

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: October 5, 2011

DATE OF REQUEST: September 16, 2011

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Charlotte Horn, (512) 239-0779

CAPTION: Docket No. 2011-0845-RUL. Consideration for publication of, and hearing on, proposed repeal of 30 Texas Administrative Code Chapter 101, General Air Quality Rules, Subchapter H, Emissions Banking and Trading, Division 5, System Cap Trading, Sections 101.380, 101.382, 101.383, and 101.385; and proposed amendments to Chapter 117, Control of Air Pollution from Nitrogen Compounds, Sections 117.1020, 117.1120, 117.1220, 117.3020, and 117.9800, and corresponding revisions to the state implementation plan.

The proposed rulemaking would repeal all rules pertaining to the System Cap Trading program specified in Chapter 101, Subchapter H, Division 5, Sections 101.380, 101.382, 101.383, and 101.385. In addition, Sections 117.1020, 117.1120, 117.1220, 117.3020, and 117.9800 would be amended to remove references to the Chapter 101 System Cap Trading program rules. (Shantha Daniel, Amy Browning) (Rule Project No. 2011-018-101-EN)

Susana Hildebrand

Chief Engineer

David Brymer

Division Director

Charlotte Horn

Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** September 16, 2011

Thru: Melissa Chao, Acting Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Susana M. Hildebrand, P.E., Chief Engineer

Docket No.: 2011-0845-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 101, General Air Quality Rules
Chapter 117, Control of Air Pollution from Nitrogen Compounds
Repeal of Chapter 101 System Cap Trading Rules and Revisions to Chapter 117
Rule Project No. 2011-018-101-EN

Background and reason(s) for the rulemaking:

Title 30 Texas Administrative Code (TAC) Chapter 101, Subchapter H, Division 5 as adopted on March 21, 2001, and amended on July 25, 2007, specifies the requirements of the System Cap Trading (SCT) program. The SCT program was created to provide owners or operators of electric generating facilities (EGF) with additional compliance flexibility to meet the system cap emission limits specified in 30 TAC Chapter 117. The SCT program compliance option is available to affected EGFs located in the Beaumont-Port Arthur 1997 eight-hour ozone maintenance area, consisting of Hardin, Jefferson, and Orange Counties; the Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment area, consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; and in certain East and Central Texas counties, as listed in §117.3000(a)(4). The SCT program has seen minimal participation by affected sources. In addition, affected sources have alternative means of compliance with the system cap emission limits of Chapter 117 in the form of the Emission Credit Banking and Trading, and Discrete Emission Credit Banking and Trading programs.

The Chapter 101 SCT program rules were submitted to the United States Environmental Protection Agency (EPA) for inclusion in the state implementation plan (SIP) on May 1, 2001, and the amendments to §101.383 and §101.385 were submitted to the EPA as revisions to the SIP on August 16, 2007. While the system cap emission limits in Chapter 117 are approved as part of the SIP (73 FR 73565), the Chapter 101 SCT program rules were not approved by the EPA for inclusion in the SIP.

The EPA sent a letter, dated October 25, 2010, to the commission requesting revisions to the Chapter 101 SCT program rules. In the letter the EPA stated its intent to conditionally approve the Chapter 101 SCT program rules if the commission agreed to commit to a rulemaking action to implement the EPA's requested revisions within a one-year time frame. The EPA required a verbal commitment by November 1, 2010, followed by a signed letter from the executive director by November 15, 2010. On November 2, 2010, the executive director responded to the EPA's request stating that due to the minimal

Re: Docket No. 2011-0845-RUL

participation in the SCT program and the limited timeline to implement the extensive revisions requested by the EPA, the commission would not be able to commit to any rulemaking action. The letter also stated the executive director's intention to seek approval from the commission to withdraw the Chapter 101 SCT program rules from the EPA's consideration as a SIP revision. The EPA published its proposed disapproval of the Chapter 101 SCT program rules in the *Federal Register* (75 FR 70654) on November 18, 2010.

On February 23, 2011, the commission approved the withdrawal of the Chapter 101 SCT program rules from consideration by the EPA as a revision to the SIP. The EPA was notified of the withdrawal of the Chapter 101 SCT program rules as a SIP revision in a letter dated March 4, 2011. The EPA acknowledged the withdrawal of the Chapter 101 SCT program rules from consideration as a SIP revision in a letter received by the commission on April 4, 2011. The EPA also published the withdrawal of its proposed disapproval of the SCT program rules in the *Federal Register* (76 FR 19739) on April 8, 2011.

