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**1. What Are We Proposing To Approve?**

*The 30 TAC, General Air Quality Rule 101*

On September 12, 2002, the Governor of Texas submitted rule revisions to 30 TAC, General Air Quality Rule 101, Subchapter A and Subchapter F, concerning the reporting and recordkeeping requirements and enforcement action for excess emissions during SSM activities. The September 12, 2002, submittal concerned amendments to Definitions (101.1), repeal of Upset Reporting and Recordkeeping Requirements (101.6), Maintenance, Startup and Shutdown Reporting, Recordkeeping, and Operational Requirements (101.7), Demonstrations (101.11), Temporary Exemptions During Drought Conditions (101.12), Petition for Variance (101.15), Effect of Acceptance of Variance or Permit (101.16), Transfers (101.17), and addition of new sections: Emissions Event Reporting and Recordkeeping Requirements (101.201), Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements (101.211), Operational Requirements (101.221), Demonstrations (101.222), Actions to Reduce Excessive Emissions (101.223), Temporary Exemptions During Drought Conditions (101.224), Petition for Variance (101.231), Effect of Acceptance of Variance or Permit (101.232), and

Variance Transfers (101.233). See our Technical Support Document (TSD) for more details. Texas submitted the September 12, 2002, rule revision as a result of adoption of Texas House Bill 2912, sections 5.01 and 18.14, 77th Legislature, 2001. In a letter dated June 10, 2002, EPA submitted comments on those rule revisions to the State.

On January 5, 2004, the TCEQ submitted additional rule revisions to 30 TAC, General Air Quality Rule 101, Subchapter F, Division 3, sections 101.221-223.

The January 5, 2004, rule revisions concerned Operational Requirements (101.221), Demonstrations (101.222), and Actions to Reduce Excessive Emissions (101.223). See our TSD for more details. The January 5, 2004, submittal establishes an affirmative defense to civil and administrative enforcement actions, other than actions for injunctive relief, for certain violations of emission limitations, provided specific criteria are met. The January 5, 2004, submittal makes clear that there is no automatic exemption from compliance with the emissions and opacity limitations during SSM activities and that the proposed amendments will not limit EPA or citizen authority to take enforcement action. Thus, determinations made by the State under section 101.222 will not bar enforcement actions for exceedances of emissions limitations brought by EPA or citizens under the Act.

The January 5, 2004, submittal also contains “sunset provisions” in subsections 101.221(g), 101.222(h), and 101.223(e) of the rule. The sunset provisions state that the sections 101.221, 101.222, and 101.223 will expire on June 30, 2005.

*The January 7, 2002, NOD*

On January 7, 2002 (67 FR 732), we published an NOD for Texas’ title V Operating Permit Program. We based the NOD upon our finding that several State requirements did not meet the minimum Federal requirements of 40 CFR part 70 and the Act. The TCEQ adopted rule revisions to resolve the deficiencies we identified in the NOD and submitted the changes to EPA as revisions to its title V Operating Permit Program on December 9, 2002. The December 9, 2002, submittal also included revisions to the Texas SIP concerning potential to emit requirements necessary for resolving the NOD.

On July 9, 2003, we proposed to approve the revisions to the Texas title V Operating Permit Program and to find that, upon final SIP approval of sections 101.201, 101.211, 101.221, 101.222, and

101.223, the revisions satisfy Texas’ requirement to correct the program deficiencies identified in the NOD (68 FR 40871).

On December 17, 2003, the TCEQ adopted the changes to sections 101.201, 101.211, 101.221, 101.222, and 101.223, reporting, recordkeeping and enforcement requirements for excess emissions during startup, shutdown, and malfunction activities, and submitted them to EPA for approval into the SIP on January 5, 2004.

We also approved SIP revisions concerning potential to emit requirements identified in the NOD on November 14, 2003 (68 FR 64543). Today, we are proposing to approve sections 101.201, 101.211, 101.221, 101.222, and 101.223 as revisions to the Texas SIP.

We have reviewed the TCEQ’s actions to resolve the shortcomings identified in the NOD, and we have proposed approval of all of the corrections. Based upon today’s proposed approval of sections 101.201, 101.211, 101.221, 101.222, 101.223; our July 9, 2003 proposed approval of revisions to the Texas title V program; and our November 14, 2003 final SIP approval of potential to emit requirements in this rulemaking action, we are proposing to find those revisions satisfy all of Texas’ requirements to correct the program deficiencies identified in our January 7, 2002, NOD.

