Meeting Procedures

(a) Doors open 30 minutes prior to the beginning of each meeting. The meetings will be informal in nature and will be conducted by one or more representatives of the FAA Central Service Center. A representative from the FAA will present a briefing on the planned modification to the Class B airspace at Detroit, MI. Each participant will be given an opportunity to deliver comments or make a presentation, although a time limit may be imposed. Only comments concerning the plan to modify the Class B airspace area at Detroit, MI, will be accepted.

(b) The meetings will be open to all persons on a space-available basis. There will be no admission fee or other charge to attend and participate.

(c) Any person wishing to make a presentation to the FAA panel will be asked to sign in and estimate the amount of time needed for such presentation. This will permit the panel to allocate an appropriate amount of time for each presenter. These meetings will not be adjourned until everyone on the list has had an opportunity to address the panel.

(d) Position papers or other handout material relating to the substance of these meetings will be accepted. Participants wishing to submit handout material should present an original and two copies (3 copies total) to the presiding officer. There should be additional copies of each handout available for other attendees.

(e) These meetings will not be formally recorded. However, a summary of comments made at the meeting will be filed in the docket.

Agenda for the Meetings

—Sign-in.

—Presentation of meeting procedures.

—FAA explanation of the planned Class B airspace area modifications.

—Solicitation of public comments.

—Closing comments.

Issued in Washington, DC, on May 6, 2010.

Edith V. Parish,

Manager, Airspace and Rules Group.

[FR Doc. 2010–11496 Filed 5–12–10; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2006–0132; FRL–9151–2]

Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to partially approve and partially disapprove a revision to the Texas State Implementation Plan (SIP) submitted by the Texas Commission on Environmental Quality (TCEQ) in a letter dated January 23, 2006 (the January 23, 2006 SIP submittal). This SIP submittal concerns revisions to 30 Texas Administrative Code (TAC) Chapter 101, General Air Quality Rules, Subchapter A General Rules; and Subchapter F Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities. This action proposes approval of those portions of the rule that are consistent with the Clean Air Act (the Act), and disapproval of those portions of the rule that are inconsistent with the Act. We are proposing disapproval of provisions that provide for an affirmative defense against civil penalties for excess emissions during planned maintenance, startup, or shutdown activities. A disapproval of these provisions means that an affirmative defense is not available in the federally approved SIP for violations due to excess emissions during planned maintenance, startup, or shutdown activities. This action is in accordance with section 110 of the Act.

DATES: Comments must be received on or before June 14, 2010.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2006–0132, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *U.S. EPA Region 6* "*Contact Us*" *Web site: http://epa.gov/region6/r6coment.htm.* Please click on "6PD" (Multimedia) and select "Air" before submitting comments.
- *E-mail:* Mr. Guy Donaldson at *donaldson.guy@epa.gov.* Please also send a copy by e-mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), at fax number 214–665–7263.
- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2006–0132. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through *www.regulations.gov* or e-mail that you consider to be CBI or otherwise protected from disclosure. The www.regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available

either electronically in *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment: TCEQ, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6691, fax (214) 665–7263, e-mail address *shar.alan@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," and "our" refer to EPA.

Outline

I. Background
A. What actions are we proposing?
B. What documents did we use in our evaluation of the January 23, 2006, SIP submittal?
C. What is the background for this proposed rulemaking action?
D. Why are we proposing approval of portions of the January 23, 2006 SIP submittal?
E. Why are we proposing disapproval of sections 101.222(h), 101.222(i), and 101.222(j) of the January 23, 2006 SIP submittal?
F. What happens if Texas continues to implement section 101.222(h) as a State law?
II. Proposed Action
III. Statutory and Executive Order Reviews

I. Background

A. What actions are we proposing?

We are proposing to approve revisions to 30 TAC, General Air Quality Rule 101, Subchapter A General Rules; and Subchapter F Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities of the January 23, 2006 submittal as revisions to the federally-approved SIP. Specifically, we are proposing to approve Subchapter A, section 101.1 (Definitions); and Subchapter F, sections 101.201 (Emissions Event Reporting and Recordkeeping Requirements), 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), 101.221 (Operational Requirements), 101.222(a) through (g) (Demonstrations), and 101.223 (Actions to Reduce Excessive Emissions) into the Texas SIP.

