

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the amendment to §101.222.

If adopted, the proposal of §101.222(k) and (l) 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 Proposed Rule

Texas' Rules

In 2003, TCEQ established an affirmative defense rule for "certain emissions events." The rule sets forth criteria that incentivize good operation and maintenance practices to minimize or avoid excess emissions and, if met, allow an owner or operator to avail itself of the affirmative defense.

The affirmative defense in §101.222(b) - (e) is available only for certain types of excess emissions, specifically from non-excessive upset events and unplanned maintenance, startup, and shutdown (MSS) activities. To be eligible for the affirmative defense, these events must have been unplanned and unavoidable, and properly reported.

The affirmative defense rules were last amended in 2005 and approved by EPA in 2010 (75 FedReg 68989 (November 10, 2010)). When EPA approved the Texas affirmative defense criteria as part of the Texas SIP in 2010, EPA acknowledged that there may be times when a source may not be able to meet emission limitations during periods of

startup, shutdown, or malfunction (SSM). In this approval, EPA referenced its 1999 policy, stating "in the course of an enforcement action for penalties, a source could assert the affirmative defense and the burden would be on the source to prove enumerated factors, including that the period of excess emissions was minimized to the extent practicable and that the emissions were not due to faulty operations or disrepair of equipment."

EPA defended its 2010 SIP approval of §101.222(b) - (e) when this approval was challenged, and ultimately upheld by the United States Circuit Court of Appeals for the Fifth Circuit in 2013. (*Luminant Generation v. EPA*, 714 F.3d 841 (5th Cir. 2013))

Petition to EPA

On June 30, 2011, Sierra Club filed a petition for rulemaking with the EPA Administrator regarding, among other things, how state and local air agencies' rules in EPA-approved SIPs treat excess emissions during periods of SSM. In response, on February 12, 2013, EPA proposed its finding that numerous SIPs across the country were approved with "broad and loosely defined provisions to control excess emissions." Although Texas was not included in the Sierra Club's petition nor subject to the 2013 proposal, on September 17, 2014 (79 FedReg 55945), EPA supplemented its original proposal to add the Texas SIP, specifically finding that §101.222(b) - (e) is substantially inadequate to meet Federal Clean Air Act (FCAA) requirements, and adopted this position in its final rulemaking. On June 12, 2015, EPA published its final action on the petition (80 FedReg 33839). In that notice, EPA stated it was clarifying,

restating, and revising its guidance concerning its interpretation of the FCAA requirements with respect to treatment in SIPs of excess emissions during periods of SSM.

Specifically, EPA rescinded its interpretation that the FCAA allows states to elect to create narrowly tailored affirmative defense provisions in SIPs. Instead, EPA promulgated its new interpretation of the FCAA as prohibiting affirmative defense provisions in SIPs based on EPA's conclusion that the enforcement structure in FCAA, §113 and §304 precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. As a result, in the final rule, EPA issued a SIP Call for 36 states, including Texas, finding that certain SIP provisions regarding excess emissions due to SSM are substantially inadequate to meet FCAA requirements and established a due date of November 22, 2016, for submittal of SIP revisions to address this finding. EPA based its final rule position on the decision in *NRDC v. EPA*, 749 F.3d (District of Columbia Circuit (D.C. Cir.)) 2014, regarding an EPA National Emission Standards for Hazardous Air Pollutants rule.

TCEQ's Response to EPA's SIP SSM Call

The commission disagrees with EPA's interpretation that an affirmative defense as to penalties is not available for enforcement of SIP violations. EPA's SSM SIP Call has been challenged, and is pending in the D. C. Circuit Court of Appeals, by the State of Texas, TCEQ, several Texas industry groups, 18 other states, approximately 23 industry

groups and trade associations, and several electric generating companies. Five environmental groups have intervened on behalf of EPA.

While the commission is not proposing to remove its affirmative defense rule from the Texas SIP, the commission is proposing to add §102.222(k) to address EPA's SSM SIP Call. EPA's SSM SIP call states, "the EPA has now concluded that the enforcement structure of the CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FedReg 33851(June 12, 2015)).

Proposed subsection (l) provides that proposed subsection (k) would not be applicable until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) - (e), have extinguished and the applicable affirmative defense in those subsections is prohibited.

Subsections (k) and (l) are not severable and are proposed to be submitted to EPA for approval of both subsections as part of the Texas SIP.

Section by Section Discussion

§101.222, Determinations

Proposed §101.222(k) would state that the use of the affirmative defenses in subsections (b) – (e) are not intended to limit a federal court’s jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

Proposed §101.222(l) would delay the applicability of §101.222(k) until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) – (e), have extinguished and the applicable affirmative defense in those subsections is prohibited.