In addition, the commissioners directed the executive director's staff to initiate rulemaking to repeal the Chapter 101 SCT program rules in order to avoid potential regulatory confusion among regulated entities. Since the Chapter 117 rules have been approved by the EPA and are included in the SIP, if the revisions to Chapter 117 are adopted, the amended sections of Chapter 117 would be submitted to the EPA as a revision to the SIP. The repeal of Chapter 101 SCT program rules will not be resubmitted to the EPA since they have already been withdrawn from the EPA's consideration as a revision to the SIP.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The rulemaking would repeal all rules pertaining to the SCT program specified in Chapter 101, Subchapter H, Division 5, §§101.380, 101.382, 101.383, and 101.385. The rulemaking would also amend §§117.1020, 117.1120, 117.1220, 117.3020, and 117.9800 to remove references to the Chapter 101 SCT program rules.

B.) Scope required by federal regulations or state statutes:

The repeal of the Chapter 101 SCT program rules and the corresponding revisions to Chapter 117 are not specifically required by federal regulation. However, repealing the Chapter 101 SCT program rules and removing the references to the SCT program in Chapter 117 will avoid confusion among regulated entities that are subject to the system cap rules in Chapter 117. It would also address any potential concerns the EPA might have regarding the use of a compliance option that is not a part of the SIP for the purposes of complying with the EPA-approved Chapter 117 rules that are included in the SIP.

C.) Additional staff recommendations that are not required by federal rule or state statute:

Various non-substantive revisions to the Chapter 117 sections opened for this rulemaking would be made to conform to current *Texas Register* style and formatting requirements.

Re: Docket No. 2011-0845-RUL

Statutory authority:

The repeal and amendments would be proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal and amendments would also be proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendments would also be proposed under Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit SIP revisions that specify the manner in which National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

Effect on the:

A.) Regulated community: No impact is expected. The SCT program was established to provide owners or operators of EGFs with additional compliance flexibility to meet the Chapter 117 system cap emission limits. There has been minimal use of the program by the regulated community, with most reports submitted for compliance purposes showing no trades. In addition, the regulated community has alternative means of compliance such as the use of Emission Credit Banking and Trading and Discrete Emission Credit Banking and Trading programs.

B.) Public: No impact is expected.

C.) Agency programs: Staff currently receives quarterly and annual reports detailing operation and emissions data from owners of EGFs participating in the SCT program. These reports are filed and no action is taken. These tasks will no longer be performed.

Stakeholder meetings:

No stakeholder meetings were conducted for this rulemaking project.

Potential controversial concerns and legislative interest:

Regulated entities might prefer to retain the SCT program so as to have multiple compliance options available to them. Retaining the SCT program would require the

Re: Docket No. 2011-0845-RUL

commission to substantially revise and resubmit the Chapter 101 SCT program rules to the EPA as a SIP revision.

Potential alternatives:

The Chapter 101 SCT program rules could be revised and resubmitted to the EPA for consideration and approval as a SIP revision. For the EPA to approve the Chapter 101 SCT program rules as a SIP revision, the rules would have to be revised to meet the EPA's extensive criteria for approval as specified in the letter dated October 25, 2010, from the EPA. The revisions required by the EPA in order to approve the Chapter 101 SCT program rules will require significant agency staff resources to implement. In addition, the EPA's recommended revisions require additional requirements from regulated entities participating in the program such as advance notice for potential trades and penalty requirements. These revisions will reduce the flexibility of the program making the program less attractive as a compliance option.

Will this rulemaking affect any current policies or require development of new policies?

