No. 12-1484

In the Supreme Court of the United States

LUMINANT GENERATION CO. LLC, OAK GROVE MANAGEMENT CO. LLC, BIG BROWN POWER CO. LLC, & SANDOW POWER CO. LLC, *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, FLORIDA, GEORGIA, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, despite the Clean Air Act's explicit commands, and this Court's jurisprudence, EPA is correct that it has discretion to insist on its preferred substantive requirements when reviewing a state implementation plan.

2. Whether, when EPA was vague, indecisive, and conclusory in explaining its bases for its action, the panel below departed from this Court's precedents by guessing at what the agency meant and substituting its own rationale for that of the agency.

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INTEREST OF *AMICI CURIAE*[1]

The *Amici* States' interest in this case is twofold. First, the Clean Air Act establishes that the States will implement the Act via state implementation plans (SIPs), while EPA, acting in a ministerial role, will review the plans for consistency with the Act. When—as here—EPA disapproves a SIP based on mere policy preference, it is critical to the States that the courts require EPA to step back within its congressionally assigned boundaries. And second, when a federal agency takes an action that impacts the States, it is important that their challenges to the action are judged by the bases the agency actually articulated at the time of the action and remain free from *post hoc* rationalization.

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amici* States provided counsel of record for all parties with timely notice of the intent to file this brief.

SUMMARY OF ARGUMENT

EPA, as shown by its actions in this case and a series of others, has decided that it has discretion to define substantive requirements necessary for the approval of state plans for implementing the Clean Air Act. But that is not what Congress said when instructing the agency that it "shall approve" a state plan that meets the Act's requirements. 42 U.S.C. § 7410(k)(3). And that is not what the Court said in the early years of the Act, when it described the States' wide discretion to decide how to implement the Act. *Train v. Natural Res. Def. Council, Inc.,* 421 U.S. 60, 79 (1975); *Union Electric Co. v. EPA*, 427 U.S. 246, 250 (1976). Nevertheless, the decision below allows EPA to impose its own preferences and disapprove of a state plan without stating how it would interfere with an applicable requirement of the Act.

This case is not just about EPA and the Clean Air Act. It challenges a core principle of administrative law that agency action "is to be tested by the basis upon which it purports to rest," and its necessary corollary that agencies have a fundamental obligation to set forth the basis of their actions with clarity and precision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947). Here, EPA's rationale was vague and indecisive. Nevertheless, the panel below substituted its own rationale for EPA's and affirmed EPA's action—for reasons EPA had not articulated.

In short, the decision below departs from this Court's precedents concerning both the Clean Air Act and fundamental principles of administrative law. In doing so, it erodes these precedents. In addition, it profoundly diminishes the authority of the States, while enlarging EPA's role from a ministerial one to one where it may impose extra-statutory requirements of its own choosing.

These are issues of national significance. Indeed, EPA has already cited this case to support an action that would require thirty-six States to revise their plans to conform to EPA's policy preferences. Because the departure from precedent is abrupt and the issues critically important to the States, certiorari is warranted.

ARGUMENT

I. The decision below conflicts with Court precedent and upends the careful balance of state and federal responsibilities critical to the success of the Clean Air Act.

A. The Clean Air Act limits each sovereign to its assigned role.

This case presents a core issue of federalism, which extends from the Constitution into our statutes. The Clean Air Act is "an experiment in

cooperative federalism," *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001), in which Congress found that "the primary responsibility" for preventing and controlling air pollution belongs to the States, while the federal government's role is to provide financial assistance and leadership to promote cooperative governmental air quality programs. 42 U.S.C. § 7401(a)(3)–(4).

These congressional findings are manifest in the Act's requirements that EPA identify air pollutants and establish national ambient air quality standards (NAAQS), *id.* §§ 7408–7409, while the States have the primary responsibility for implementing those standards. To implement the NAAQS, States must adopt, and periodically revise, their state implementation plans (SIPs). *Id.* § 7410. EPA must approve a State's SIP revision if it meets all of the applicable requirements of the Act and must disapprove those that would interfere with the NAAQS or another applicable requirement of the Act. *Id.* § 7410(k)(3), (*l*). EPA may also partially approve and disapprove a SIP or approve one conditionally. *Id.* § 7410(k)(3)– (4).