We are also proposing to disapprove sections 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity), 101.222(i) (concerning effective date of permit applications), and 101.222(j) (concerning processing of permit applications) of the January 23, 2006 submittal. We are proposing disapproval of these provisions because they provide for an affirmative defense against civil penalties for excess emissions during planned maintenance, startup, or shutdown activities. A disapproval of these provisions means that an affirmative defense is not available for violations due to excess emissions during planned maintenance, startup, or shutdown activities in the federally-approved SIP.

Based on our review of the January 23, 2006 submittal, we believe that sections 101.222(h), 101.222(i), and 101.222(j) are severable from, and independent of, the remainder of the submittal. Therefore, our disapproval of sections 101.222(h), 101.222(i), and 101.222(j), and approval of the remainder of the January 23, 2006 submittal, will not affect the implementation of the sections being approved today for inclusion in the SIP. See section 20 of our Technical Support Document (TSD) prepared in conjunction with this document for more information.

B. What documents did we use in our evaluation of the January 23, 2006, SIP submittal?

The EPA's interpretation of the Act as it applies to excess emissions occurring during periods of startup, shutdown, and 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" (1982 Policy); EPA's clarification to the above policy memorandum dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation (1983 Policy); 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" (1999 Policy); EPA's final rule for Utah's sulfur dioxide control strategy (Kennecott Copper), April 27, 1977 (42 FR 21472); EPA's final rule for Idaho's sulfur dioxide control strategy, November 8, 1977 (42 FR 58171); and the latest clarification of EPA's policy issued on December 5, 2001 (2001 Policy). See the policy or clarification of policy at: *http://www.epa.gov/ttn/oarpg/t1pgm.html* (URL dating July 22, 2008). The EPA's interpretation that the Act prohibits the inclusion in SIPs of automatic exemptions from emission limitations for sources in certain startup, shutdown, or malfunction situations was upheld by the United States Court of Appeals for the Sixth Circuit in *Michigan Department Of Environmental Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000).

C. What is the background for this proposed rulemaking action?

On March 30, 2005 (70 FR 16129), we granted limited approval to SIP revisions to Chapter 101, Subchapter A and Subchapter F, including sections 101.221 (Operational Requirements), 101.222 (Demonstrations), and 101.223 (Actions to Reduce Excessive Emissions). The rules concerned reporting and recordkeeping requirements and enforcement actions for excess emissions during startup, shutdown, maintenance, and malfunction activities. We granted limited rather than full approval of that submission because we found sections 101.222(c) and (e) were ambiguous because they could be interpreted to provide an exemption from SIP permitting requirements or an affirmative defense for certain scheduled maintenance activities. *See* also our May 9, 2005 (70 FR 24348) proposal, and August 26, 2005 (70 FR 50205) final rule granting limited approval to an extension of the expiration dates for sections 101.221, 101.222 and 101.223 to June 30, 2006. As discussed below, however, the approved provisions, 30 TAC 101.221, 101.222, and 101.223 have expired by their own terms, are no longer part of the Texas SIP, and therefore are no longer enforceable under the SIP.

On January 26, 2006 we received a letter, dated January 23, 2006, from the Chairman of the TCEQ requesting EPA review and approve revisions to 30

TAC, General Air Quality Rule 101, Subchapter A General Rules; and Subchapter F Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities. The January 23, 2006 submittal included revised 30 TAC sections 101.1 (Definitions), 101.201 (Emissions Event Reporting and Recordkeeping Requirements), 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), and new sections 101.221 (Operational Requirements), 101.222 (Demonstrations), and 101.223 (Actions to Reduce Excessive Emissions). The previous version of sections 101.221, 101.222, and 101.223 approved into the SIP in 2005 expired from the Texas SIP, by their own terms, on June 30, 2006. On March 23, 2006, we determined the January 23, 2006 submittal administratively complete as reflected in a letter to the Chairman of the TCEQ. This administrative completeness letter is a part of the docket and available for public review. On February 8, 2007, EPA met with TCEQ to discuss issues related to the January 23, 2006 SIP submittal. TCEQ responded to our questions in a letter dated April 17, 2007 from John F. Steib, Jr, Deputy Director, TCEQ Office of Compliance and Enforcement to John Blevins, Director EPA Compliance Assurance and Enforcement Division (April 17, 2007 letter). The April 17, 2007 letter is included in the docket for this action.

