UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

AUG 08 2016

Sherry Davis
Office of Legal Services (MC 205)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Proposed Revisions to 30 TAC Chapter 101, General Air Quality Rules, Section 101.222
Rule Project Number 2016-018-101-CE

Dear Ms. Davis:

The United States Environmental Protection Agency (EPA) appreciates the opportunity to submit comments on proposed revisions to 30 TAC Chapter 101, General Air Quality Rules, Section 101.222 - Demonstrations, concerning excess emissions during periods of startups, shutdowns, and malfunctions (SSM). The Texas Commission Environmental Quality (TCEQ) is undertaking the proposed revisions in response to the EPA's State Implementation Plan (SIP) Call finding that the provisions in 30 TAC 101.222(b) - (e) are substantially inadequate to meet the Clean Air Act (CAA) requirements as they apply to excess emissions during periods of startup, shutdown, and malfunction. See the EPA's SSM SIP Call 80 FR 33840, (June 12, 2015).

It is our understanding that TCEQ intends the addition of proposed rule 30 TAC 101.222(k) to modify the existing affirmative defenses in 30 TAC 101.222(b) - (e) by explicitly stating that these affirmative defenses are not intended to limit the jurisdiction or discretion of federal courts in enforcement actions. In addition, our understanding is that TCEQ intends the addition of proposed rule 30 TAC 101.222(l) to provide that proposed rule 30 TAC 101.222(k) will not take effect until completion of litigation concerning the SSM SIP Call, as it applies to 30 TAC 101.222(b) - (e), including all appeals.

Our specific comments on the proposed revisions to 30 TAC 101.222 are as follows:

1. As stated in the SSM SIP Call, the EPA interprets the CAA to preclude affirmative defense provisions in SIPs. See 80 FR 33840 (June 12, 2015). Based upon its reevaluation of the CAA requirements, the EPA found that the affirmative defense provisions in 30 TAC 101.222(b) - (e) do not meet the CAA requirements and must be removed from the Texas SIP. *Id.* at 33968. The EPA acknowledges the TCEQ's attempt to revise 30 TAC 101.222 in a manner that it considers consistent with the CAA requirements through inclusion of 30 TAC 101.222(k). However, the EPA does not agree that states may include affirmative defenses in SIP provisions, because such provisions are by design created to alter or eliminate the statutory jurisdiction of the federal courts to determine liability and to impose the full range of remedies provided in the CAA. To the extent that a state elects to have such affirmative defense provisions for purposes of state law only, such provisions may be appropriate but should not be included in the SIP.

Thus, if the TCEQ intends the affirmative defense provisions in 30 TAC 101.222(b) - (e) to be effective for state law purposes only, and intends these provisions to have no legal effect for purposes of enforcement of SIP requirements in federal courts, then these provisions should not be included in the SIP. Merely adding a statement to the SIP that the existing affirmative defense provisions "are not intended" to affect the federal courts is insufficient because the provisions will be perceived as imposing binding requirements that courts must adhere to, rather than exercising the full range of authority conferred upon the federal courts in the CAA. To retain such provisions would, at a minimum, lead to confusion on the part of regulated entities, regulators, the public and the courts. In the SSM SIP Call, the EPA has directed states to remove existing affirmative defense provisions from SIPs, including those in 30 TAC 101.222(b) - (e). Thus, the proposed revisions to add 30 TAC 101.222(k) will not meet the requirements of the SSM SIP Call.

2. The practical effect of 30 TAC 101.222(l) is that substantially inadequate SIP provisions would remain in the SIP for an indefinite period of time, perhaps a period of several additional years. In the SSM SIP Call, the EPA has directed states to make SIP submissions to revise the identified substantially inadequate SIP provisions by November 22, 2016. The EPA provided states with the full 18 months allowed by the CAA section 110(k)(5), considering time needed by states to make the required SIP submission balanced against the need for correction of the substantially inadequate provisions in a timely fashion. The EPA acknowledges the TCEQ's preference to defer the effective date of the proposed 30 TAC 101.222(k) by providing through proposed 30 TAC 101.222(l) that it would not be effective until an unknown later date.

   Even if 30 TAC 101.222(k) were otherwise valid, however, the EPA does not agree that states may include provisions that have the effect of deferring a required SIP revision as provided in proposed 30 TAC 101.222(l). Such an approach is inconsistent with the explicit statutory requirement that states make corrective SIP submissions no later than 18 months after the EPA's issuance of a SIP call. This failure to correct the substantially inadequate SIP provisions in a timely fashion would have further adverse impacts by delaying any needed corresponding revisions to title V permits in the ordinary course over succeeding years. A provision that delays the correction of substantially inadequate SIP provisions in response to a SIP call for several years is inconsistent with the timely revision of substantially inadequate SIP provisions, as contemplated in CAA section 110(k)(5). Thus, the proposed revisions to add 30 TAC 101.222(l) will not meet the requirements of the SSM SIP Call.

3. The EPA strongly recommends that the TCEQ submit a SIP revision that will simply remove 30 TAC 101.222(b) - (e) from the Texas SIP. This SIP revision would meet the requirements of the SSM SIP Call and bring the Texas SIP into compliance with CAA requirements on this issue. If the TCEQ seeks to retain the affirmative defenses provided in 30 TAC 101.222(b) - (e) for state law purposes, outside of the SIP, the EPA does not anticipate concerns with that approach. The existing affirmative defenses in 30 TAC 101.222(b) - (e) are narrowly drawn and the EPA does not believe that they would interfere with the state's required enforcement authority to meet other applicable CAA requirements. As explained in detail in the SSM SIP Call, states have discretion to revise their SIPs to address the substantially inadequate SIP provisions in the way they consider most appropriate, so long as they comply with CAA requirements. The TCEQ may elect to revise the provisions of the Texas SIP in other ways in response to the SIP Call, but at a minimum the TCEQ should remove the affirmative defense provisions from the SIP.

4. The SIP submittal letter should state that the submission of the proposed SIP revisions by Texas is being made in response to the EPA's SSM SIP Call 80 FR 33968-9 (June 12, 2015).

Should you have any questions regarding this letter, please feel free to contact me at (214) 665-7242, or Alan Shar of my staff at 214-665-6691. If you have legal questions, please contact Rick Bartley at 214-665-8046. Again, I appreciate your efforts to address this important requirement.

Sincerely yours,

Guy Donaldson
Chief
Air Planning Section