The proposed rulemaking will not affect any current policies or require development of new policies.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If the Chapter 101 SCT program rules are not repealed, regulated entities could use the SCT program to comply with the Chapter 117 system cap emission limits. The Chapter 117 rules have been approved by the EPA as a SIP revision, while the Chapter 101 SCT program rules have been withdrawn from consideration by the EPA as a SIP revision. The use of the SCT program, which is not a federally enforceable program, to comply with Chapter 117 rules, which are federally enforceable, would open regulated entities to potential federal action by the EPA. In addition, the EPA might revoke the approval of the Chapter 117 rules as a SIP revision.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: October 5, 2011

Anticipated *Texas Register* publication date: October 21, 2011

Public hearing date (if any): November 15 and 17, 2011

Public comment period: October 21, 2011 – November 21, 2011

Anticipated adoption date: March 28, 2012

Agency contacts:

Shantha Daniel, Ph.D., Rule Project Manager, 239-3930, Air Quality Division

Amy Browning, Staff Attorney, 239-0891

Charlotte Horn, Texas Register Coordinator, 239-0779

Commissioners
Page 5
September 16, 2011

Re: Docket No. 2011-0845-RUL

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Shantha Daniel, Ph.D.
Charlotte Horn

The Texas Commission on Environmental Quality (commission) proposes the repeal of §§101.380, 101.382, 101.383, and 101.385.

Background and Summary of the Factual Basis for the Proposed Rules

On March 21, 2001, the commission adopted rules establishing the requirements for the System Cap Trading (SCT) program in Chapter 101, Subchapter H, Division 5, §§101.380, 101.382, 101.383, and 101.385.

The SCT program was established to provide the owners or operators of affected electric generating facilities (EGF) with an additional compliance option to meet the system cap emission limits specified in 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds. The EGFs affected by the Chapter 117 system cap emission limits are located in the Beaumont-Port Arthur 1997 eight-hour ozone maintenance area, consisting of Hardin, Jefferson, and Orange Counties (BPA area); the Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment area, consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties (HGB area); and in the East and Central Texas counties of Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton.

The system cap emission limits in Chapter 117 set daily, 30-day rolling average, or annual emission caps on total nitrogen oxides (NO_x) emissions from EGFs that are: subject to the Chapter 117 emission specifications for attainment demonstration (ESAD); under common ownership or control; and grouped together in an electric power generating system, as defined in §117.10(14). For example, if company A has three sites, X, Y, and Z with 3, 4, and 5 EGFs, respectively, that are subject to the Chapter 117 ESADs and are part of an electric power generating system, Chapter 117 sets a daily, 30-day rolling average, or annual emission caps on the total emissions from the 12 affected EGFs. The SCT program provides additional compliance flexibility to owners of EGFs operating under a system cap to exceed the system cap at discrete periods of time by purchasing surplus emission allowables, which were generated during the same time period, from other owners of EGFs also operating under a system cap. Surplus emission allowables are calculated as the difference between the amount of emissions in a Chapter 117 system cap emission limit and the actual emissions from that electric power generating system. Trading of surplus emissions allowables is allowed only between owners or operators of electric power generating systems that have the same type of Chapter 117 system cap emission limit (i.e., daily, 30-day rolling average, or annual emission caps) and are within the same nonattainment area. Owners or operators of EGFs located in the East and Central Texas counties can only trade surplus emissions allowables with other owners or operators of EGFs located in these counties.

The SCT program has seen minimal participation with most reports submitted for compliance purposes showing no trades. In cases where trading was reported, the purchased surplus emission allowables were not used to meet the system cap emission limit. In addition, owners or operators of affected EGFs have alternative compliance options to meet the Chapter 117 system cap emission limits. In the BPA and HGB areas, alternative compliance options are available via the Emission Credit Banking and Trading (ERC) and Discrete Emission Credit Banking and Trading (DERC) programs. In the counties of East and Central Texas, alternative compliance options are available via the DERC program.

The Chapter 101 SCT program rules were submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP) on May 1, 2001. Sections 101.383 and 101.385 were amended On July 25, 2007, to accurately reference the renumbered Chapter 117 sections related to the system cap emission limits. These amendments were submitted to the EPA as a revision to the SIP on August 16, 2007.

The EPA sent a letter, dated October 25, 2010, to the commission requesting revisions to the Chapter 101 SCT program rules. In the letter the EPA stated its intent to conditionally approve the Chapter 101 SCT program rules if the commission agreed to

commit to a rulemaking action to implement the EPA's requested revisions within a one-year time frame. The EPA required a verbal commitment by November 1, 2010, followed by a signed letter from the executive director by November 15, 2010. On November 2, 2010, the executive director responded to the EPA's request stating that due to the minimal participation in the SCT program and the limited timeline to implement the revisions requested by the EPA, the commission would not be able to commit to any rulemaking action. The letter also stated the executive director's intention to seek approval from the commission to withdraw the Chapter 101 SCT program rules from the EPA's consideration as a revision to the SIP. On November 18, 2010, the EPA published its proposed disapproval of the Chapter 101 SCT program rules in the *Federal Register* (75 FR 70654).