We have reviewed the January 23, 2006 submittal including Texas' response to our August 8, 2005 comment letter, and the April 17, 2007 letter and determined that, with the exception of the affirmative defense provisions discussed below, the January 23, 2006 SIP submittal is consistent with our interpretation of the Act. *See* section D of this document for more information. We have determined that one of the affirmative defense provisions, new section 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity) of the January 23, 2006 submittal is inconsistent with the Act as interpreted in EPA policy and guidance, and therefore we are proposing disapproval of the new section 101.222(h), and two related provisions new sections 101.222(i), and 101.222(j). *See* section E of this document for more information. If we take final action to disapprove the new sections 101.222(h), (i) and (j), no sanctions or Federal Implementation Plan clocks will be started under section 179(b) of the Act, because Texas did not submit these provisions to satisfy a mandatory requirement of the Act. A final disapproval action will mean that no affirmative defense against civil penalties will exist in the federally approved SIP for violations that occur during planned maintenance, startup, or shutdown activities.

D. Why are we proposing approval of portions of the January 23, 2006 SIP submittal?

The EPA interprets the Act such that all emissions in excess of limits established in a SIP, including among other things, state control strategies and New Source Review SIP permits, are violations of the applicable emission limitation because excess emissions have the potential to interfere with attainment and maintenance of the National Ambient Air Quality Standards (NAAQS), reasonable further progress, state control strategies, or with the protection of Prevention of Significant Deterioration (PSD) increments. However, EPA recognizes that imposition of a penalty for sudden and unavoidable malfunctions, startups or shutdowns caused by circumstances entirely beyond the control of the owner or operator may not be appropriate. The EPA has provided guidance on two approaches States may use in addressing such excess emissions: enforcement discretion and affirmative defense to civil penalties. Under an enforcement discretion approach, the State (or another entity, such as EPA, seeking to enforce a violation of the SIP) may consider the circumstances surrounding the event in determining whether to pursue enforcement. Under the affirmative defense approach, the State may establish an affirmative defense that may be raised in the context of an enforcement proceeding. In an enforcement action, the defendant may raise a response or defense in an action for civil penalties, regarding which the defendant has the burden to prove that certain criteria have been met. See page 2 of the attachment to the 1999 Policy.

Neither approach may waive reporting requirements for the violation. States are not required to provide an affirmative defense approach, but if they choose to do so, EPA will evaluate the State's SIP rules for consistency with the Act as interpreted in our policy and guidance documents listed in section B above.

We are proposing to approve Subchapter A, revised section 101.1 (Definitions); and Subchapter F, revised sections 101.201 (Emissions Event Reporting and Recordkeeping Requirements) and 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), and new sections 101.221 (Operational Requirements), 101.222 (a) through (g) (Demonstrations), and 101.223 (Actions to Reduce Excessive Emissions), into the Texas SIP. TCEQ revised definitions in Subchapter A, section 101.1 as needed to implement Subchapter F and to implement other legislative changes. The changes define "planned maintenance, startup, or shutdown" and "unplanned maintenance, startup, or shutdown" activities; "excess opacity event;" and "emissions event;" and replace the terms "facility" and "site" with "regulated entity." The submittal also includes several revisions to the SIP definition of "reportable quantity." *See* section 9 of the TSD for more information. We believe that the revisions to section 101.1 will provide for consistency among subchapters A and F, and will facilitate implementation of the rule. Therefore, we are proposing to approve the submitted revisions to section 101.1. Although we are proposing to approve all of the changes to the definitions section 101.1, including the definition for "planned maintenance, startup, or shutdown," as we have stated we are proposing to disapprove the regulatory provisions that would provide an affirmative defense for violations during these events. Our approval of the submitted definition "planned maintenance, startup, or shutdown" insures that the reporting and recordkeeping requirements for these events will be appropriately applied.