This Court first commented on the Act's careful balance of state and federal responsibilities nearly 40 years ago:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly however,

> it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met . . . . * * * Congress . . . left to the States considerable latitude in determining specifically how the standards would be met. This discretion includes the continuing authority to revise choices about the mix of emission limitations.

Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 79, 87 (1975). *See also Union Electric Co. v. EPA*, 427 U.S. 246, 250 (1976) ("Each State is given wide discretion in formulating its plan, and the Act provides that the Administrator 'shall approve' the proposed plan if . . . it meets [the Act's] specified criteria."). This Court has made it clear that "[t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [Act]." *Train*, 421 U.S. at 79. In short, EPA's role in reviewing state plan revisions is ministerial.

B. The decision below allows EPA to claim authority beyond what Congress has conferred.

In this and other recent cases, *see infra* section I(C), EPA has sought to expand its authority with

respect to its review of SIP revisions at the expense of state prerogatives. This is not what Congress had in mind when it confined EPA to a merely ministerial role in such reviews.

In the present case, EPA disapproved of a Texas plan revision that would allow an affirmative defense against civil penalties (but not injunctive relief) for excess emissions resulting from planned startup, shutdown, and maintenance. 75 Fed. Reg. 68989, 68991 (Nov. 10, 2010) (disapproving 30 Tex. Admin. Code § 101.222(h)–(j)).[2]

EPA's objections were limited to the affirmative defense for planned maintenance.[3] Its ultimate bases for disapproving the maintenance defense were generalized and conclusory assertions that the affirmative defense could undermine the Act's enforceability and air quality attainment requirements and that it was inconsistent with the Act. 75 Fed. Reg. at 68993–95. But EPA's notice of disapproval fails to allege that the affirmative defense would interfere with any specific provision of the Act and thus also fails to describe *how* it

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[2] EPA simultaneously *approved* Texas's affirmative defense for *unplanned* startup, shutdown, and maintenance. 75 Fed. Reg. at 68991. *See* App. B for relevant portions of section 101.222.

[3] As discussed in section II, *infra*, EPA's sole basis for disapproving of the planned startup and shutdown provisions was that they could not be severed from the planned maintenance provision.

would interfere with an applicable provision of the Act. The Act requires more. *See* 42 U.S.C. § 7410(k)(3), (*l*).

Further, EPA's lack of clarity and precision has frustrated judicial review. *See Chenery*, 332 U.S. at 196–97 ("[T]he basis upon which [administrative action] purports to rest . . . must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.").

To the extent that EPA explains its disapproval, that explanation is no more than EPA's policy preference. EPA asserts: "We believe, however, that maintenance activities can and should be scheduled during process shutdowns." 75 Fed. Reg. at 68992. To the extent they are not, "the source should ensure that control equipment can be continuously effective during maintenance activities." *Id.* And to the extent that is not possible, "the State can consider establishing alternative limits that apply during [maintenance] events." *Id.* at 68993 n.8.

But EPA's bare opinion about how to best operate an industrial facility is not an interpretation of the Act. Nor is EPA's preference for establishing alternative limits rather than providing an affirmative defense. These appraisals implicate policy choice—not requirements of the

Act—and question the wisdom of the States' choices for emission limitations. They therefore tread on State prerogative.[4]

EPA also asserts that the affirmative defense "must be narrowly-tailored in order not to undermine enforceability of the SIP." *Id.* at 68992. But EPA's "narrowly-tailored" criterion appears nowhere in the Act or in its implementing regulations. Nor should the criterion be considered a valid interpretation of the Act, given that EPA never explains how this criterion relates to the Act. EPA's categorical rejection of *any* affirmative defense for planned maintenance demonstrates that EPA is imposing its policy preference.