On February 23, 2011, the commission approved the withdrawal of the Chapter 101 SCT program rules from consideration by the EPA as a revision to the SIP. The EPA was notified of this withdrawal in a letter dated March 4, 2011. The EPA acknowledged the withdrawal of the Chapter 101 SCT program rules from consideration as a SIP revision in a letter received by the commission on April 4, 2011, and published its withdrawal of the proposed disapproval of the SCT program rules in the April 8, 2011, issue of the *Federal Register* (76 FR 19739).

The repeal of the Chapter 101 SCT program rules is proposed concurrently with amendments to sections in Chapter 117 that would remove references to the Chapter 101 SCT program rules. The amendments to Chapter 117 are published in a separate rulemaking in this issue of the *Texas Register*.

Section by Section Discussion

The proposed repeal of §§101.380, 101.382, 101.383, and 101.385 would remove all rules related to the SCT program from Chapter 101. The SCT program was established to provide additional compliance flexibility to owners of EGFs subject to the system cap emission limits specified in Chapter 117; however, the program has seen minimal participation by affected sources. The Chapter 101 SCT program rules have been withdrawn from consideration by the EPA as a revision to the SIP and are not federally enforceable. The Chapter 117 rules specifying the system cap emission limits have been approved by the EPA as a SIP revision and are therefore federally enforceable. The proposed repeal of the SCT program rules would avoid any potential regulatory confusion among owners or operators of affected EGFs regarding the use of a compliance option that is no longer federally enforceable to meet a federally enforceable rule.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rulemaking is in effect, no significant fiscal implications are anticipated for the commission. Units of state or local government that own or operate EGFs are not expected to experience fiscal impacts as a result of the rulemaking. The proposed rulemaking would repeal the existing Chapter 101 SCT program rules, which have been minimally used.

The proposed rulemaking would repeal the SCT program rules specified in Chapter 101. Amendments are also proposed to Chapter 117, to remove references to the SCT program as a part of the same rule package, and fiscal impacts of the revisions to Chapter 117 will be addressed in a separate fiscal note.

The SCT program was created to provide additional compliance flexibility to owners or operators of EGFs subject to system cap emission limits specified in Chapter 117. Under this program, only owners of electric power generating systems in the same nonattainment area or within the East and Central Texas counties are allowed to trade surplus emissions allowables. The SCT program has seen minimal participation, and owners and operators of EGFs in the affected areas have complied with the system cap emissions limits using other available compliance options. Records indicate that there have been no trades under the SCT program from Fiscal Year 2008 - Fiscal Year 2010.

No SCT trades are expected for Fiscal Year 2011, and the commission has withdrawn the Chapter 101 SCT program rules from the EPA's consideration as a SIP revision. The proposed rulemaking will remove the SCT program as a compliance option in the BPA area, the HGB area, and the 31 counties of East and Central Texas.

There may be as many as 18 sites with EGFs in the 31 counties of East and Central Texas that are owned or operated by state or local government. In the BPA area and the HGB area, records indicate there are no EGFs owned or operated by state agencies or local government. The repeal of the Chapter 101 SCT program rules is not expected to have any fiscal impact on EGFs in the East and Central Texas counties owned or operated by local government since no reports have been received that indicate the SCT program is being utilized as a compliance option. In addition, the proposed rulemaking does not change current emissions limits with which EGFs have been in compliance for a few years. In any case, government-owned or operated EGFs in these counties will still have alternative compliance options available to them. For example, in the BPA and HGB areas, affected sources will still have ERCs or DERCs available to them as compliance options.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed

rulemaking will be the repeal of rules for a minimally used compliance option. Repeal of the Chapter 101 SCT program rules is expected to increase rule clarity and efficiency regarding compliance options for EGFs.

The proposed rulemaking will not have a fiscal impact on individuals because EGFs are typically owned or operated by large businesses.