Revisions to sections 101.201 (Emissions Event Reporting and Recordkeeping Requirements) relate to how and where to report excess emission events. The revisions make numerous changes to the terms of the currently approved SIP, including adding requirements to file initial notifications and final reports with the local air pollution agencies with jurisdiction and to include TCEQ's regulated entity number with the report; modifying the requirement to report by facility to instead require reporting by emission point; allowing reporting without speciation of the pollutants emitted for events that have a reportable quantity less than 100 pounds or amounts less than ten pounds per 24 hours. Texas made a number of other minor revisions to clarify reporting requirements that are described in section 10 of the TSD. We believe that these other revisions to the reporting requirements will facilitate implementation of the rule by clarifying the existing reporting requirements and establishing a new requirement that

local air pollution authorities be informed of emissions events. *See* section 10 of the TSD for more information. Therefore, we are proposing to approve the revisions to section 101.201.

Revisions to 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements). This section of the SIP was last approved on March 30, 2005 (70 FR 16129) and had no expiration date. *See* Table II of the TSD. This section describes the requirements for owners and operator to make an initial notification at least 10 days prior to a scheduled maintenance, startup or shutdown activity and the requirements to provide a final report within 2 weeks after the event. Texas revised the rules to clarify that, if during a scheduled maintenance activity additional maintenance is required that results in unanticipated emissions, and that the maintenance was unforeseeable and requires immediate corrective action to avoid a malfunction, then the event is considered an unplanned maintenance activity or an upset depending on the reasons. This change is relevant to the affirmative defense provisions in section 101.222 which require different criteria to be demonstrated in order to assert the affirmative defense for upsets and unplanned maintenance emission events versus planned maintenance, startup, and shutdown activities. Another change to section 101.211 requires pre-reporting of the expected duration of any maintenance, startup or shutdown activity. Section 101.211(f) adopts the requirement for annual reporting of emissions resulting from scheduled maintenance, startup, and shutdown activities by a regulated entity. For entities subject to emission inventory (EI) reporting, the annual emissions event report must be submitted with the EI report. The annual emissions event report must include the total number of reportable and non-reportable emissions events and quantity of emissions experienced at the regulated entity. Major sources statewide and minor sources in nonattainment, maintenance, early action compact areas, and Nueces and San Patricio Counties are subject to the annual emissions event reporting requirements. See section 7 of the TSD for more information. These revisions to section 101.211 will provide for reporting and recordkeeping provisions associated with scheduled maintenance, startup, and shutdown events, and will facilitate tracking of these events. Therefore, we are proposing to approve the revisions to section 101.211. If our proposed approval of these reporting requirements for scheduled maintenance, startup and shutdown events is finalized, it only means that facilities will need to make these required notifications. If we finalize our proposed disapproval of section 101.222(h), an affirmative defense will not be available for violations due to excess emissions during planned maintenance, startup, or shutdown activities.

New Section 101.221 (Operational Requirements) discusses the requirement to maintain air pollution equipment in good working order. A previous version of this section was part of the SIP but that provision expired. This new section is important because it provides the requirement that air pollution abatement equipment must be maintained and in good working order. Paragraph (d) in Section 101.221 provides that the commission may exempt sources from control requirements when there is a lack of technical knowledge. The new section 101.221 also clarifies that no exemptions can be authorized by the commission for any federal requirements to maintain air pollution control equipment, including requirements such as New Source Performance Standards (NSPS) or National Emissions Standards for Hazardous Air Pollutants (NESHAP). In its letter of April 17, 2007, Texas confirmed that the term "federal requirements" includes any requirement in the federally-approved SIP. Thus, the State interprets this provision not to apply where the control requirement that has been approved as part of the SIP. We believe that this interpretation is critical to allowing us to approve the provision into the SIP. If the TCEQ were to be allowed to exempt sources from control requirements specified in the SIP, such action could undermine the attainment and maintenance of the NAAQS. Thus, new section 101.221 is approvable only because the State has clarified that it does not allow exemptions to be provided for federal requirements including any requirement in the federally-approved SIP. *See* sections 13 and 14 of the TSD for more information.

