

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** June 17, 2016

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

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

Docket No.: 2016-0877-RUL

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

Background and reason(s) for the rulemaking:

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

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

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

EPA's SIP Call is being challenged in the D.C. Circuit Court of Appeals by Texas/TCEQ and several Texas industry groups, as well as 18 other states, approximately 23 industry groups and trade associations, and several electric generating companies. Five environmental groups have intervened on behalf of EPA.

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In addition to the litigation, the response to the SIP Call includes this rulemaking, proposing language in subsection (k) to address EPA's interpretation that the affirmative defenses in §101.222(b) - (e) operate to limit the jurisdiction of federal courts. Proposed language in subsection (l) establishes that the applicability date will be delayed until all appeals of the challenge of the SIP Call are extinguished and the current affirmative defense is prohibited. This proposal does not include repeal or SIP removal of §101.222(b) - (e).

Scope of the rulemaking:

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

A.) Summary of what the rulemaking will do:

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

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

TCEQ is required to revise the SIP by November 22, 2016, to remove or replace §101.222(b) - (e).

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

The proposal includes delayed applicability because the availability of an affirmative defense remains in litigation.

Statutory authority:

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

Effect on the:

A.) Regulated community:

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

B.) Public:

No impact is anticipated.

C.) Agency programs:

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

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Stakeholder meetings:

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

Potential controversial concerns and legislative interest:

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

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

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

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

The SIP Call requires removal of §101.222(b) - (e) from the SIP. A finding of failure to submit a SIP revision could trigger an obligation for the EPA to impose a FIP.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: July 6, 2016

Anticipated *Texas Register* publication date: July 22, 2016

Anticipated public hearing date (if any): August 8, 2016

Anticipated public comment period: July 8, 2016 - August 8, 2016

Anticipated adoption date: November 2, 2016

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Attachments:

None

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