The proposed rulemaking is not expected to have a fiscal impact on large businesses that own or operate the estimated 119 sites with EGFs in the BPA area, the HGB area, and the 31 counties of East and Central Texas. The proposed rulemaking eliminates the SCT program as a compliance option for EGFs in meeting system cap emissions limits.

Records indicate that this program has not been used in the 2008 - 2010 Fiscal Year time frame. EGFs in the affected areas have submitted reports that indicate they are using other available options to meet system cap emissions limits. Businesses have been in compliance with current system cap emissions limits for a few years, and the proposed rulemaking will not change those limits.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. The proposed rulemaking applies to EGFs, and small businesses do not typically own or operate EGFs.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed repeal of the SCT program rules from Chapter 101 in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed repeal does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Instead, the specific intent of the proposed repeal is to remove rules related to the SCT program from Chapter 101. The SCT program was established to provide additional compliance flexibility to sources subject to the system cap emission limits specified in Chapter 117; however, it has only seen minimal participation by affected sources. The SCT program rules in Chapter 101 have been withdrawn from consideration by the EPA as a revision to the SIP and are not federally enforceable, while the Chapter 117 rules specifying the system cap emission limits have been approved by the EPA as a SIP revision and are therefore federally enforceable. The proposed repeal of the SCT rules in Chapter 101 will avoid potential regulatory confusion among owners or operators of sources subject to the system cap emission limits in Chapter 117 by removing a compliance flexibility option that is not federally enforceable. As discussed in the Fiscal Note portion of this preamble, the proposed repeal is not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards on the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, the proposed repeal does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed repeal will avoid potential regulatory confusion among owners or operators of EGFs subject to the system cap emission limits in Chapter 117 by removing a compliance flexibility option that is not federally enforceable. The proposed repeal does not exceed a requirement of a delegation agreement or a contract between state and federal government if this rulemaking is adopted. The proposed repeal was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this rulemaking.

Therefore, this proposed repeal is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed repeal under Texas Government Code, §2007.043. The purpose of the proposed rulemaking is to

repeal rules related to the SCT program from Chapter 101. The proposed repeal will not create any additional burden on private real property. The proposed repeal will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed repeal will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rulemaking in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRA) (31 TAC §501.12(l)). The CMP policy applicable to the proposed

rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas so as to protect CNRAs and promote the public health, safety, and welfare (31 TAC §501.32). The proposed rulemaking would not increase emissions of air pollutants and is therefore consistent with the CMP goal in 31 TAC §501.12(1) and the CMP policy in 31 TAC §501.32.

Promulgation and enforcement of this rulemaking will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rulemaking is consistent with these CMP goals and policies and does not create or have a direct or significant adverse effect on any coastal natural resource areas. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 101 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the repeals of §§101.380, 101.382, 101.383, and 101.385 are

adopted, owners or operators with facilities subject to the federal operating permit program must revise their operating permit to remove all references to the SCT program rules. The owners or operators of these facilities would have the option of initiating a permit action or waiting for the next permit action, such as a renewal, to remove these references.

Announcement of Hearings

The commission will hold public hearings on this proposal in Houston on November 15, 2011, at 1:30 p.m. and 6:00 p.m. in Conference Room C at the Houston-Galveston Area Council located at 3555 Timmons Lane; and in Austin on November 17, 2011, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during a hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to a hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-018-101-EN. The comment period closes November 21, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Shantha Daniel, Air Quality Planning Section, (512) 239-3930.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING
[DIVISION 5: SYSTEM CAP TRADING]
[[§101.380, 101.382, 101.383, 101.385]

Statutory Authority

The repeals are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air.

The proposed repeals implement TWC, §§5.102, 5.103, and 5.105; and THSC, §§382.002, 382.011, 382.012, and 382.017.

[\$101.380. Definitions]

[The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise: Surplus emission allowables--The amount, greater than zero, that a source owner or operator's allowable emissions in a system cap emission limit specified in Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) is greater than the actual emissions in that system, in:]

[(1) pounds per day for a:]

[(A) single day; or]

[(B) rolling 30-day average period; or]

[(2) tons per year for a calendar year period for a source subject to Chapter 117, Subchapter B, Division 2 of this title (relating to Utility Electric Generation in East and Central Texas).]

[§101.382. Applicability]

[Trades of emission allowables are limited to sources located within a single nonattainment area or within another single area with unique emission limits identified in Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds).]