New section 101.222 (Demonstrations) provides an affirmative defense for certain emission events. Emission events are defined in the Texas rules as upsets that result in unauthorized emissions. Upsets are defined in the Texas rules similar to the term malfunction used in EPA's guidance. Section 101.222(a) provides criteria in 101.222(a)(1) through 101.222(a)(6) to determine if an emission event is excessive. If emission events are determined by the executive director to be excessive, the source may not assert an affirmative defense under sections 101.222(b) through 101.222(e). Section 101.222(b) adopts an affirmative defense for non-excessive upset events. We have determined that the affirmative defense provided by section 101.222(b) is consistent with the interpretation of the Act set forth in our 1999 Policy for the following reasons: (1) The rule does not provide an exemption from compliance with applicable emission limitations; (2) The affirmative defense provided is limited to upset or malfunctions; (3) The affirmative defense applies only to a judicial or administrative enforcement action for a violation of applicable emission limitations; (4) The defense applies only to civil penalties and cannot be asserted for an enforcement action for injunctive relief. (5) The rule specifies criteria, which must be met in order to assert the defense that are consistent with those outlined in EPA's 1999 Policy; (6) The burden to prove that the criteria have been met is on the owner or operator; (7) A determination by TCEQ that the criteria have been met does not constitute a waiver of liability for the violation; (8) Nothing in the rule, including a determination by the TCEQ, would bar EPA or a citizen suit enforcement action for the emission violation; (9) The affirmative defense cannot be asserted where the unauthorized emissions cause or contribute to an exceedance of the NAAQS, PSD increments or to a condition of air pollution; (10) The affirmative defense may not be asserted against Federal performance or technology-based standards such as NSPS or NESHAP; (11) The affirmative defense may not be asserted where the Executive Director of TCEQ determines that the emissions event is excessive under the criteria in section 101.222(a); and (12) The emissions event must be reported to TCEQ under section 101.201 in order for the owner or operator to assert the affirmative defense.

Sections 101.222(c) and 101.222(e) provide a similar affirmative defense for unplanned maintenance, startup or shutdown activities that arise from sudden and unforeseeable events beyond the control of the operator that require immediate corrective action to minimize or avoid an upset or malfunction. This provision allows an affirmative defense where the source or operator has the burden to prove that maintenance activities undertaken arose from sudden or unforeseeable events beyond the control of the operator, that

immediate corrective action was required to minimize or avoid an upset or malfunction and that the criteria in section 101.222(c) or (e) have been met. TCEQ provided supplemental information concerning sections 101.222(c) and (e) in a letter dated April 17, 2007 (included in the docket for this action and available for public review) in response to questions from EPA. The April 17, 2007 letter confirmed that TCEQ interprets that unplanned maintenance events are "functionally equivalent to EPA's 'malfunction' with regards to applicability of an affirmative defense." *See* section 101.1(109)(B). *Also see* Tables III and VIII of our TSD. The EPA agrees that TCEQ's treatment of "unplanned maintenance, startup, or shutdown activity" is functionally equivalent to EPA's policy definition of malfunction. *See* pages 1 and 2 of the April 17, 2007 letter for details. In addition, the affirmative defense provided by TCEQ, including the criteria that a source must prove in asserting the affirmative defense is consistent with EPA's recommended policy approach for providing an affirmative defense for excess emissions during a malfunction. Therefore, we are proposing approval of 101.222(c) and (e) into the Texas SIP.

As discussed elsewhere, we are proposing to disapprove section 101.222(h), which provides an affirmative defense for excess emissions during periods of planned maintenance, startup or shutdown activities. Sections 101.222(c)(1) and 101.222(e)(1) both include requirements for facilities to report scheduled maintenance, startup, or shutdown activities. Our approval of sections 101.222(c)(1) and 101.222(e)(1) only affirms a facility's requirement to provide notification of these events. However, while we believe that it is appropriate for sources to report such events, we do not believe that it is appropriate to provide an affirmative defense for penalties for excess emissions during these planned events. Because these events are planned, we believe that sources should be able to comply with applicable emission limits during these periods of time. As discussed elsewhere, if we finalize our disapproval of section 101.222(h), an affirmative defense will not be available for unauthorized emissions during these activities.

