


TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Withdrawal from State Implementation Plan

AGENDA REQUESTED: January 26, 2022

DATE OF REQUEST: January 7, 2022

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Gwen Ricco, Rule/Agenda Coordinator, (512) 239-2678

CAPTION: Docket No. 2021-1519-SIP. Consideration to Withdraw a November 2016 State Implementation Plan (SIP) Revision made in response to United States Environmental Protection Agency's 2015 Startup Shutdown and Malfunction SIP Call from EPA's review. (Keith Sheedy, Elizabeth Lieberknecht, Betsy Peticolas) (Non-Rule SIP RPN 2022-006-SIP-NR)



Gwen Ricco

Agenda Coordinator

Copy to CCC Secretary? NO YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** January 7, 2022

Thru: Laurie Gharis, Chief Clerk
Toby Baker, Executive Director

From: Craig Pritzlaff, Director **CP**
Office of Compliance and Enforcement

Docket No.: 2021-1519-SIP

Subject: Commission Withdrawal of November 2, 2016 SIP Revision

Background and reason(s) for the SIP Withdrawal:

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, agency, or Commission) rule 30 Texas Administrative Code § 101.222(b) - (e) was substantially inadequate to meet Federal Clean Air Act (FCAA) requirements. Section 101.222(b) - (e) creates an affirmative defense, 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. In addition to challenging EPA's SIP Call through litigation, in November 2016, TCEQ adopted amendments to § 101.222 by adding subsections (k) and (l) and a revision to its SIP. On November 18, 2016, TCEQ submitted this SIP Revision to EPA for approval. To date, EPA has taken no action on this submittal.

On February 7, 2020, EPA Region 6 published a final action, withdrawing the 2015 SIP Call issued to Texas. (85 Fed. Reg. 7232) (Feb. 7, 2020). Therefore, Texas no longer has an obligation to submit a SIP revision in response to the 2015 SIP Call.

In a memorandum dated September 30, 2021, EPA announced its plans to revisit the 2020 final action withdrawing the SIP Call as to Texas through notice and comment rulemaking and withdrew a memorandum dated October 9, 2020, which stated SIP provisions that create affirmative defense provisions to claims for penalties for certain excess emissions may be consistent with the FCAA in certain circumstances.

Staff recommend that the 2016 SIP Revision be withdrawn from EPA's consideration because no SIP Call is pending as to Texas's affirmative defense provisions. If EPA makes a new finding of substantial inadequacy and issues a new SIP Call as to Texas, then staff will propose an appropriate response.

Scope of the request:

A.) Summary of what the SIP Withdrawal will do:

If approved by the Commission, the previously submitted SIP Revision relating to 30 Texas Administrative Code § 101.222(k) and (l) would be withdrawn from EPA's consideration.

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

There are no required federal regulations or state statutes associated with this SIP withdrawal. Because the SIP revision has not been approved by EPA, no public hearing is necessary for the Commission to withdraw it from EPA consideration.

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

Staff recommends that 30 Texas Administrative Code § 101.222(k) and (l) remain codified and not repealed through rulemaking.

Statutory authority:

Texas Health and Safety Code, §§382.002, 382.011, and 382.012; Texas Water Code, §§5.013, 5.102, 5.103, and 5.105.

Effect on the:

A.) Regulated community:

No impact is anticipated.

B.) Public:

No impact is anticipated.

C.) Agency programs:

No impact is anticipated.

Stakeholder meetings:

None were held.

Potential controversial concerns and legislative interest:

Although TCEQ's affirmative defense provisions have historically received attention, this proposed withdrawal action is not anticipated to be controversial..

Does this withdrawal affect any current policies or require development of new policies?

No.

What are the consequences if this SIP withdrawal does not go forward? Are there alternatives to withdrawing?

If the Commission does not approve this withdrawal, the EPA could act on the pending SIP Revision (including disapproval) or take no action.

Key points in the SIP withdrawal adoption schedule:

Anticipated adoption date: January 26, 2022

Agency contacts:

Keith Sheedy, P.E., Project Manager, Program Support and Environmental Assistance Division, (512) 239-1556
Elizabeth Lieberknecht, Staff Attorney, Litigation Division, (512) 239-0620

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Betsy Peticolas, Staff Attorney, Environmental Law Division, (512) 239-6033
Gwen Ricco, Texas Register/Agenda Coordinator, (512) 239-2678

Attachments:

None.

cc: Chief Clerk, 2 copies
Executive Director's Office
Jim Rizk
Morgan Johnson
Brody Burks
Office of General Counsel
Keith Sheedy
Gwen Ricco

**ORDER ADOPTING WITHDRAWAL OF
REVISION TO THE STATE IMPLEMENTATION PLAN
FROM EPA CONSIDERATION FOR APPROVAL**

**Docket No. 2021-1519-SIP
Non-Rule Project No. 2022-006-SIP-NR**

On January 26, 2022, the Texas Commission on Environmental Quality (Commission), during a public meeting, considered the withdrawal from consideration for United States Environmental Protection Agency (EPA) approval a previously submitted revision to the State Implementation Plan (SIP) for amendments to 30 Tex. Admin. Code § 101.222.

On November 2, 2016, the Commission adopted amendments to 30 Tex. Admin. Code § 101.222, adding subsections (k) and (l). This rulemaking was conducted in response to EPA's 2015 SIP Call relating to the Commission's affirmative defense provisions. (80 Fed. Reg. 33840, 33968-69) (June 12, 2015). The Commission submitted the revision to EPA on November 18, 2016. To date, EPA has taken no action on this submittal.

On February 7, 2020, EPA Region 6 published a final action, withdrawing the 2015 SIP Call issued to Texas. (85 Fed. Reg. 7232) (Feb. 7, 2020). Therefore, Texas no longer has an obligation to submit a SIP revision in response to the 2015 SIP Call.

In a memorandum dated September 30, 2021, EPA announced its plans to revisit the 2020 final action withdrawing the SIP Call as to Texas through notice and comment rulemaking and withdrew a memorandum dated October 9, 2020, which stated SIP provisions that create affirmative defense provisions to claims for penalties for certain excess emissions may be consistent with the Federal Clean Air Act in certain circumstances.

After considering these events, the Commission has decided to withdraw the 2016 SIP Revision. The Commission is not repealing 30 Tex. Admin. Code § 101.222(k) and (l) and therefore, no rulemaking is associated to this withdrawal.

Under Tex. Health & Safety Code §§ 382.011, 382.012, and 382.023, the Commission has the authority to control the quality of the state's air and to issue orders consistent with the policies and purposes of the Texas Clean Air Act, Chapter 382 of the Tex. Health & Safety Code.

IT IS THEREFORE ORDERED BY THE COMMISSION that the SIP Revision adopted by the Commission on November 2, 2016 and submitted to EPA on November 18, 2016 is hereby withdrawn from submission to EPA as a revision to the SIP.

IT IS FURTHER ORDERED BY THE COMMISSION that on behalf of the Commission, the Chairman should transmit a copy of this Order, to the Regional Administrator of EPA Region 6 conveying this withdrawal.

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Jon Niermann, Chairman

Date Signed

DRAFT