWC, §7.052(b), because the facility is considered to be operating under a temporary authorization as provided in TWC, §5.501(a)(2)(A). A facility which has been issued an emergency order has been provided a limited-term authorization and must submit an application for a permit or permit modification within 60 days of the order issuance, as described in 30 TAC §35.806.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout the rules to conform with Texas Register requirements and agency guidelines.

The adopted amendment to §35.801, Emergency Orders Because of Catastrophe, adds roads, bridges, or other infrastructure to the list of repairs or replacements for which the commission may authorize immediate action. The commission also revises the definition of catastrophe by replacing the word “operator” with the word “applicant” and by adding the language “or a road, bridge, or other infrastructure.”

The adopted amendment to §35.802, Application of an Emergency Order, adds language, in paragraphs (1) and (5), allowing an applicant to state that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure to the

list of possible statements in an application for an emergency order of why the construction and emissions are necessary. In describing the limitations on the proposed construction and emissions, the applicant may cite the public works project as the specific basis for the emergency authorization.

The adopted amendment to §35.804, Issuance of Order, adds language to the list in paragraph (1) of possible reasons that would allow the commission to issue an emergency order, allowing the commission to issue an order under this subchapter if it is found that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure. New §35.804(5)(C), adds public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The adopted amendment to §35.805, Contents of an Emergency Order, adds in paragraph (3), public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The adopted amendment to §35.807, Affirmation of an Emergency Order, adds language to the list in paragraph (1) of possible reasons that would allow the commission to issue an emergency order, allowing the commission to affirm a proposed or issued order under this subchapter if the applicant shows that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or

replacement of roads, bridges, or other infrastructure. New §35.807(5)(C) adds public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The adopted amendment to §35.808, Modification of an Emergency Order, adds language, in paragraph (1), allowing the commission to modify a proposed or issued order under this subchapter if the applicant shows that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from 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 commission has determined that the adopted rulemaking does not fall under the definition of a "major environmental rule" because it does not adversely affect any of the categories listed in §2001.0225, and the amendments do not mandate new requirements for the regulated community. Rather, the adopted rules are intended to reflect the statutory changes made to TWC, §5.515, by HB 2949, which provide authorization for specific types

of facilities that may emit air contaminants in limited circumstances. Material adverse effects on the environment are not anticipated, and the impacts on the economy and productivity are expected to be significant and positive insofar as recoveries from catastrophic events will be more quickly and efficiently realized.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), 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. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law under TWC, Chapter 5, Subchapter L; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather specifically under TWC, §5.515.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an analysis of whether these rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of the rules is

to incorporate into commission rules the changes made to TWC, §5.515, by the Texas Legislature, by adding language to authorize emergency orders in the event of a catastrophe to include the repair or replacement of roads, bridges, or other infrastructure.

Promulgation and enforcement of the amendments would constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rulemaking because the amendments neither relate to, nor have any impact on, the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking. None of the adopted rules mandate any new requirements, but rather, provide for a specific type of authorization.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the rulemaking is one identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The CMP goal applicable to the adopted rules is to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the adopted rules include the administrative policies and the policies for specific activities related to the emission of air pollutants. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the rules will establish clear and consistent

requirements governing the issuance of emergency and temporary orders for the repair or replacement of roads, bridges, or other infrastructure when necessitated by a catastrophe, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances such as potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

PUBLIC COMMENT

A public hearing on the proposed rules was held in Austin on April 4, 2006, at the Texas Commission on Environmental Quality but no oral comments were received. Written comments were submitted by the North Central Texas Council of Governments (NCTCOG) and the EPA.

RESPONSE TO COMMENTS

NCTCOG supported the amendments and commented that construction associated with emergency orders issued for the repair of infrastructure destroyed during a catastrophe may mitigate long-term emissions due to congestion which may result from an unresolved infrastructure failure.

The commission appreciates the support and concurs in the rationale proffered by NCTCOG that identifies potential environmental benefits which may result through the use of the emergency order authorization tool.