Section 101.222(d) concerns excess opacity events due to an upset or opacity events that are not emissions events. As noted previously, emissions events are upsets that result in unauthorized emissions. *See* 101.1(28). Upsets are defined in the Texas rules similar to the term malfunction used in EPA's guidance. *See* Table IV of our TSD. The affirmative defense criteria in section 101.222(d) are specifically tailored for opacity related activities and follow the pattern of the criteria in 101.222(b). Therefore, we are proposing to approve the criteria in the section 101.222(d) provision for the same reasons we believe the criteria in 101.222(b) are consistent with our interpretation of the Act as outlined in our 1999 Policy, and we are proposing to approve section 101.222(d). *See* Table VII of our TSD for more information.

We are proposing to approve section 101.222(f) (Obligations) because this section provides that an affirmative defense cannot apply to violations of federally promulgated performance or technology-based standards, such as those found in 40 CFR parts 60, 61, and 63. This is consistent with EPA's interpretation of the Act as provided in the 1999 Policy at page 3.

New Section 101.223 (Actions to Reduce Excessive Emissions) provides for a corrective action plan and written notification concerning excessive emission events. This section will enhance the Texas SIP by providing a clear requirement for facilities determined to have excessive emission events to take necessary corrective actions to reduce the future occurrence of such events.

In summary, we are proposing approval of 30 TAC, General Air Quality Rule 101, Subchapter A, revised section 101.1 (Definitions); and Subchapter F, revised sections 101.201 (Emissions Event Reporting and Recordkeeping Requirements) and 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), and new sections 101.221 (Operational Requirements), 101.222 (Demonstrations, except 101.222(h), 101.222(i), and 101.222(j)), and 101.223 (Actions to Reduce Excessive Emissions) into the Texas SIP.

E. Why are we proposing disapproval of sections 101.222(h), 101.222(i), and 101.222(j) of the January 23, 2006 SIP submittal?

New Section 101.222(h) provides a temporary affirmative defense for planned maintenance, startup, or shutdown activity emissions, which are currently unauthorized, meet certain criteria, and have been reported in accordance with section 101.211. *See* section 101.1(109) or Table III of our TSD for the definition of unplanned maintenance, startup, or shutdown activity.

This section (101.222(h)) also sets forth a time table for an owner or operator to file a permit application to authorize startup, shutdown, and maintenance activities from routine or normal operations based on facility's SIC code. The affirmative defense for planned maintenance, startup, or shutdown activities expires the earlier of one year after the application deadlines in the rule or upon issuance or denial of a permit to authorize planned maintenance, startup, or shutdown activities. We believe that section 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity) is inconsistent with the Act as interpreted in EPA's long-standing national policy on excess emissions during startup, shutdown, maintenance, and malfunction activities and in actions taken by EPA regarding excess-emissions-related SIP revisions for other states; therefore, we are proposing disapproval of the provision. If we finalize the disapproval, this provision would not be included as part of the Texas SIP.

Section 101.222(h) provides an affirmative defense for planned maintenance activities. It is EPA's long-standing position expressed in guidance documents and other rulemakings that planned maintenance activities are predictable events that are subject to planning to minimize releases, unlike malfunctions or upsets, which are sudden, unavoidable or beyond the control of the owner or operator. Thus, States should require sources to comply with the applicable emission limits during these activities. The EPA's interpretation of section 110 of the Act and related policies allows an affirmative defense to be asserted against civil penalties in an enforcement action for excess emissions activities which are sudden, unavoidable or caused by circumstances beyond the control of the owner or operator and where emissions control systems may not be consistently effective, such as during startup or shutdown periods.[1] However, EPA has determined that it is inappropriate to provide an affirmative defense for excess emissions resulting from planned maintenance. The source or operator should be able to plan maintenance that might otherwise lead to excess emissions to coincide with maintenance of production equipment or other facility shutdowns. Thus, EPA

[1] We also note that we generally believe that for planned startup and shutdown events, most sources should be able to comply with applicable emission limitations. However, for those sources and source categories where such compliance is not possible, the State should develop alternative, applicable emission limits for such events, which they can consider in SIPs demonstrating attainment and maintenance of the NAAQS, rather than establishing an affirmative defense for such emission events.