The commission is not proposing and does not intend to amend or remove subsections (a) – (j) and, therefore, is not soliciting comment on these subsections. The public notice period for comments on proposed subsections (k) and (l) will begin on July 8, 2016, and end on August 8, 2016.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rulemaking would add §101.222(k) and (l) to explain that the use of the affirmative defenses in §101.222(b) – (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement

action. The proposed rule would include a delayed applicability date to put Texas in a position to comply with the EPA's SSM SIP Call while maintaining its position in the litigation concerning the EPA's SSM SIP Call. The applicability would not be effective until the appeals of the SIP Call are extinguished and the affirmative defense rule is prohibited.

The rulemaking does not change the currently required information, including reporting and recordkeeping, regarding certain excess emissions that is required to be provided to TCEQ by the regulated community for owners and operators with these types of emissions under §§101.201, 101.211, and 101.222. Although the rulemaking proposes a new regulatory component, it does not include additional, new, or revised activities that affect the manner in which TCEQ conducts investigations.

No fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule. State and local governments do not typically engage in the type of activities that would generate such emissions, and the proposed rulemaking would not apply to these entities.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be in compliance with federal law and a continuation of the public benefit

currently experienced from the emissions event program.

The proposed rulemaking would add §101.222(k) and (l) to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. The proposed rule would include a delayed applicability date to put Texas in a position to comply with EPA's SSM SIP Call while maintaining its position in the litigation concerning the EPA's SSM SIP Call. The applicability would not be effective until the appeals of the EPA's SSM SIP Call are extinguished and the affirmative defense rule is prohibited.

The rulemaking does not change the currently required information regarding certain excess emissions that is required to be provided to TCEQ, including the reporting or recordkeeping for the regulated community under §§101.201, 101.211, and 101.222. Although, the rulemaking proposes a new regulatory component, it does not include additional, new, or revised activities that affect the manner in which TCEQ conducts investigations.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect. The scope of excess emissions subject to an affirmative defense remains the same.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is necessary under federal law and does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare an RIA.

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 specific intent of the proposed rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and the prohibition of the affirmative defense rule.

Additionally, even if the rule met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring an RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only 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 proposed rule would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the

National Ambient Air Quality Standards (NAAQS) within the state. While 42 USC, §7410, generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the proposed rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) is not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and prohibition of the affirmative defense rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB or bill) 633 during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct an RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal

law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full RIA unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. The commission contends that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rule may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and, in fact, creates no additional impacts since the proposed rule does not exceed the requirement to attain and maintain the NAAQS. For these reasons, the proposed rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law.

The commission consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978))

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission substantially complied with

the requirements of Texas Government Code, §2001.0225.

The specific intent of the proposed rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and prohibition of the affirmative defense rule. The proposed rule was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States

Constitution or the Texas Constitution, §17 or §19, Article I or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and prohibition of the affirmative defense rule. The proposed rule will not create any additional burden on private real property. The proposed rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking 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 commission rules in 30 TAC Chapter 281, relating to Applications Processing, Subchapter B. 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 Advisory Committee and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed 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(1)). The proposed rule complies with this goal by ensuring that the rule meets applicable federal and state requirements for regulation of air quality in these areas. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Section 101.222 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must revise their operating permit consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 8, 2016, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-018-101-CE. The comment period begins with newspaper publication of the notice of hearing and closes on August 8, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Cynthia Gandee, Program Support Section, (512) 239-0179 or Janis Hudson, Environmental Law Division, (512) 239-0466.

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

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

§101.222

Statutory Authority

The rule is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The rule is also proposed under Texas Health and Safety Code (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; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC,

§382.0215, concerning Assessment of Emissions Due to Emissions Events, which defines "emissions event," requires owners and operators of regulated entities to meet certain requirements, and requires the commission to centrally track and collect information relating to emissions events, including the use of electronic reporting; and THSC, §382.0216, concerning Regulation of Emissions Events, which establishes and prescribes criteria for and requires responses to excessive emissions events, allows for use of corrective action plans in response to excessive emissions events, and authorizes the commission to establish an affirmative defense to a commission enforcement action for emissions events.

In addition, the rule is also proposed under Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The proposed rule will implement THSC, §§382.002, 382.011, 382.012, and 382.017.

§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).

(k) Federal court jurisdiction. Subsections (b) - (e) of this section are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

(l) Delayed applicability. Subsection (k) of this section does not apply until all appeals regarding the United States Environmental Protection Agency's rulemaking entitled "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," published in the *Federal Register* on June 12, 2015, as it applies to subsections (b) - (e) of this section, have extinguished and the applicable affirmative defense in subsections (b) - (e) of this section is prohibited.