



Deviation/STEERS Reporting: Potential Enforcement, Litigation, and News Media Impacts

AWMA

November 2011

Presented by: **Jed Anderson, The AL Law Group and
Malcolm Richards, Titan Engineering**



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Plaintiff's Exhibit A



STEERs Emission Event Reporting Database

Regulated entity name	ABC Chemical Plant	Physical location	3515 COUNTY RD 420
Regulated entity RN number	RN1324658323	City, County	POINT CITY, HARRIS
Type(s) of air emissions event:	EMISSIONS EVENT	Event began:	06/09/2009 8:05PM
This is based on the:	FINAL REPORT	Event ended:	06/12/2009 5:51PM
Cause	CATASTROPHIC LINE FAILURE OCCURRED DUE TO EXCESSIVE CORROSION AND FATIGUE CAUSED BY AGE		
Action taken	REPAIRED AND REPLACED EQUIPMENT		

**Slide is fictional and only for demonstration purposes



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Examples of Emission Event Descriptions We Found on the Internet



“**Catastrophic** seal failure . . .”

“The compressor was brought down suddenly [. . .] as **excessive corrosion** caused leaks”

“Electricians tried to locate the problem because it kept acting differently all the time.”

“[T]he rupture disk failed . . . due to **fatigue caused by age.**”

“Production people did something that caused our inlet rates to keep steadily climbing.”

“Operator was distracted due to working in a severe thunderstorm.”

“He made adjustments on the unit . . . but was not aggressive enough in his adjustments . . .” [sic.]

“**Lost just about everything at the plant.**”

(see <http://www11.tceq.texas.gov/oce/eer/index.cfm>).



Deviation/STEERS Reporting Concerns

Why should I be concerned about wording and representations in deviation/STEERS reports?

- ❖ A company's stock dropped because of a STEERS report—temporarily losing the company **a billion dollars**. A facility operator reported in STEERS that a “*catastrophic line failure occurred*”. The report was picked up by a national news service and resulted in a billion dollar short-term stock loss according to the company.
- ❖ STEERS reports are **available via the internet** for the public, plaintiff's attorneys, the press, and regulators to review and use for lawsuits, newspaper articles, enforcement actions, permit challenges, rule developments, etc. (see <http://www11.tceq.texas.gov/oce/eer/index.cfm>).
- ❖ Companies must “reasonably inquire” into Title V compliance. Both the company and personnel are potentially subject to **civil and criminal** liability.
- ❖ Companies overseas are apparently making a business out of collecting information via the internet and **packaging and selling this information to plaintiff's attorneys** in the United States.
- ❖ Deviation reports are also public information. Although not currently available on-line, it is likely a matter of time.
- ❖ TCEQ, EPA, plaintiff's attorneys, and the public are increasingly turning toward STEERS reports and deviation reports as evidence and basis for lawsuits and enforcement actions. The Texas legislature recently **increased penalty amounts from \$10k to \$25k per day** which likely makes deviation/STEERS reporting that much more relevant.

DEVIATION REPORTING



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Annual Compliance Certification and Deviation Reports

- ❖ After an initial authorization to operate (GOP) or permit issuance (SOP), the owner or operator must certify compliance with the terms and conditions of the permit for at least every 12 month period following the initial issuance. Annual compliance certifications should be submitted no later than 30 days after the end of the certification period.
- ❖ Additionally, the owner or operator shall report, in writing, **all instances of deviations**, the probable cause of the deviations, and any corrective actions or preventative measures taken for each emission unit covered by a GOP or SOP.
- ❖ A deviation report should be submitted for at least each six-month period after permit issuance or at the frequency required by an applicable requirement which requires more frequent reporting. However, no report is required if no deviations occurred over the six-month reporting period.
- ❖ The deviation reports should be submitted no later than 30 days after the end of each reporting period.