did not provide for an affirmative defense during maintenance activities in the 1999 Policy. Because these events can be planned and because control equipment can be consistently effective during maintenance, EPA does not believe it is appropriate under the Act to allow an affirmative defense for any excess emissions during maintenance activities; any such events should be addressed only through the exercise of enforcement discretion. *Also see* 72 FR 5238 published February 5, 2007. We expressed our concern about providing an affirmative defense to section 101.222(h) related activities in our August 8, 2005 comment letter to TCEQ (Comment #16); however, TCEQ did not incorporate our comment in its final adoption of the rule that was submitted to EPA. We have placed our August 8, 2005 comment letter to TCEQ in the docket where it is available for public review. Also, see April 27, 1977 (42 FR 21472); November 8, 1977 (42 FR 58171); and August 23, 2000 (65 FR 51412). For the above reasons, we are proposing to disapprove section 101.222(h).

Section 101.222(i) concerns the scheduling and applicable effective dates for permit applications submitted to TCEQ requesting that unauthorized emissions associated with the planned maintenance, startup, or shutdown activities be permitted. Since section 101.222(i) is not severable from section 101.222(h), which we are proposing to disapprove, we are proposing to disapprove section 101.222(i), as well.

Section 101.222(j) concerns processing of permit applications referenced in 101.222(h), and provides the Executive Director with the authority to process, review, and permit unauthorized emissions from planned maintenance, startup, or shutdown activities. We explained our reasons for proposing to disapprove section 101.222(h) above. Since section 101.222(j) is not severable from section 101.222(h), which we are proposing to disapprove, we are proposing to disapprove section 101.222(j), as well.

Based on our review of the January 23, 2006 submittal, we believe our disapproval of the submitted new sections 101.222(h), 101.222(i), and 101.222(j), which would result in such provisions not being included in the approved SIP, does not change the meaning or stringency of the portions of the January 23, 2006 SIP submittal that we are approving and that would become a part of the federally enforceable SIP. Therefore, sections 101.222(h), 101.222(i), and 101.222(j) are severable from the remaining sections of the SIP and can be disapproved. *See* section 20 of our TSD for more information.

F. What happens if Texas continues to implement section 101.222(h) as a State law?

Historically, emissions from startup, shutdown and maintenance activities were not included in Texas air permits or authorizations; instead, such emissions were subject to the State's emission events rules. The EPA expects all emissions, including those emissions during startup, shutdown and maintenance activities, to be addressed in permits issued under or authorizations provided by the approved SIP. Texas chose to adopt a schedule for sources to apply for and the State to issue air permits to include emissions due to planned maintenance, startup, or shutdown. Permit provisions addressing emission limitations for planned maintenance, startup, or shutdown activities cannot interfere with compliance with applicable SIP requirements. For example, a permit rule cannot alter or provide relief from the emission limits set forth in 30 TAC Chapter 115 for Volatile Organic Compounds or Chapter 117 for Oxides of Nitrogen.

Texas adopted this schedule through rulemaking in the new section 101.222(h), which EPA has proposed to disapprove because it provides an affirmative defense for facilities with permits that do not include emission limitations for these types of activities during the transition period. Under the State rule, which EPA has proposed not be approved into the SIP, once a facility receives a new federally enforceable permit or authorization that includes emission limitations for these activities, an affirmative defense is no longer available. If the permittee has emissions that exceed an emission limit in a SIP permit and those emissions are due to planned maintenance, startup, or shutdown activities that had not been considered in the original issuance of the permit to a facility, this exceedance can still be a violation of the SIP. As noted previously, these permits cannot be inconsistent with the applicable SIP.

Thus, if EPA takes final action to disapprove section 101.222(h), and Texas continues to implement the new section 101.222(h) as a State law, there will be a "gap" between State law and Federal law in the EPA-approved Texas SIP. The federally-approved SIP will not provide an affirmative defense for planned maintenance, startup, or shutdown activities, and EPA or other parties could seek enforcement of the federally-approved limits in federal court. In addition, as stated above, any alternative limits established through the permitting process cannot be inconsistent with the applicable SIP.