**2. Why Are We Approving This Rule?**

In this rulemaking action, we are proposing to approve the September 12, 2002, and January 5, 2004, submittals as revisions to the Texas SIP. These revisions primarily address violations of SIP requirements caused by periods of excess emissions due to SSM activities. Generally, since SIPs must provide for attainment and maintenance of the National Ambient Air Quality Standards (NAAQS), all periods of excess emissions must be considered violations. As a result, EPA cannot approve any SIP revisions that provide automatic exemptions for periods of excess emissions. In addition, excess emissions above applicable emission limitations in title V permits are deviations subject to title V reporting requirements.

We are approving these revisions to the Texas SIP as consistent with the requirements of the Act and EPA’s interpretation of those requirements as expressed in EPA **Federal Register** notices and policy documents, and because the revisions clarify: (a) that there is no automatic exemption from compliance with the emissions and opacity limitations, (b) that the

proposed amendments will not limit EPA or citizen authority to take enforcement action, and (c) that for each occurrence the source or operator has the burden of proof to demonstrate that emissions were not excessive, and the identified criteria outlined in the rule have been met.

This rulemaking would temporarily adopt the affirmative defense clause of General Rule 101, Subchapter F, section 101.222, which states that certain emissions activities and opacity activities are subject to an affirmative defense to all claims in enforcement actions, other than claims for administrative technical orders or actions for injunctive relief, for which the source or operator proves all of the listed criteria. If approved into the SIP, the affirmative defense would be available until June 30, 2005, to a source or operator in an enforcement action seeking penalties brought by the State, EPA, or citizens. Determinations made by the State under section 101.222 will not bar EPA or citizen enforcement actions. We are proposing to find this revision consistent with EPA's interpretation of the Act as discussed in guidance, dated September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." This action is consistent with our recent reviews of affirmative defense clauses in other states, such as approvals of revisions to the Michigan, Arizona, Arkansas and other states' SIPs.

As stated previously, the January 5, 2004, SIP submittal contains sunset provisions in sections 101.221, 101.222, and 101.223 of the rule. The sunset provisions state that three sections of the rule will expire on June 30, 2005. The EPA is required to ensure that SIP revisions fully comply with enforceability and other requirements of section 110 of the Act. The EPA has approved rules with sunset provisions or expiration dates only under very limited circumstances. We are here proposing to approve sections 101.221, 101.222, and 101.223, which expire of their own terms on June 30, 2005, as requested by the State, because they strictly meet the requirements of section 110(l) of the Act.

Under EPA's interpretation of the Act, a SIP can provide an affirmative defense to certain actions for penalties brought for excess emissions that arise during SSM episodes, provided defined criteria are demonstrated by the source.

However, EPA cannot approve an affirmative defense clause into a SIP that would undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other applicable requirement of the Act, including the State's enforcement authority or the effectiveness of a State's programs. As stated previously, we are proposing to find Texas' affirmative defense clause consistent with EPA's interpretation of the Act. We will consider the temporary effect of this rule in any future review of the State's attainment demonstrations or other rulemaking actions involving excess emissions during SSM activities. The EPA does not consider sunset provisions in SIP rulemakings under section 110(l) of the Act appropriate except in very narrow and limited circumstances.

If the State fails to revise these temporary sections and EPA does not approve them into the Texas SIP on or before June 30, 2005, the affirmative defense clause will no longer exist in the Texas SIP. A source or operator could no longer assert an affirmative defense to Federal or citizen enforcement actions for violations which occur after the SIP provisions expire. The EPA considers all periods of excess emissions as violations of the applicable emissions limitation. However, under Section 113 of the Act, EPA has discretion to refrain from taking an enforcement action for excess emissions resulting from SSM activities, such as those caused by circumstances entirely beyond the control of the source or operator. Unless the pertinent sections of the State rule are revised and approved by EPA, after June 30, 2005, all emissions in excess of applicable emission limitations during SSM activities would be violations of the Texas SIP and subject to EPA or citizen enforcement.