EPA commented that it interprets TWC, §5.501, to provide the commission with the general authority to issue temporary or emergency orders. The EPA further stated its understanding that through these orders, the commission may issue a temporary permit or temporarily suspend or amend a permit condition.

Section 5.501 does include authority to issue a temporary permit or temporarily suspend or amend a permit condition. However, the commission has never issued a temporary permit in lieu of a conventional authorization method for facilities with air emissions. The authority exercised through the Chapter 35 rules and this rulemaking is for issuance of emergency orders.

Emergency orders are most accurately described as limited-term authorizations necessary to respond to certain catastrophic events. For example, in one instance, an emergency order was issued to install a larger boiler to replace two smaller boilers that were damaged in a catastrophic event until the two smaller boilers could be repaired. However, the larger boiler was not allowed to operate at a firing rate that would create emissions greater than the permitted limit for the two boilers, thus providing a limited-term authorization for the larger boiler, with no greater impact on the environment. The emergency order rules require that a facility which has been issued an emergency order submit an application for a permit or permit modification within 60 days of the order issuance.

EPA expressed its understanding that the Chapter 35 emergency order rules enable the commission to authorize a temporary permit or suspension of permit requirements without necessitating the submission of any such action to the EPA as a revision to the SIP. EPA stated that such an

arrangement, which it identified as “director discretion,” would run afoul of the requirement for the submission of a SIP revision contained in Federal Clean Air Act, §110(I).

The Chapter 35 emergency order rules, as amended through this adoption, do not contemplate the issuance or suspension of a permit or permit conditions. Rather, the rules authorize the issuance of a limited-term authorization necessary to respond to certain catastrophic events.

EPA expressed concern that the proposed amendments would allow a source to avoid preconstruction requirements and permit review procedures, while authorizing emissions in contravention of state and federal requirements. Specifically, EPA stated that any SIP revision submittal must demonstrate that the proposed revision would not interfere with the attainment or maintenance of the National Ambient Air Quality Standards (NAAQS), Prevention of Significant Deterioration (PSD) requirements, or negatively affect the existing air quality in Texas.

The Chapter 35 emergency order rules, as amended through this adoption, contemplate and call for a comprehensive technical review. As set forth in 30 TAC §35.805, and other sections in Subchapter K, as well as within each issued emergency order, any construction authorized by an emergency order may not interfere with the attainment or maintenance of the NAAQS or violate applicable portions of the control strategy. To that end, the review of emergency order applications conducted by the commission consists of an evaluation of best available control technology (BACT) and a review of potential impacts of human health and the environment by the use of air dispersion modeling and evaluation by the commission’s Toxicology Section. The

review also includes input from the commission's applicable regional office and the commission's Air Permits Division, as appropriate. The review will ensure that the construction is subject to current and possibly more stringent requirements than were in existence for facilities that are being replaced. The technical review process is at least as comprehensive as the commission's review of permit applications. Therefore, these rules, as a revision to the SIP, do not interfere with attainment or maintenance of the NAAQS, violate PSD requirements, or negatively affect existing air quality in Texas.

Additionally, the emergency order rules require that a facility which has been issued an emergency order submit an application for a permit or permit modification within 60 days of the order issuance. As set forth in 30 TAC §35.806, the permit application will be considered without regard to the activity(ies) authorized under an emergency order. Since 1993, the commission has issued approximately 13 air emergency orders. The majority of these authorized replacement or repairs of damaged facilities and/or control equipment, while a few authorized new facilities and one authorized a different loading operation. In a number of cases, operation under the emergency order authority actually lasted less than the maximum 180-day term (one was operated for less than one week). Therefore, the impact to the environment was relatively minimal, and permit applications were not necessary for all of these authorizations.

EPA commented that under certain extraordinary circumstances, such as natural disasters, the commission could exercise its enforcement discretion. EPA intends to review such circumstances on a case-by-case basis.