In further support of its action, EPA points to a collection of agency memoranda, which, it alleges, interpret the requirements of the Act. *See id.* at 68992. Setting aside the question of what, if any, deference is owed to such memoranda, they do not support EPA's categorical rejection of the affirmative defense. Just the opposite. Describing something that sounds much like an affirmative defense, the memoranda expressly support the idea that a defendant facing enforcement for emissions

[4] Moreover, EPA's explanation is inconsistent with its own policy memoranda. *See infra* note 5 and accompanying text.

from planned maintenance activities should, upon demonstrating certain criteria, obtain relief.[5]

In short, EPA has failed to articulate a lawful basis for its disapproval of the affirmative defense for planned maintenance.[6] What it has articulated

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[5] *See, e.g.*, Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air, Noise & Radiation, to Reg'l Adm'rs, Regions I–X, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," Sept. 28, 1982 <http://www.epa.gov/ttn/oarpg/t1/memoranda/exempol09 2882.pdf> (accessed July 17, 2013) ("[E]xcess emission during periods of scheduled maintenance should be treated as a violation *unless a source can demonstrate that such emissions could not have been avoided* through better scheduling for maintenance or through better operation and maintenance practices." (emphasis added)).

[6] In addition to being unlawful, EPA's disapproval is arbitrary and capricious. Its generalized concerns about "air quality attainment," "enforceability," and "narrow tailoring" are at odds with the plain language of Texas's rule. Regarding "attainment," the affirmative defense is not available unless the operator "proves" that the emissions "did not cause or contribute to an exceedance of the NAAQS" or other "condition of air pollution." 30 Tex. Admin. Code § 101.222(c)(9). And regarding "enforceability" and "narrow tailoring," the criteria an operator must prove to establish the affirmative defense for planned maintenance are precisely the same criteria that establish the defense for unplanned startup, shutdown, and maintenance—*which EPA has approved*. *See id.* § 101.222(h).

amounts to agency preference that treads on prerogatives reserved to the States.

Facing the very quandary described in *Chenery*—namely, EPA's "vague and indecisive" description of how the affirmative defense would interfere with an applicable requirement of the Act—the panel below was "compelled to guess at the theory underlying the agency's action." 332 U.S. at 196–97. As discussed in section II, *infra*, the panel, despite *Chenery*, *did* guess and affirmed EPA's disapproval on bases EPA never articulated.

The panel's decision is a clear departure from this Court's precedent. Unless it is corrected, it will allow EPA preference to reign where Congress and this Court have recognized the States as the primary authority.

C. EPA's claim to such broad authority is repeated and deliberate.

This case is not an isolated event. EPA has repeatedly tested the boundaries of its assigned ministerial role, exhibiting a growing hostility towards cooperative federalism.

A pair of cases decided by the Fifth Circuit in 2012 illustrates that EPA desires its role in reviewing plan revisions to be anything but ministerial. Upon review of Texas's Pollution Control Project Standard Permit, EPA based its disapproval on its *own* interpretation of *state* law

and three extra-statutory standards. *Luminant Generation Co. v. EPA*, 675 F.3d 917, 930–32 (5th Cir. 2012). As in the present case, EPA failed to identify a single provision of the Act with which the proposed Standard Permit revision purportedly interfered. *Id.* at 926 ("Nowhere in either the proposed or final disapproval does the EPA explain how the PCP Standard Permit is inconsistent with any particular provision of the Act.").

Because this was contrary to the narrow ministerial role the Act assigned to EPA, the Fifth Circuit vacated the disapproval as arbitrary and capricious and outside the agency's statutory authority. *Id.* at 932 ("If Texas's regulations satisfy [the Act], the EPA must approve them, as § 7410(k)(3) requires. That is the full extent of the EPA's authority in the SIP-approval process because that is all the authority that the CAA confers."). Noting that EPA referred to its "discretionary" authority when reviewing SIP submissions, the Fifth Circuit admonished that "[t]his statement reflects a misapprehension by the EPA of its authorized role in the SIP-approval process. As discussed above, the EPA does not possess any 'discretionary authority in that process'." *Id.* at 928 n.8 (citation omitted).

The second case concerned Texas's Flexible Permit Program. After eighteen years of silence, EPA disapproved of this revision based on its interpretation of Texas law, its preference for different wording in the Texas regulations, and

policies that seemed to be "invented . . . for the sole purpose of disapproving Texas's proposal." *Texas v. EPA*, 690 F.3d 670, 682–83 (5th Cir. 2012). As the Fifth Circuit tactfully put it, this "surely is not what Congress intended by cooperative federalism, particularly after what the EPA concedes was delay far in excess of the statutory deadline." *Id.* at 680 n.6.