### 3. What Documents Did We Use in the Evaluation of This Rule?

The EPA's interpretation of the Act on excess emissions occurring during startup, shutdown or malfunction is set forth in the following documents: a memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, entitled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions;" EPA's clarification to the above policy memorandum dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation; EPA's policy memorandum reaffirming and supplementing the above policy, dated

September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation, entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown;" and EPA's final rule for Utah's sulfur dioxide control strategy (Kennecott Copper), 42 FR 21472 (April 27, 1977). The latest clarification of EPA's policy was issued on December 5, 2001. See the policy or clarification of policy at <http://www.epa.gov/ttn/oarpg/t1pgm.html>.

To find the latest federally approved Texas SIP concerning excess emissions see 65 FR 70792 (November 28, 2000).

### 4. What Is a State Implementation Plan?

Section 110 of the Act requires States to develop air pollution regulations and control strategies to ensure that state air quality meets the NAAQS that EPA has established. Under section 109 of the Act, EPA established the NAAQS to protect public health. The NAAQS address 6 criteria pollutants. These criteria pollutants are: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide. Each State must submit these regulations and control strategies to us for approval and incorporation into the federally enforceable SIP. Each State has a SIP designed to protect air quality. These SIPs can be extensive, containing State regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

### 5. What Is the Federal Approval Process for a SIP?

When a State wants to incorporate its regulations into the federally enforceable SIP, the State must formally adopt the regulations and control strategies consistent with State and Federal requirements. This process includes a public notice, a public hearing, a public comment period, and a formal adoption by a State-authorized rulemaking body.

Once a State adopts a rule, regulation, or control strategy, the State may submit the adopted provisions to us and request that we include these provisions in the federally enforceable SIP. We must then decide on an appropriate Federal action, provide public notice on this action, and seek additional public comment regarding this action. If we receive adverse comments, we must address them prior to a final action.

Under section 110 of the Act, those State regulations and supporting information become a part of the federally approved SIP upon our approval. You can find records of these SIP actions in the CFR at title 40, part 52, entitled "Approval and Promulgation of Implementation Plans." The actual state regulations that we approved are not reproduced in their entirety in the CFR but are "incorporated by reference," which means that we have approved a given State regulation with a specific effective date.

#### 6. What Does Federal Approval of a SIP Mean to Me?

A State may enforce State regulations before and after we incorporate those regulations into a federally approved SIP. After we incorporate those regulations into a federally approved SIP, both EPA and the public may also take enforcement action against violators of these regulations.

#### 7. What Areas in Texas Will the Proposed SIP Revision Affect?

The proposed SIP revision will affect all sources of air emissions operating within the State of Texas.

#### General Information

##### A. What Is the Public Rulemaking File?

The EPA is committed to ensuring public access to the information used to inform the Agency's decisions regarding the environment and human health and to ensuring that the public has an opportunity to participate in the Agency's decision-making process. The official public rulemaking file consists of the documents specifically referenced in a particular agency action, any public comments received, and other information related to the action. The public rulemaking file does not include Confidential Business Information (CBI) or other information for which disclosure is restricted by statute, although such information is a part of the Agency's official administrative record for the action.

##### B. How Can I Get Copies of This Document and Other Related Information?

1. *An official public rulemaking file is available for inspection at the Regional Office.* The Regional Office has established an official public rulemaking file for this action under Identification Number (ID No.) TX-162-1-7598. The public rulemaking file is available for viewing at the Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. Contact the person listed

in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. If possible, schedule the appointment two working days in advance of your visit. Official hours of business for the Regional Office are Monday through Friday, 8:30 a.m. to 4 p.m. excluding Federal holidays. Copies of any State submittals and EPA's technical support document are also available for public inspection at the State Air Agency during official business by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

2. *You may access this **Federal Register** document electronically through the *Regulations.gov* Web site located at <http://www.regulations.gov>. The *Regulations.gov* Web site is the central online rulemaking portal of the United States government and is a public service to increase participation in the government's regulatory activities by offering a central point for submitting comments on regulations.*

##### C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, through hand delivery/courier or by facsimile. Instructions for submitting comments by each method are discussed below. To ensure proper receipt by EPA, identify the appropriate ID No. in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." The EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in section D below.