[§101.383. General Provisions]

[(a) System cap limits may be exceeded with surplus emission allowables obtained for that day from another source owner or operator participating in a system cap. The owner or operator may exceed the:]

[(1) maximum daily cap with one-day surplus emission allowables generated on the same day; and]

[(2) rolling 30-day average daily system cap emission limitation with surplus emission allowables generated over the same period.]

[(b) System cap limits for units within an electric power generating system as regulated under §117.3020 of this title (relating to System Cap) may be exceeded with

surplus emission allowables obtained for that calendar year from another source owner or operator participating in a system cap.]

[(c) The cap requirements of Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) continue to apply, except as modified in subsections (a) and (b) of this section.]

[\$101.385. Recordkeeping and Reporting]

[(a) The owner or operator of a source in an ozone nonattainment area participating with this division shall submit to the executive director a quarterly report.]

[(1) Each quarterly report will be based on a three-calendar month period beginning on January 1 of each year.]

[(2) The report shall be submitted within 30 days following the end of the quarterly period.]

[(3) The report shall detail the following:]

[(A) the daily nitrogen oxides (NO_x) emissions from each source along with supporting calculations for the maximum daily cap and the rolling 30-day average system cap emission limitation;]

[(B) all emission trades conducted under this division during the reported time period including the trade date or period, quantity traded, and trading participants.]

[(b) The owner or operator of a source participating in a system cap limit for sources subject to §117.3020 of this title (relating to System Cap) shall submit to the executive director an annual report.]

[(1) Each annual report will be based on a 12-month calendar period beginning on January 1 of each year.]

[(2) The report shall be submitted within 30 days following the end of the annual period.]

[(3) The report shall detail the following:]

[(A) the annual NO_x emissions from each source along with supporting calculations; and]

[(B) all emissions trades conducted under this division during the reported time period including trade date, quantity traded, and trade participants.]

[(c) The owner or operator of any system participating in this division shall report within 48 hours to the executive director any time that the system exceeded its daily or rolling 30-day average system cap emission limitation, or within 30 days any time that the system exceeded its annual system cap, and did not obtain surplus emission allowables for that time period. This report shall include:]

[(1) cause of the exceedence with supporting data;]

[(2) date or period of exceedence;]

[(3) amount of exceedence with data to demonstrate the amount of emissions in excess of the applicable limit; and]

[(4) number of surplus emission allowables traded on the date of or during the period of the exceedence.]

The Texas Commission on Environmental Quality (commission) proposes amendments to §§117.1020, 117.1120, 117.1220, 117.3020, and 117.9800.

If adopted, the amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

On March 21, 2001, the commission adopted rules that provided owners or operators of electric generating facilities (EGF) located in the Dallas-Fort Worth one-hour ozone nonattainment area (consisting of Collin, Dallas, Denton, and Tarrant Counties) or the East and Central Texas counties, as listed in §117.3000(a)(4), and subject to the system cap emission limits specified in Chapter 117 additional compliance flexibility in meeting their system caps through participation in the System Cap Trading (SCT) program. The SCT program was established through rules adopted by the commission on March 21, 2001, specifying the requirements for the SCT program in 30 TAC Chapter 101, Subchapter H, Emissions Banking and Trading.

The system cap emission limits in Chapter 117 set daily, 30-day rolling average, or annual emission caps on total nitrogen oxides (NO_x) emissions from EGFs that are: subject to the Chapter 117 emission specifications for attainment demonstration (ESAD); under common ownership or control; and grouped together in an electric

power generating system, as defined in §117.10(14). For example, if company A has three sites, X, Y, and Z with 3, 4, and 5 EGFs, respectively, that are subject to the Chapter 117 ESADs and are part of an electric power generating system, Chapter 117 sets a daily, 30-day rolling average, or annual emission caps on the total emissions from the 12 affected EGFs.