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CERTIFICATION OF TRUTH by Responsible Official (Title V/Deviations)

I, _____, the _____ am authorized to make this submission on *(Name printed or typed) (DR or ADR) behalf of the owners and operators of the source or units for which the submission is made.* ***I certify under penalty of law that I have personally examined, and am familiar with,*** the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements are to the best of my knowledge and belief true, accurate, and complete. ***I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information,*** including the possibility of ***fine or imprisonment.*** The above certification is for the statements and information dated during the time period in IV.A below, OR on a specific date(s) in IV.B below:



Deviation Background Discussion

- ❖ TCEQ defines “deviation” as, “Any **indication** of noncompliance with a term or condition of the [Federal Operating] permit, as found using, at a minimum, compliance method data from monitoring, record keeping, reporting, or testing required by the permit.” 30 TAC §122.10(3)
 - EPA defines “deviation” as “any situation in which an emission unit fails to meet a permit term or condition. A deviation is not always a violation.” 40 C.F.R. § 71.6(a)(3)(iii)(C).
 - EPA said, “Texas' use of the phrase “any indication of noncompliance with a term or condition of the permit” is similar to EPA’s definition of deviation - “any situation in which an emission unit fails to meet a permit term or condition”. Therefore, the two definitions of deviation are sufficiently similar to cover the same situations. See <http://www.epa.gov/region7/air/title5/t5memos/txcitizen.pdf>
- ❖ “The goal of deviation reporting is to allow the company, citizens, and the regulatory agencies to know when situations that **may indicate potential noncompliance** occur and what action was taken to solve those situations.” --TCEQ’s Deviation Guidance: http://www.tceq.texas.gov/assets/public/compliance/field_ops/guidance/devrep_guidanceev3.pdf



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Deviation Background Discussion

- ❖ **Indication** ≠ Violation
- ❖ **Indication** ≠ Non-compliance
- ❖ **Indication** ≠ That it for sure happened



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Deviation Background Discussion

From TCEQ's Deviation Report Instructions:

Cause of Deviation: *Enter brief summary of the cause of the deviation (limited to 80 characters).*

Corrective Action Taken: *Provide a brief description of the corrective action taken to end the deviation or avoid future similar events (limited to 80 characters).*



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General Legal Suggestions in Preparing the Deviation Report

- ❖ **Always and above all be truthful and accurate.**
- ❖ Write your deviation report descriptions as if these descriptions would be read in open court to a jury—because they just might be.
- ❖ Write your deviation reports keeping in mind that they will likely be reviewed by regulators for enforcement purposes.
- ❖ Write your deviation reports as if they might be quoted in the Houston Chronicle.
- ❖ Try to avoid using language that might be inflammatory.
- ❖ Use words such as “potential”, “appears that”, “may have”, etc. where appropriate since a deviation is not a violation and later you might discover there was no deviation in the first place. This is especially so where there is some doubt into the underlying circumstances.
- ❖ Try to lead with a positive in your deviation description where appropriate and lead with statements that point out this is a deviation not a violation. Ex./:
 - “No reportable quantities were exceeded when . . .”
 - “A Title V deviation was incurred when . . .”



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General Legal Suggestions in Preparing the Deviation Report (cont.)

- ❖ Include where possible measures implemented to prevent reoccurrence.
- ❖ Deviation descriptions do not need to be lengthy. When in doubt probably best to not include more language. TCEQ's guidance again says 80 characters long.
- ❖ TCEQ stated that if emissions event reported in STEERS, then much of information need not be repeated in deviation report—**including description of the cause of the deviation and the remediation action**. It is generally wise therefore to not repeat this information in the deviation report so as not to create potential inconsistencies.

(see http://www.tceq.texas.gov/assets/public/compliance/field_ops/guidance/devrep_guidanceev3.pdf).

- ❖ If deviation was discovered as part of an audit under the Texas Environmental Health & Safety Audit Act, make sure to so indicate and I would suggest leading out with this fact.
- ❖ If deviation being addressed through another enforcement effort (NOV/NOE), consent decree, etc. then note this in the description and/or corrective action.
- ❖ If deviation raised in a previous deviation report, make sure to so indicate.
- ❖ Consider TCEQ Guidance on Duration of Event/Number of Deviations.