But despite twice being admonished to remain within the confines of its ministerial role, the decision below has emboldened EPA. In February, EPA proposed a rule that articulates a new policy for excess emissions during startup, shutdown, and malfunctions, and that calls on thirty-six States to remove the affirmative defenses for startup and shutdown from their implementation plans. 78 Fed. Reg. 12460 (Feb. 22, 2013). In its notice of proposed rulemaking, EPA repeatedly cites (an earlier version of) the panel opinion as legal justification for its action, arguing that its interpretation of the Act is reasonable. *Id.* at 12471 n.29; *see also id.* at 12470 n.24; 12476 n.51; 12505 n.124.

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[7] The panel issued three opinions. The present opinion, on which the court issued its mandate, is dated March 25, 2013. *Luminant Generation Co.*, 714 F.3d 841. Pet. App. A at 1a. It supercedes an October 12, 2012, opinion, *Luminant Generation Co.v. EPA*, 699 F.3d 427 (5th Cir. 2012) (withdrawn). Pet. App. B at 35a. That opinion, in turn, superceded an opinion dated July 30, 2012, also withdrawn. Pet. App. C at 72a.

But EPA's ultimate interpretation is that it enjoys the discretion to define the substantive requirements of a State's implementation plan. EPA's admission is express:

> In summary, the EPA believes that the CAA provides . . . the EPA in its role as approver of SIPs, some discretion in defining the substantive requirements that are necessary to attain and maintain the NAAQS, protect PSD increments, and protect visibility, or to meet other CAA requirements.

Id. at 12472. The *Amici* States believe quite the opposite. As discussed in section I(A), *supra*, the Clean Air Act gives the States, and the States alone, the sole discretion to determine the substantive requirements of their respective implementation plans, so long as they do not interfere with the NAAQS or another applicable requirement of the Act. EPA's duty with regard to its review of plan revisions is non-discretionary. The Act is express: EPA "*shall* approve" submittals that meet the applicable requirements of the Act and "*shall not* approve" revisions that would interfere with an applicable requirement. 42 U.S.C. § 7410(k)(3), (*l*) (emphasis added). The *Amici* States urge the Court to grant Luminant's petition before EPA roams farther from its proper role.

II. The decision below violates fundamental principles of administrative law by rationalizing *post hoc*.

As discussed in section I(B), *supra*, EPA failed to allege that the affirmative defense for planned maintenance would interfere with a particular provision of the Act, much less explain *how* it would interfere. Instead, EPA offered generalized conclusions that the defense was inconsistent with the Act, along with explanations of its own policy preferences.

The panel below therefore should have granted industry's petition for review and remanded the matter to EPA. Instead, it denied the petition, allowing EPA's disapproval to stand. 714 F.3d at 860. Pet. App. A at 33a–34a.

The panel's basis for affirming EPA was that "EPA interprets section 7413 of the Act as only authorizing affirmative defenses that are narrowly tailored to address periods of unavoidable, excess emissions," and that "the agency concludes that section 7413 does not authorize an affirmative defense for planned [startup, shutdown, and maintenance] activity." *Id.* at 856. Pet. App. A at 25a.

But EPA made no such interpretation of section 7413. And EPA reached no such conclusion about section 7413. Indeed, EPA's notice of proposed action never mentions section 7413. *See* 75 Fed.

Reg. 26892 (May 13, 2010). And its final notice cites section 7413 (CAA § 113) only for the proposition that Texas's affirmative defense criteria "are consistent with" and do not "impermissibly limit" section 7413(e) and that the section 7413(e) penalty assessment criteria may be raised in an enforcement action for excess maintenance emissions. 75 Fed. Reg. at 68992, 68999. In the dissent from the denial of the motion for rehearing en banc, Judge Edith Jones summarizes: "Simply put, before the panel issued its original opinion, EPA never stated that it disapproved the affirmative defense for planned maintenance because the defense did not comport with § 7413." Pet. App. E at 119a–20a.

In any event, section 7413 is not an appropriate basis for disapproval. The applicable requirements for state implementation plans are not found in section 7413, but in section 7410. *See* 42 U.S.C. § 7410; *Virginia v. EPA*, 108 F.3d 1397, 1406–10 (D.C. Cir. 1997) (examining the history of requirements applicable to state implementation plans). And as Judge Jones points out, EPA could apply section 7413 to justify nearly any preference:

> [Section] 7413 simply cannot bear the weight of the agency's duty to justify its disapproval. Indeed, if § 7413 is sufficient here, it would seem applicable to nearly any disapproval of a SIP that EPA might conjure: SIP violations will always

> involve potential penalties, and variations in SIPs that EPA doesn't like can always be said to affect the amount of penalties. But that outcome would be at variance with EPA's statutory *duty* to allow states to fashion their own SIPs.

Pet. App. E at 121a–22a (emphasis in original). Thus, even if EPA were to adopt the panel's reasoning on remand, it would not suffice.

Although EPA was vague and conclusory elsewhere, it did clearly articulate its basis for disapproving of the affirmative defense for excess emissions from planned startup and shutdown activities. It determined, albeit erroneously,[8] that these defenses should be disapproved because they are not severable from the affirmative defense for excess emissions from planned maintenance activities. 75 Fed. Reg. at 68991. But the decision below lumps these defenses together with the maintenance defense as being inconsistent with section 7413, and thus misreads the record and substitutes the panel's rationale for EPA's. *See* 714 F.3d at 857. Pet. App. A at 31a.

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[8] *See* TEX. GOV'T CODE § 311.032(c) (providing that when one provision or application of a statute is invalid, but others may still be given effect, the provisions or applications are severable).

By substituting the panel's rationale for EPA's and making *post hoc* rationalizations for EPA's disapproval, the decision below violates fundamental principles of administrative law. *Chenery*, 332 U.S. at 196; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). Further, in contravention of the Clean Air Act, it allows EPA the discretion it desires to disapprove of state plans based on its own preference, rather than a clear and precise statement of how the plan would interfere with an applicable requirement of the Act.

This improperly enlarges EPA's authority at the expense of the States'. Because this case will be felt each time EPA reviews a state implementation plan revision, it is critically important to the States that the Court hear this case.

CONCLUSION

The *Amici* States urge the Court to grant the petition.

Respectfully submitted.

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APPENDIX A

TEXAS GOVERNMENT CODE § 311.032
Severability of Statutes

(a) If any statute contains a provision for severability, that provision prevails in interpreting that statute.

(b) If any statute contains a provision for nonseverability, that provision prevails in interpreting that statute.

(c) In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.

CREDIT(S)

Acts 1985, 69th Leg., ch. 479, § 1, eff. Sept. 1, 1985.

Current through Chapters effective immediately through Chapter 36 of the 2013 Regular Session of the 83rd Legislature

APPENDIX B

30 Texas Administrative Code § 101.222 (Tex. Comm'n on Envtl. Quality) (excerpts)

(a) Excessive emissions event determinations. The executive director shall determine when emissions events are excessive. To determine whether an emissions event or emissions events are excessive, the executive director will evaluate emissions events using the following criteria:

(1) the frequency of the facility's emissions events;

(2) the cause of the emissions event;

(3) the quantity and impact on human health or the environment of the emissions event;

(4) the duration of the emissions event;

(5) the percentage of a facility's total annual operating hours during which emissions events occur; and

(6) the need for startup, shutdown, and maintenance activities.

* * *

(c) Unplanned maintenance, startup, or shutdown activity. Emissions from an unplanned maintenance,

startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves the emissions were from an unplanned maintenance, startup, or shutdown activity, as defined in § 101.1 of this title (relating to Definitions), and all of the following:

(1) for a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of § 101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements). For an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of § 101.201 of this title and demonstrates that reporting under § 101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the activity, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the periods of unauthorized emissions from any unplanned maintenance, startup, or

shutdown activity could not have been prevented through planning and design;

(3) the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in an unplanned maintenance, startup, or shutdown mode resulting in unauthorized emissions were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emissions monitoring systems were kept in operation if possible;

(8) the owner or operator actions during the period of unauthorized emissions from any unplanned maintenance, startup, or shutdown

activity were documented by contemporaneous operating logs or other relevant evidence; and

(9) unauthorized emissions did not cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution.

* * *

(e) Opacity events resulting from unplanned maintenance, startup, or shutdown activity. Excess opacity events, or other opacity events where there was no emissions event, that result from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves the opacity resulted from an unplanned maintenance, startup, or shutdown activity, as defined in § 101.1 of this title, and all of the following:

(1) for excess opacity events that result from a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of § 101.211 of this title. For excess opacity events that result from an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of § 101.201 of this title and demonstrates that reporting pursuant to § 101.211(a) of this title

was not reasonably possible. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the opacity was caused by a sudden, unavoidable breakdown of equipment or process beyond the control of the owner or operator;

(3) the periods of opacity could not have been prevented through planning and design;

(4) the opacity was not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(5) if the opacity event was caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(6) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing opacity;

(7) the frequency and duration of operation in a startup or shutdown mode resulting in opacity were minimized;

(8) all emissions monitoring systems were kept in operation if possible;

(9) the owner or operator actions during the opacity event were documented by contemporaneous operating logs or other relevant evidence; and

(10) the opacity event did not cause or contribute to a condition of air pollution.

(f) Obligations. Subsections (b)--(e) and (h) of this section do not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to an emissions event or a maintenance, startup, or shutdown activity. Any affirmative defense provided by subsections (b)--(e) and (h) applies only to violations of state implementation plan requirements. An affirmative defense cannot apply to violations of federally promulgated performance or technology based standards, such as those found in 40 Code of Federal Regulations Parts 60, 61, and 63. The affirmative defense is available only for emissions that have been reported or recorded.

(g) Frequent or recurring pattern. Evidence of any past event subject to subsections (b)--(e) of this section is admissible and relevant to demonstrate a frequent or recurring pattern of events, even if all of the criteria in that subsection are proven.

(h) Planned maintenance, startup, or shutdown activity. Unauthorized emissions or opacity events from a maintenance, startup, or shutdown activity that are not unplanned that have been reported or recorded in compliance with § 101.211 of this title are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the criteria listed in subsection (c)(1)--(9) of this section for emissions, or subsection (e)(1)--(9) of this section for opacity events and the following:

(1) the owner or operator has filed an application to authorize the emissions or opacity by the following dates:

(A) for facilities in Standard Industrial Classification (SIC) code 2911 (Petroleum Refining), one year after the effective date of this section;

(B) for facilities in major group SIC code 28 (Chemicals and Allied Products), except SIC code 2895, two years after the effective date of this section;

(C) for facilities in SIC code 2895 (Carbon Black), four years after the effective date of this section;

(D) for facilities in SIC code 4911 (Electric Services), five years after the effective date of this section;

(E) for facilities in SIC codes 1311 (Crude Petroleum and Natural Gas), 1321 (Natural Gas Liquids), 4612 (Crude Petroleum Pipelines), 4613 (Refined Petroleum Pipelines), 4922 (Natural Gas Transmission), 4923 (Natural Gas Transmission and Distribution), six years after the effective date of this section; and

(F) for all other facilities, seven years after the effective date of this section.

(2) an owner or operator who filed an application listed in paragraph (1) of this subsection has provided prompt response for any requests by the executive director for information regarding that application.

(i) The affirmative defense in subsection (h) of this section will expire upon the earlier of one year after the application deadlines in subsection (h)(1)(A) and (C)--(F) of this section, or the issuance or denial of a permit applied for under subsection (h)(1)(A) and (C)--(F) of this section, or voidance of an application filed under subsection (h)(1)(A) and (C)--(F) of this section. The affirmative defense in subsection (h) of this section will expire upon the earlier of two years after the application deadline in subsection (h)(1)(B) of this section or the issuance or denial of a permit

applied for under subsection (h)(1)(B) of this section, or voidance of an application filed under subsection (h)(1)(B) of this section. If the permit application remains pending after the affirmative defense expires, the commission will use enforcement discretion for all claims in enforcement actions brought for excess emissions from planned maintenance, startup, or shutdown activities, other than claims for administrative technical orders and actions for injunctive relief for which the owner or operator proves the criteria in subsections (c) and (e) of this section, until the issuance or denial of a permit applied for under subsection (h)(1) of this section, or voidance of an application filed under subsection (h)(1) of this section.

(j) The executive director shall process permit applications referenced in subsection (h) of this section in accordance with the schedule set out in § 116.114 of this title (relating to Application Review Schedule).

Source: The provisions of this § 101.222 adopted to be effective September 12, 2002, 27 TexReg 8499; amended to be effective January 8, 2004, 29 TexReg 118; amended to be effective June 23, 2005, 30 TexReg 3593; amended to be effective January 5, 2006, 30 TexReg 8884.