

TCEQ's Clarification of Affirmative Defense for Certain Excess Emissions

Overview

On July 6, 2016, TCEQ approved proposed rulemaking for Title 30 Texas Administrative Code (30 TAC) Chapter 101 *General Air Quality Rules* to add clarification of affirmative defense provisions for certain excess emissions. The proposed rulemaking is provided in response to EPA's June 12, 2015 Startup, Shutdown, and Malfunction (SSM) State Implementation Plan (SIP) Call for Texas in which EPA determined 30 TAC needed to be revised to remove Affirmative Defense noted in four (4) places for excess emissions that occur during upsets (30 TAC 101.222(b)), unplanned events (30 TAC 101.222(c)), upsets with respect to opacity limits (30 TAC 101.222(d), and unplanned events with respect to opacity limits (30 TAC 101.222(e)).

Background

In 2003, TCEQ established an affirmative defense rule in §101.222(b) - (e) from non-excessive upset events and unplanned MSS. In 2005, the affirmative defense rules were last amended and subsequently approved by EPA in 2010. In 2013, TCEQ's SIP was upheld by the United States Fifth Circuit Court of Appeals.

This topic was brought to the forefront in 2011 when Sierra Club filed a petition that some SIPs violated provisions of the Clean Air Act (CAA), which required that emission sources continuously meet emission limitations. In 2013, EPA published a proposed rule in response to the 2011 Sierra Club petition and in September 2014, EPA further expanded their proposal on SSM emissions to eliminate all Affirmative Defense from SIPs for any CAA violation including malfunctions. On June 12, 2015, EPA published the final "SSM SIP Call" rule. In the final rule, EPA found that SIP provisions in 36 states were substantially inadequate and required revision, including Texas.

Proposed Rule

With the proposed rulemaking, the following would be added:

- 30 TAC 101.222(k): provides clarification that the affirmative defenses for excess emissions that occur during upsets, unplanned events, upsets with respect to opacity limits, and unplanned events with respect to opacity limits listed in §101.222(b) - (e) are not intended to limit the jurisdiction or discretion of federal courts.
- 30 TAC 101.222(l): provides a timeframe upon which subsection (k) will be applicable, i.e., not until all appeals regarding the EPA's SSM SIP Call are completed and the affirmative defense provisions in the listed subsections are prohibited.

The proposed rule does not impact TCEQ regulations regarding emission events. However, if EPA disagrees with TCEQ's proposal to keep §101.222(b) - (e), a Federal Implementation Plan (FIP) could be issued to remove these citations. Public comments are being received from July 8, 2016 – August 8, 2016 with an anticipated adoption date by November 2, 2016. The proposed rule was published in the Texas Register (July 22, 2016, 41 [TexReg 5343](#)). Texas is required to revise its SIP to allow special emission limits, control measures, or control techniques to minimize excess emissions by November 22, 2016 with an effective date in 2017.

A link to the proposed rulemaking can be found in the following web link:

https://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/proposals/16040101_pro.pdf