1. *Electronically.* To submit comments electronically (via e-mail, *Regulations.gov*, or on disk or CD-ROM), EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD-ROM you submit, and in any cover letter accompanying the disk or CD-ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. The EPA's policy is that EPA will not edit your comments. Any identifying or contact information provided in the body of a comment will

be included as part of the comment that is placed in the public rulemaking file and may be made available in EPA's public Web sites. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *E-mail.* Comments may be submitted by electronic mail (e-mail) to *Diggs.Thomas@epa.gov*, Attention "Public comment on ID No. TX-162-1-7598." In contrast to the *Regulations.gov* Web site, EPA's e-mail system is not an "anonymous" system. If you send an e-mail comment directly to EPA, your e-mail address will be automatically captured and included as part of the comment that is placed in the official public rulemaking file.

ii. *Regulations.gov.* Comments may be submitted electronically at the *Regulations.gov* Web site, the central online rulemaking portal of the United States government. Every effort is made to ensure that the Web site includes all rule and proposed rule notices that are currently open for public comment. You may access the *Regulations.gov* Web site at <http://www.regulations.gov>. Select "Environmental Protection Agency" at the top of the page and click on the "Go" button. The list of current EPA actions available for comment will be displayed. Select the appropriate action and follow the online instructions for submitting comments. Unlike EPA's e-mail system, the *Regulations.gov* Web site is an "anonymous" system, which means that any personal information, e-mail address, or other contact information will not be collected unless it is provided in the text of the comment. See the Privacy Notice at the *Regulations.gov* Web site for further information. Please be advised that EPA cannot contact you for any necessary clarification unless your contact information is included in the body of comments submitted through the *Regulations.gov* Web site.

iii. *Disk or CD-ROM.* You may submit comments on a disk or CD-ROM that you mail to: Thomas H. Diggs, Chief, Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. Please include the text "Public comment on ID No. TX-162-1-7598" on the disk or CD-ROM. These electronic submissions will be accepted in WordPerfect, Word, or ASCII file format. You should avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: Thomas H. Diggs (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas

75202–2733. Please include the text “Public comment on ID No. TX–162–1–7598” in the subject line of the first page of your comments.

### 3. *By Hand Delivery or Courier.*

Deliver your written comments or comments on a disk or CD–ROM to: Mr. Thomas H. Diggs, Chief (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Attention “Public comment on ID No. TX–162–1–7598.” Such deliveries are only accepted during official hours of business, which are Monday through Friday, 8:30 a.m. to 4 p.m., excluding Federal holidays.

4. *By Facsimile.* Fax your comments to: (214) 665–7263, Attention “Public comment on ID No. TX–162–1–7598.” Please notify the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document that a Fax has been sent.

### D. *How Should I Submit CBI to the Agency?*

You may assert a business confidentiality claim covering CBI information included in comments submitted by mail or hand delivery in either paper or electronic format. CBI should not be submitted via e-mail or at the Regulations.gov Web site. Clearly mark any part or all of the information submitted which is claimed as CBI at the time the comment is submitted to EPA. CBI should be submitted separately, if possible, to facilitate handling by EPA. Submit one complete version of the comment that includes the properly labeled CBI for EPA’s official administrative record and one copy that does not contain the CBI to be included in the public rulemaking file. If you submit CBI on a disk or CD–ROM, mark the outside of the disk or the CD–ROM that it contains CBI and then identify the CBI within the disk or CD–ROM. Also submit a non-CBI version if possible. Information which is properly labeled as CBI and submitted by mail or hand delivery will be disclosed only in accordance with procedures set forth in 40 CFR part 2. For comments submitted by EPA’s e-mail system or through the Regulations.gov Web site, no CBI claim may be asserted. Do not submit CBI to the Regulations.gov Web site or via EPA’s e-mail system. Any claim of CBI will be waived for comments received through the Regulations.gov Web site or EPA’s e-mail system. For further advice on submitting CBI to the Agency, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

### E. *What Should I Consider as I Prepare My Comments for EPA?*

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate ID No. in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

### Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001). This proposed action merely proposes to approve State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes,

as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA’s role is to approve State choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**Authority:** 42 U.S.C. 7401 *et seq.*

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon Monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: February 23, 2004.

**Richard E. Greene,**

*Regional Administrator, Region 6.*

[FR Doc. 04–4625 Filed 3–1–04; 8:45 am]

**BILLING CODE 6560–50–P**