General Legal Suggestions in Preparing the Deviation Report (cont.)

❖ Keep in mind affirmative defense criteria when preparing deviation descriptions and include affirmative aspects of criteria where appropriate (e.g. if you later want to pursue an affirmative defense you will not want the deviation to have conflicting information)

[...]

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

(3) the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded, and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

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

(8) the owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;

(9) the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;

(10) the percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high;



Other Reporting Requirements May Satisfy Deviation Reporting Obligations

From TCEQ Guidance:

There are a large number of existing reporting requirements found in the rules that already require a company to indicate when specific rule requirements may not have been met. These existing reports, provided three additional obligations are met, can be used to satisfy the deviation reporting requirements of the Operating Permits program. These three additional obligations are:

- *The report must clearly identify which Operating Permit is involved.*
- *The report must contain at a minimum the information as described in the Deviation Report.*
- *The report must be Certified by the Responsible Official.*

Provided they are modified to meet the stated criteria, the following are examples of existing reporting that could be used to fulfill the deviation reporting obligation:

Emission Event final reports, provided they are submitted in hardcopy format for the public file, and contain the same information required by the Deviation Report.

- *Existing NSPS (40 CFR60),*
- *NESHAPS (40 CFR 61), or*
- *MACT standard (40 CFR 63) required reporting.*
- *Reporting required in the relevant portions of a PSD permit.*

(see http://www.tceq.texas.gov/assets/public/compliance/field_ops/guidance/devrep_guidancecv3.pdf).



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STEERS REPORTING



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STEERS Reporting Example

Which of the following STEERS descriptions would you rather have read to a jury?

“Failure of a rupture disc that resulted in a butadiene emissions release to the atmosphere”

Or

“Rupture disc performed as designed”

The law requires you to provide a truthful and accurate description of your deviation/upset. ***You do not however need to further legally harm or endanger yourself as you go about doing this.***



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EXAMPLE OF THE POWER OF LANGUAGE

TCEQ PENALTY POLICY

An emission event is “Major” if the amounts are Significant and it “exceeds levels that are protective.”

An emission event is “Moderate” if the amounts are Significant but it does not exceed levels that are protective.



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EXAMPLE OF THE POWER OF LANGUAGE (cont.)

MODELING RESULT

“It can be seen that the exceedance of the ESL occurred in only one hour out of the 70 hours of the emissions event. Predicted impacts were below the ESL for all other hours of the event.”

TCEQ CONCLUSION

“Human health or the environment . . . Has been exposed to pollutants which exceed levels that are protective of human health or environmental receptors as a result of this violation.

BETTER MODELING RESULT

“Because the ESL did not exceed 4 times the ESL for more than 10 hours, the emissions did not exceed levels that are protective of human health or environmental receptors.”



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STEERS Based on Emission Event Reporting Rules

► Initial Upset Reporting - §101.201(a)

(a) The following requirements for reportable emissions events apply.

(1) As soon as practicable, but not later than 24 hours after the discovery of an emissions event, the owner or operator of a regulated entity shall:

(A) determine if the event is a reportable emissions event; and

(B) notify the commission office for the region in which the regulated entity is located, and all appropriate local air pollution control agencies with jurisdiction, if the emissions event is reportable.

(2) The initial 24-hour notification for reportable emissions events, with the exception of emissions from boilers or combustion turbines referenced in the definition of reportable quantity (RQ) in §101.1 of this title (relating to Definitions) for each regulated entity, must at a minimum,

identify for each emissions point with emissions that exceed an RQ:

(A) the name of the owner or operator of the regulated entity experiencing an emissions event;

(B) the commission Regulated Entity Number of the regulated entity experiencing an emissions event, if a Regulated Entity Number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the common name of the process units or areas, the common name of the facilities that incurred the emissions event, and the common name of the emission points where the unauthorized emissions exceeded an RQ were released to the atmosphere;

(D) the date and time of the discovery of the emissions;

(E) the estimated duration of the emissions;

(F) the compound descriptive type of the individually listed compounds or mixtures of air contaminants released during the emissions event, in the definition of RQ in §101.1 of this title that are known through common process knowledge, past engineering analysis, or testing to

have equaled or exceeded the RQ; (G) the estimated total quantities for those compounds or mixtures described in subparagraph (F) of this paragraph;

(H) the best known cause of the emissions event at the time of the initial 24-hour notification, if known; and

(I) the actions taken, or being taken, to correct the emissions event and minimize the emissions.



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STEERS Based on Emission Event Reporting Rules

► Final Upset Reporting - §101.201(b) and (c)

(b) The owner or operator of a regulated entity experiencing an emissions event shall create a final record of all reportable and non-reportable emissions events as soon as practicable, but no later than two weeks after the end of an emissions event. Final records must be maintained on-site for a minimum of five years and be made readily available upon request to commission staff or personnel of any air pollution program with jurisdiction. If a regulated entity is not normally staffed, records of emissions events may be maintained at the staffed location within Texas that is responsible for the day-to-day operations of the regulated entity.

(1) The final record of a reportable emissions event must identify for all emission points involved in the emissions event: [. . .]

(J) **the best known cause of the emissions event at the time of reporting;**

(K) the actions taken, or being taken, to correct the emissions event and minimize the emissions; and

(L) any additional information necessary to evaluate the emissions event.

(c) For all reportable emissions events, **if the information required in subsection (b) of this section differs from the information provided in the initial 24-hour notification** under subsection (a) of this section, the owner or operator of the regulated entity shall submit a copy of the final record to the commission office for the region in which the regulated entity is located and to appropriate local air pollution agencies with jurisdiction no later than two weeks after the end of the emissions event. **If the owner or operator does not submit a record under this subsection, the information provided in the initial 24-hour notification under subsection (a) of this section will be the final record of the emissions event,** provided the initial 24-hour notification was submitted electronically in accordance with subsection (g) of this section.



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STEERS Initial Notification Guidance

Cause of Emission

Enter the cause of the emission event or Excess Opacity event in the space provided. There is no limit as to how many characters you can enter to explain the cause of the event. Tip: If you need to enter a lengthy explanation, type it in another application such as Word or Notepad prior to working on this section of your final report. [. . .]

Actions Being Taken

Enter the action being taken to minimize emissions and/or correct the situation of the emission or Excess Opacity event in the space provided. There is no limit as to how many characters you can enter to explain the actions being taken. Tip: If you need to enter a lengthy explanation, type it in another application such as Word or Notepad prior to working on this section of your final report. [. . .].

Basis Used to Determine Quantities

Enter the basis used to determine quantities and any additional information needed to evaluate the event in the space provided. [. . .]

Affirmative Defense

The following question must be answered either "YES" or "NO" before the initial notification can be submitted:

"The owner or operator of the regulated entity asserts this reported event or activity, as applicable, meets the applicable affirmative defense criteria."

Before 04/13/2006, this question was not asked; the answer to it has been defaulted to "no". This does not indicate the TCEQ believes that the affirmative defense criteria have not been met. See

<https://www6.tceq.state.tx.us/steers/help/aeme/create.html>

****Keep in mind "ditto" function for repeating occurrences of the same or similar upsets as well as the "batch" submission ability**



Changes to Initial STEERS Notification

Verify or Repudiate TCEQ Incident

Review the information which is displayed on the page. If the information which is displayed is correct click Verify. Clicking the "Verify" button signifies that you agree that the data displayed in this report is the exact data or is acceptably equivalent to the data provided by you or some other authorized individual for the specified regulated entity. The verification only pertains to the accuracy of how the submitted data was entered into the TCEQ data system, not the validity of the data itself. [. . .]

Once you click the "Verify" button, the "Confirm Records to Send to TCEQ" page will display. Verify the information you will be submitting to the TCEQ. The "Publication Status" will reflect whether the incident has been verified, repudiated, made public or reported. If you agree with the information displayed is what you want to submit to the TCEQ, enter your password in the space provided at the bottom of the page. [. . .]