We want to make it clear that if we finalize this rulemaking action, sources subject to the Chapter 101 Emission Events rules should be aware of the gap between the EPA-approved SIP and the revised State rules for excess emissions from such activities. The current EPA-approved SIP does not provide for an affirmative defense to civil penalties in an EPA or citizen suit enforcement action for an exceedance of a SIP requirement. If we finalize disapproval of sections 101.222(h), 101.222(i) and 101.222(j), the EPA-approved SIP will provide an affirmative defense only for unplanned activities and will continue to not provide an affirmative defense to a federal enforcement action for violation of a SIP requirement due to planned activities.

The EPA considers any emissions not authorized under the Act or the regulations promulgated or approved thereunder (*e.g.,* exceedance of an emission limitation or other applicable SIP requirement) a violation. Any such unauthorized emissions should be reported as a deviation under title V reporting and/or other applicable reporting requirements. Under the Act, EPA and citizens may enforce the EPA-approved SIP as federal law. Thus, as provided above, regulated sources remain subject to the requirements of the EPA-approved SIP and subject to potential enforcement for violations of the SIP during a "SIP gap." *See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions, dated March 1, 1991. A source must comply with the EPA-approved SIP until and unless it is revised. *See Train* v. *NRDC,* 421 U.S. 60 (1975).

II. Proposed Action

Today, we are proposing to approve into the Texas SIP the following provisions of 30 TAC General Air Quality Rule 101 as submitted on January 23, 2006:

Subchapter A

Revised section 101.1 (Definitions); and

Subchapter F

Revised Section 101.201 (Emissions Event Reporting and Recordkeeping Requirements),

Revised Section 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements),

New Section 101.221 (Operational Requirements),

New Section 101.222 (Demonstrations), except 101.222(h), 101.222(i), and 101.222(j)),

New Section 101.223 (Actions to Reduce Excessive Emissions).

We are also proposing to disapprove sections 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity), 101.222(i) (concerning effective date of permit applications), and 101.222(j) (concerning processing of permit applications) into Texas SIP. The EPA is proposing to find that these 3 sections (101.222(h), 101.222(i), and 101.222(j)) are not severable from each other.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. If a portion of the plan revision meets all the applicable requirements of this chapter and Federal regulations, the Administrator may approve the plan revision in part. 42 U.S.C. 7410(k); 40 CFR 52.02(a). If a portion of the plan revision does not meet all the applicable requirements of this chapter and Federal regulations, the Administrator may then disapprove portions of the plan revision in part that does not meet the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices that meet the criteria of the Act, and to disapprove state choices that do not meet the criteria of the Act. Accordingly, this proposed action, in part, approves state law as meeting Federal requirements and, in part, disapproves state law as not meeting Federal requirements; and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- 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);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act;
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994); and
- This rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 5, 2010.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

[FR Doc. 2010–11429 Filed 5–12–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R10–OAR–2008–0391; FRL–9149–5]

Determination of Attainment for PM–10; Fort Hall PM–10 Nonattainment Area, Idaho

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing under the Clean Air Act (CAA) to determine that the Fort Hall PM–10 nonattainment area on the Fort Hall Indian Reservation in Idaho has attained the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter of less than or equal to 10 microns (PM–10). EPA's proposed finding that the Fort Hall PM–10 nonattainment area has attained the 24-hour PM–10 NAAQS is based on EPA's review of complete, quality-assured monitored air quality data for the three-year period ending December 31, 2009. Preliminary data for 2010 indicate that the area continues to attain the standard.

EPA's proposed determination of attainment is not equivalent to a proposed redesignation to attainment under CAA section 107(d)(3). If this proposal is finalized, the designation status for the Fort Hall PM–10 nonattainment area would remain moderate nonattainment until such time as the area is redesignated to attainment as provided in CAA section 107(d)(3).

DATES: Written comments must be received on or before June 14, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2008–0391, by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E- Mail: R10–Public_Comments@epa.gov.*

C. *Mail:* Donna Deneen, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop: AWT–107, Seattle, WA 98101.

D. *Hand Delivery:* U.S. Environmental Protection Agency, Region 10, Attn: Donna Deneen (AWT–107), 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101, 9th Floor. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2008–0391. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment.