

INSIGHTS

TCEQ Adopts Changes to Affirmative Defense Rule in Response to EPA SIP Call

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On November 2, 2016, the Commissioners of the Texas Commission on Environmental Quality (TCEQ) approved the adoption of changes to the rule language in 30 Texas Administrative Code (TAC) Chapter 101 that establishes an affirmative defense to enforcement for unauthorized emissions resulting from upset events.

The TCEQ was prompted to make the change by a June 12, 2015 action by the U.S. Environmental Protection Agency (EPA) known as the “SSM SIP Call.” The SSM SIP Call directed the State of Texas (and 35 other states) to change language in state rules and associated State Implementation Plans (SIPs) addressing the treatment of emissions that occur during startup, shutdown, and malfunction (SSM) events, with a November 22, 2016 deadline for action.

TCEQ rules have, for many years, included affirmative defense criteria: if an owner or operator proves to the TCEQ that the circumstances surrounding an upset event (and the associated unauthorized emissions) meet all of the criteria listed in 30 TAC section 101.222(b), that upset event is subject to an affirmative defense to any claims for monetary penalties in an enforcement action. EPA’s SSM SIP Call directed states to remove this type of affirmative defense rule language, based on an EPA determination that such rule language unlawfully limits a court’s jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

Rather than repeal the specified affirmative defense criteria, the final rule approved for adoption by the TCEQ Commissioners does the following:

- Retains all of the existing affirmative defense criteria;
- Adds a new paragraph (30 TAC 101.222(k)) stating that the listed affirmative defense criteria “are not intended to limit a federal court’s jurisdiction or discretion to determine the appropriate remedy in an enforcement action;” and
- Adds a new paragraph delaying the applicability of new paragraph 30 TAC 101.222(k) until there is a final and non-appealable federal court decision that upholds EPA’s SSM SIP Call.

(The State of Texas is a litigant in the case challenging the legality of the SSM SIP Call.)

In its public comments on the proposed rule, EPA claimed that the TCEQ's proposed response to the SSM SIP Call was insufficient, and recommended that TCEQ remove the regulatory affirmative defense language altogether. The Commissioners' decision to adopt the rule fix in spite of EPA's comments may lead to another SIP approval showdown between TCEQ and EPA.

Please contact us for more information regarding this action and its potential implications for the regulated community in Texas.

For a copy of the rule language approved for adoption, as well as the TCEQ's response to public comment on the proposed rule, [click here](#).