If you do not agree that the information displayed is correct click Repudiate. [. . .]

Please provide a more detailed description for the basis of your repudiation in the space provided, if necessary. [. . .]

Once you verify a specific incident, the incident will be made available for public viewing at [Air Emission Event Report Database](#)

If you repudiate an incident, it will not be made public. The Region office is sent an email regarding the reason for your repudiation. The disputed data is edited and the incident is made available again for verification or repudiation.



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Preparing the Final STEERS Report

TAKE TIME TO EVALUATE:

Cause of Emission Event or Excess Opacity Event, or Reason for Scheduled Activity

Actions Taken or Being Taken, to Minimize Emissions and/or Correct the Situation

Basis Used to Determine Quantities and Any Additional Information Necessary to Evaluate the Event

Affirmative Defenses



General Legal Suggestions in Preparing STEERS Reports

- ❖ Truthful and accurate.
- ❖ Jury-ready.
- ❖ Front-page newspaper worthy.
- ❖ Write for regulators/enforcement.
- ❖ Non- inflammatory.
- ❖ Repudiate if necessary.
- ❖ Use words such as “potential”, “appears that”, “may have”, etc. where appropriate.
- ❖ Lead description entries with positive facts or extenuating circumstances where appropriate.
- ❖ Include corrective actions or measures to prevent reoccurrence.
- ❖ Brief.
- ❖ Think Corrective Actions.



Why Again Be Concerned with STEERS Reporting Statements?

Why Be Concerned?

- ❖ Impact on stock or public perception.
- ❖ **Available via the internet.**
- ❖ **Possible Civil and Criminal** liability (based on reasonable inquiry).
- ❖ Companies **packaging and selling this information to plaintiff's attorneys.**
- ❖ TCEQ, EPA, plaintiff's attorneys, and public reliance.
- ❖ **Increased penalty amounts from \$10k to \$25k per day.**



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STEERS and Litigation Consideration

CITIZEN'S SUIT LETTER

National Environmental Law Center letter to ExxonMobil: http://www.sierraclub.org/environmentallaw/lawsuits/docs/Exxon-First-Notice-Letter_11.30.09.pdf:

*“ExxonMobil has, on numerous occasions, emitted air pollutants into the atmosphere from the Baytown Complex in amounts that exceed applicable annual permit limits. A description of such permit violations at the Baytown Complex resulting solely from emission events occurring from November 2004 through November 2009 is contained in the attached Table 4. For each such violation of an annual permit limit, Table 4 contains: the applicable state permit number; the number of the emission point from which the emissions occurred; the rolling 12-month period during which each violation occurred; and the type and amount of pollutant emitted. **This information is taken directly from ExxonMobil’s STEERS reports to TCEQ”***

Update on TCEQ Revisions to DEVIATION REPORTING



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Overview of TCEQ Deviation Report Guidance

CHANGES SINCE THE 2008 VERSION

NOTE: This single guidance document replaces the two documents published in 2008 for the deviation reporting and permits compliance certification.

1. Deviation Report and Compliance Certification Period Start and End Dates Based on Specific Circumstances: Permit Revocation, Termination, or Re-issuance.
2. Addressing Reports and Certifications for Portables (Regional Jurisdiction).
3. The Requirements Subject to Deviation Reporting, Site Operating Permit (SOP): Final version of NSR permit application representations relied upon to issue or amend the NSR permit.
4. Reporting Unauthorized Emissions: Citing Unauthorized Emissions.



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Overview of TCEQ Deviation Report Guidance

CHANGES SINCE THE 2008 VERSION (CONTINUED)

NOTE: This single guidance document replaces the two documents published in 2008 for the deviation reporting and permits compliance certification.

5. Reporting Unauthorized Emissions: Liquid Spills, Drips, and Leaks.
6. Appendix A Reasonable Inquiry: Guidance for Establishing Failure to Report a Deviation.
7. Appendix C: EPA Letter, Risk Management Plan and Process Safety Management (but the letter was referred to in the past guidance).



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Overview of TCEQ Deviation Report Guidance

1. PERIOD START AND END DATES BASED ON SPECIFIC CIRCUMSTANCES

Permit Revocation or Termination

Per 30 TAC §122.360, The Environmental Protection Agency (EPA) may revoke, terminate, revise, or re-issue a Title V Permit.

- ❖ Revoked or Terminated Title V Permit holders may stop Deviation Reporting and Periodic Compliance Certification (PCC) .
 - Must NOT have other obligations to report such as an Agreed Order, Consent Decree, or compliance agreement.
- ❖ Final Deviation Report
 - Must cover the first day after the last Deviation Reporting period to the Revocation or Termination date.
- ❖ Final PCC
 - Must cover the first day after the last PCC period to the Revocation or Termination date.



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Overview of TCEQ Deviation Report Guidance

1. PERIOD START AND END DATES BASED ON SPECIFIC CIRCUMSTANCES

Permit Re-Issuance

Per 30 TAC §122.360, The Environmental Protection Agency (EPA) may revoke, terminate, revise, or re-issue a Title V Permit.

- ❖ The Re-Issuance date of a Title V Permit works the same as the Initial Issuance date of the Title V Permit.
- ❖ The Re-Issuance date is the first day of the compliance period.
- ❖ The Deviation Report
 - Must cover the day of re-issuance to six months after and must be submitted within 30 days of the end of the compliance period.
- ❖ The PCC
 - Must cover the day of re-issuance to one year after and must be submitted within 30 days of the end of the compliance period.



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Overview of TCEQ Deviation Report Guidance

2. ADDRESSING REPORTS AND CERTIFICATIONS FOR PORTABLES

This is guidance for portable sources such as Air Curtain Incinerator GOP Permits.

- ❖ Since Portable Sources may operate in more than one TCEQ Region, the Deviation Report and PCC should be submitted to the regional office in which the permit holder is operated or headquartered.
- ❖ If the Portable Source will remain in one TCEQ Region during the period, the permit holder has the *option* to submit the report to either:
 - The Region the permit holder is operated or headquartered.
 - The Region the source is operated during the period (this requires prior notice to the region).
- ❖ The permit holder is responsible for complying with geographic based State Rules and noting deviations if it is operated in an affected geographic location.



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Overview of TCEQ Deviation Report Guidance

3. REQUIREMENTS SUBJECT TO DEVIATION REPORTING FOR SOP's

- ❖ Final New Source Review (NSR) Permit.
- ❖ Final NSR permit application representations relied upon by TCEQ to issue NSR Permit.
- ❖ *This is now in writing in a Guidance Document.*



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Overview of TCEQ Deviation Report Guidance

4. REPORTING UNAUTHORIZED EMISSIONS: CITING UNAUTHORIZED EMISSIONS

- ❖ 30 TAC §116.110 Should be used for all unauthorized emissions.
- ❖ All other non compliance issues should be listed as well
 - Example: exceedance of an NSR permit limit should also list the NSR authorization.



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Overview of TCEQ Deviation Report Guidance

5. REPORTING UNAUTHORIZED EMISSIONS: LIQUID SPILLS, DRIPS, AND LEAKS

- ❖ Must look at rule is potentially violated.
- ❖ Audio, Visual, Olfactory (AVO) monitoring condition may cause this to be a deviation.
- ❖ Resulting Air Emissions may be a deviation.
 - Did this result in a reportable event?
 - Did this result in a recordable event?
- ❖ Reportable and Recordable Events Must be reported as a deviation.



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Overview of TCEQ Deviation Report Guidance

6. APPENDIX A – REASONABLE INQUIRY: GUIDANCE FOR ESTABLISHING FAILURE TO REPORT A DEVIATION

- ❖ Deviations that must be recorded as a deviation (lack of recording these deviations is automatically another deviation):
 - Noncompliance with a permit term based on information required by the permit.
 - Subject of a NOV or NOE related to a permit requirement and received by the permit holder during the immediate past deviation reporting periods.
 - Lack of NSR authorization for a new or modified facility owned or operated within the area covered by the TV permit, by the permit holder or by a contractor working for the permit holder, and regulated by the subject Title V permit where such new construction or modification triggers NSR per the regulations or statute.
 - Violations reported through an audit program by the permit holder. The Texas Environmental, Health, and Safety Audit Privilege Act addresses immunity from penalties. This limited immunity does not affect the TCEQ's authority to seek injunctive relief, make technical recommendations, or otherwise enforce compliance; therefore, the violation/deviation must be reported under Title V regardless of immunity status.
 - Reportable emissions events recorded in STEERS.
 - “Non-reportable” emissions events as recorded by the permit holder.
 - Until they are corrected, noncompliance situations reported in the form OP-ACPS: Application Compliance Plan and Schedule during permit renewal.



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Overview of TCEQ Deviation Report Guidance

6. APPENDIX A – REASONABLE INQUIRY: GUIDANCE FOR ESTABLISHING FAILURE TO REPORT A DEVIATION (CONTINUED)

- ❖ Deviations that are expected to be recorded as a deviation (lack of recording these deviations is highly likely another deviation):
 - Violations discovered through a separate on-site investigation or records review by a regulatory entity having jurisdiction (TCEQ, local programs acting on behalf of the TCEQ, or EPA). This is the guidance provided in an ongoing compliance investigation while a deviation report is required. If the investigation has concluded with an NOV or NOE, refer to item 2 above for automatic deviation.
 - Except for planned MSS authorized under an NSR mechanism, maintenance activities on units and systems subject to the operating permit that result in identification of deviations from equipment standards, work practice standards, or unauthorized emissions. Includes repairs and related work orders.
 - Recorded responses by dedicated emergency response crews or teams, including internal or external fire departments.



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Overview of TCEQ Deviation Report Guidance

6. APPENDIX A – REASONABLE INQUIRY: GUIDANCE FOR ESTABLISHING FAILURE TO REPORT A DEVIATION (CONTINUED)

- ❖ All other deviations/violations should be reviewed on a case-by-case basis, including the use of citizen-collected evidence.
 - Reasonable inquiry test: If it was reasonable to expect the Responsible Official (RO) to know a deviation was happening (or not happening), by way of some reporting mechanism or data including credible evidence that was brought before the RO, then the deviation should have been reported.



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Overview of TCEQ Deviation Report Guidance

7. APPENDIX C: EPA LETTER, RISK MANAGEMENT PLAN AND PROECESS SAFETY MANAGEMENT (BUT THE LETTER WAS REFERRED TO IN THE PAST GUIDANCE)

- ❖ The Risk Management Plan (40 CFR Part 68) is listed in the Title V Permit.
- ❖ Any deviations, including a PSM audit finding, must be listed as a deviation.
- ❖ Per an EPA Letter dated May 30, 2006:
 - “Violations of the Occupational Safety and Health Act (OSHA) Process Safety Management (PSM), including PSM audit findings which are violations of Risk Management Plan (RMP) requirements, should be Title V deviations subject to deviation reporting. Credible evidence of a violation of a PSM, that is also a violation of an applicable requirement RMP of the Clean Air Act, is a Title V deviation subject to reporting requirements.”



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Overview of TCEQ Deviation Report Guidance

GENERAL NOTES REGARDING GUIDANCE

- ❖ This new TCEQ Guidance had not been through a formal public comment period.
- ❖ *Natural Resources Defense Council v. EPA*, (D.C. Cir. 2011).
 - Ruled EPA violated the Administrative Procedure Act (APA) by relying on guidance rather than the regulation.
- ❖ *National Mining Association v. Jackson*, (D.C. Cir. 2011) (NMS 768 F. Supp. 2d. At 50)
 - Court initially concluded that the EPA exceeded its authority by adopting and implementing guidance.
 - This case is still pending and a decision is anticipated forthcoming by the end of the year.



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