Historically, the commission has not encountered unauthorized construction after natural disasters or other catastrophic events, and therefore there have been few opportunities, if any, to choose between exercising enforcement discretion and consideration of issuance of an emergency order. The rules in Subchapter K anticipate that an application for an emergency order be submitted prior to construction of the replacement facilities. If a facility was constructed without authorization, it would be operating without having undergone a BACT or health impacts review. However, when confronted with an application for a temporary authorization necessitated by the occurrence of a catastrophic event, the commission prefers to rely upon the emergency order authorization tool in order to ensure that a comprehensive review is conducted, which is a case-by-case review that should meet EPA requirements. As noted earlier in this preamble, the commission has issued very few emergency orders; some were due to catastrophic events that were also natural disasters.

EPA indicated that it may be able to approve the emergency order program, as submitted through previous SIP revisions, assuming that when considering the issuance of an emergency order, the state incorporates a review process which is equivalent to the process used in considering an application for a regular permit.

As described earlier, the review of applications for emergency orders is at least as comprehensive as the commission's review of permit applications. Additionally, the emergency order rules require that a facility which has been issued an emergency order submit an application for a permit or permit modification within 60 days of the order issuance. As set forth in 30 TAC

§35.806, the permit application will be considered without regard to the activity(ies) authorized under an emergency order. Therefore, a person who is granted an emergency order is on notice that there is no guarantee that the subsequent permit application will be granted and, if so, whether the construction and operating requirements will be the same.

EPA requested clarification on what authority the TCEQ relies upon in requiring a technical review of emergency order applications which contains modeling, BACT, lowest achievable emission rate, Class I impacts, and impacts on soils, vegetation, and visibility.

As indicated earlier, the Chapter 35 emergency order rules, as amended through this adoption, contemplate and call for a comprehensive technical review. As set forth in 30 TAC §35.805, as well as within each issued emergency order, any construction authorized by an emergency order may not interfere with the attainment or maintenance of NAAQS or violate applicable portions of the control strategy. The commission interprets this directive to necessitate a comprehensive impacts review as described in previous responses to comments. This interpretation is grounded in Texas Health and Safety Code (THSC), §382.024. Such a review is also predicated upon the required showing that the activity authorized under an emergency order will not cause or contribute to air pollution, as set forth in TWC, §5.515(d). The applicant must also demonstrate that there will be no more than a *de minimus* increase in off-property air contaminant concentrations, per TWC, §5.515(c). To ensure that the emergency order will not violate applicable portions of the control strategy, the review will check for compliance with such applicable portions, for example, as permitting requirements, federal permitting applicability,

new source performance standards (NSPS), national emissions standards for hazardous air pollutants (NESHAPS), and rules adopted for control of volatile organic compounds and nitrogen oxide emissions in nonattainment areas. Additionally, the TCEQ has in the past conducted and required applicants to conduct air dispersion modeling as appropriate to assure compliance.

EPA inquired as to what would happen if an entity was found to be in violation of a state or federal requirement after an emergency order was issued. Specifically, EPA wondered whether the emergency order issuance would shield such an entity from enforcement action.

An emergency order issued under Chapter 35 would not shield an entity from an enforcement action brought for violating a state or federal requirement or the terms of the emergency order. Additionally, each emergency order issued by the executive director will be considered by the commission during an open public meeting and must be affirmed, set aside, or modified, which provides the commission the opportunity to ensure compliance with such requirements.

EPA commented that 30 TAC §116.410 allows a facility to apply for an emergency order under TWC, §5.515, while Chapter 35 of the Texas Administrative Code authorizes immediate action under an emergency order. EPA wondered whether a source may submit a single application for an emergency order or must submit two applications.

The rules pertaining to emergency orders have been moved in their entirety to Chapter 35.

There remains a reference to emergency orders in 30 TAC §116.1200, renumbered from 30 TAC

§116.410, effective February 1, 2006, which directs the public to Chapter 35. Only one application is required.

EPA sought the commission's interpretation on whether TWC, §5.515 must be submitted and approved into the SIP.

The legal authority to adopt the emergency order rules adopted and submitted to EPA in 1998 and these amendments is listed in the STATUTORY AUTHORITY sections of the rulemaking documents, and as such, is submitted to EPA for its review as part of this revision into the SIP.

EPA sought the commission's interpretation on what provisions of Chapter 35 need to be approved into the SIP for air purposes.

Through this rulemaking, the commission is submitting amendments to Subchapter K of Chapter 35. Subchapter K has previously been submitted as a revision to the SIP. Since this rulemaking is not opening Chapter 35, Subchapters A - C, nor were subsections in Subchapters A - C proposed for removal from consideration as a revision to the SIP, the commission cannot revise the SIP submission at adoption of these rules to concurrently designate applicable subsections within those subchapters.

EPA questioned where the term "*de minimis* increase" as used in the current Chapter 35 emergency order provisions is defined for all criteria pollutants. Further, EPA asks if there is an ambient *de*

minimis threshold for ozone or ozone precursors and where the term “national ambient air quality standards” is defined.

In determining *de minimus* amounts for purposes of reviewing emergency order applications, the commission refers to the definition of “*de minimis* impact” in 30 TAC §101.1(25) as a guideline for assessing truly *de minimus* amounts of air contaminants. A “*de minimis* impact” is defined as “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.” The referenced specified amounts are set forth in an attached chart. The chart provides various amounts by NAAQS averaging times, for carbon monoxide, nitrogen dioxide, sulfur dioxide, and particulate matter greater than 10 microns (PM₁₀), ranging from 1 to 25 micrograms per cubic meter.

While there is no ambient *de minimus* threshold for ozone or ozone precursors *per se*, the commission reviews each emergency order application and identifies whether there are any predicted adverse off-property concentrations of either criteria or non-criteria pollutants regardless if there is any increase in emissions. The definition of National Ambient Air Quality Standards is defined in 30 TAC §101.1(68).

SUBCHAPTER K: AIR ORDERS

§§35.801, 35.802, 35.804, 35.805, 35.807, 35.808

STATUTORY AUTHORITY

These amendments are adopted under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules to carry out its duties under the TWC and the other laws of the state; §5.105, which establishes the commission's authority to set policy by rule; §5.501, which establishes the commission's authority to issue emergency orders; §5.502, which sets forth requirements for emergency order applications; §5.504, which establishes the commission's authority to hold a hearing on the issuance of an emergency order; and §5.515, which allows the commission to issue emergency orders for immediate action for the addition, replacement, or repair of facilities or control equipment, or the repair or replacement of roads, bridges, or other infrastructure, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act (TCAA). In addition, these rules are adopted under THSC, §382.011, which gives the commission the authority to control the quality of the state's air; §382.012, which authorizes the commission to develop a state air control plan; §382.017, which authorizes the commission to adopt rules implementing the TCAA; §382.024 and §382.025, which establish the authority of the commission to issue air orders and what factors the commission must consider when issuing such orders; and §382.063, which authorizes the commission to issue emergency orders because of catastrophe.

The adopted amendments implement TWC, §§5.501, 5.502, 5.504, and 5.515, and THSC, §§382.011, 382.012, 382.024, 382.025 and 382.063.

§35.801. Emergency Orders Because of Catastrophe.

The commission or executive director may issue emergency orders under Texas Water Code, §5.515, to authorize immediate action for the addition, replacement, or repair of facilities or control equipment, or the repair or replacement of roads, bridges, or other infrastructure, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act. For purposes of this section, a catastrophe is an unforeseen event including, but not limited to, an act of God, an act of war, severe weather conditions, explosions, fire, or other similar occurrences beyond the reasonable control of the applicant, which renders a facility or its functionally related appurtenances, or a road, bridge, or other infrastructure, inoperable.

§35.802. Application for an Emergency Order.

The owner or operator of a facility, as that term is defined in Texas Health and Safety Code, §382.003, desiring to obtain an order under this subchapter shall submit an application in accordance with §35.24 of this title (relating to Application for Emergency or Temporary Order). The application must contain the information required by that section and the following:

(1) a statement that the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions, and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, necessitated by a catastrophe;

(2) a description of the catastrophe;

(3) a statement that there are no practicable alternatives to the proposed construction and emissions;

(4) a statement that the emissions will not cause or contribute to a condition of air pollution;

(5) a statement that the proposed construction and emissions will occur only:

(A) on the property where the catastrophe occurred;

(B) on other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided that no more than a *de minimus* increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe;

(6) a description of the proposed construction and the type and quantity of air contaminants to be emitted;

(7) an estimate of the dates on which the proposed construction and emissions will begin and end;

(8) an estimate of the date on which the facility will begin operation;

(9) a statement that any construction or modification will not interfere with the attainment or maintenance of national ambient air quality standards or violate applicable portions of the control strategy; and

(10) any other information or item the executive director may require to support or explain the need for, or to expedite the issuance of, an emergency order; including information regarding the applicability of and compliance with any federal requirements for new or modified sources.

§35.804. Issuance of Order.

The commission or executive director may issue an order under this subchapter if it is found that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, that is necessitated by a catastrophe;

(2) there are no practicable alternatives to the proposed construction and emissions;

(3) the emissions will not cause or contribute to a condition of air pollution;

(4) any construction or modification will not interfere with the attainment or maintenance of national ambient air quality standards or violate applicable portions of the control strategy;

(5) the proposed construction or emissions will occur only:

(A) on property where the catastrophe occurred;

(B) on other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided that no more than a *de minimus* increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe;

(6) the time limits in the order for the beginning and completion of the proposed construction and emissions are reasonable; and

(7) the schedule in the order for submission of a complete permit application is reasonable.

§35.805. Contents of an Emergency Order.

In addition to the requirements of §35.26 of this title (relating to Contents of Emergency or Temporary Order), an emergency order issued under this subchapter shall contain at least the following:

(1) a description of the emergency construction and emissions to be authorized;

(2) reasonable time limits for the beginning and the completion of the proposed construction and emissions;

(3) authorization for action only:

(A) on the property where the catastrophe occurred;

(B) on other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided that no more than a *de minimus* increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe;

(4) the requirement that any construction or modification will not interfere with the attainment or maintenance of national ambient air quality standards or violate applicable portions of the control strategy; and

(5) a schedule for submission of a complete construction permit application under provisions of Texas Clean Air Act, Chapter 382.

§35.807. Affirmation of an Emergency Order.

The commission shall affirm a proposed or issued order if the applicant shows at the hearing, by a preponderance of the evidence, that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, that is necessitated by a catastrophe;

(2) there are no practicable alternatives to the proposed construction and emissions;

(3) the emissions will not cause or contribute to a condition of air pollution;

(4) any construction or modification will not interfere with the attainment or maintenance of national ambient air quality standards or violate applicable portions of the control strategy; and

(5) the proposed construction or emissions will occur only:

(A) on property where the catastrophe occurred;

(B) on other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided that no more than a *de minimus* increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during the catastrophe;

(6) the time limits in the order for the beginning and completion of the proposed construction and emissions are reasonable; and

(7) the schedule in the order for submission of a complete permit application is reasonable.

§35.808. Modification of an Emergency Order.

The commission shall modify a proposed or issued order if the hearing record shows that:

(1) construction and emissions otherwise precluded under the Texas Clean Air Act are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions and are necessary for

the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, that is necessitated by a catastrophe;

(2) there is no practicable alternative to such construction and emissions; and

(3) modification of certain terms of the proposed or issued order is necessary to make the order, construction, and/or emissions meet the requirements stated in §35.807 of this title (relating to Affirmation of an Emergency Order).