On May 23, 2007, the commission adopted reformatted and renumbered Chapter 117 rules. The adopted rules also provided new emission specifications for the Dallas-Fort Worth 1997 eight-hour ozone nonattainment area (DFW area), consisting of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties, necessary to demonstrate the attainment of the 1997 eight-hour ozone National Ambient Air Quality Standards (NAAQS). Under the adopted rules, EGFs in the Collin, Dallas, Denton, or Tarrant Counties that are subject to the new emissions specifications are no longer required to meet the emission specifications specified in Chapter 117, Subchapter B, Division 2, Subchapter C, Division 2, after March 1, 2009. For EGFs in the DFW area, the Chapter 117 rules do not allow participation in a system cap as an alternative means of compliance with the new emissions specifications, and hence EGFs in the DFW area no longer have the option of participating in the SCT program.

Certain compliance flexibility options (the SCT program, the Emission Credit Banking and Trading program, and the Discrete Emission Credit Banking and Trading program)

were provided by the adopted rules to owners or operators of EGFs with system cap emission limits specified in Chapter 117 and located in the Beaumont-Port Arthur 1997 ozone maintenance area (BPA area), consisting of Hardin, Jefferson, and Orange Counties; the Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment area (HGB area), consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; and counties in East and Central Texas as listed in §117.3000(a)(4). The East and Central Texas counties are Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton. The adopted rules also made clear that EGFs in the HGB area are required to meet the system cap emission limits specified in §117.320 or §117.1220, in addition to complying with the emission specifications in §117.310 or §117.1210 through participation in the Mass Emissions Cap and Trade program.

The SCT program rules in §101.383 and §101.385 were amended on July 25, 2007, to accurately reference the newly renumbered sections in Chapter 117 related to system cap emission limits.

The SCT program has seen minimal participation from affected sources, and on February 23, 2011, the commission approved the withdrawal of the Chapter 101 SCT

program rules from consideration by the EPA as a revision to the SIP. The EPA was notified of this withdrawal in a letter dated March 4, 2011. While the repeal of the Chapter 101 SCT program rules and corresponding revisions to Chapter 117 are not specifically required by federal regulation, the Chapter 117 rules for system cap requirements are included in the SIP (73 FR 73562) and allow the SCT program as a regulatory option for compliance. Removing the references to the SCT program in Chapter 117 will avoid confusion among regulated entities that are subject to the Chapter 117 system cap emission limits and will address any potential concerns regarding the use of a compliance option that is not federally enforceable to meet a federally enforceable rule.

The amendments to §§117.1020, 117.1120, 117.1220, 117.3020, and 117.9800 are proposed concurrently with the repeal of sections pertaining to the SCT program from Chapter 101. The repeal of sections pertaining to the SCT program from Chapter 101 is published in a separate rulemaking in this issue of the *Texas Register*.

Section by Section Discussion

The proposed rulemaking would amend the major source rules in Chapter 117, Subchapter C, Divisions 1 - 3; Subchapter E, Division 1; and Subchapter H, Division 2. These proposed changes would amend §§117.1020, 117.1120, 117.1220, 117.3020, and 117.9800 by removing references to Chapter 101 SCT program rules. The proposed

rulemaking would also include various non-substantive revisions to these sections to conform to current *Texas Register* style and format requirements.

§§117.1020, 117.1120, 117.1220, 117.3020, System Cap

The commission proposes to amend §§117.1020(l), 117.1120(l), 117.1220(l), and 117.3020(l) by removing references to Chapter 101, Subchapter H, Division 5, SCT program. The existing language in subsection (l) provides owners or operators of EGFs subject to the Chapter 117 system cap emission limits the flexibility to exceed their system cap provided that the owner or operator is complying with the requirements of §117.9800 or Chapter 101, Subchapter H, Division 1, 4, or 5. The proposed amendments would remove references to Chapter 101, Subchapter H, Division 5, SCT program requirements.

§117.9800, Use of Emission Credits for Compliance

The commission proposes to amend §117.9800(b) by removing references to the SCT program requirements in Chapter 101, Subchapter H, Division 5. The existing language in subsection (b) allows an owner or operator of a unit subject to §§117.320, 117.1020, 117.1120, 117.1220, or 117.3020 to meet the emission control requirements of these system caps by complying with the requirements of Chapter 101, Subchapter H, Division 5, SCT program or by obtaining Emission Reduction Credits, Mobile Emission Reduction Credits, Discrete Emission Reduction Credits, or Mobile Discrete Emission

Reduction Credits in accordance with Chapter 101, Subchapter H, Divisions 1 and 4. The proposed amendments would remove references to Chapter 101, Subchapter H, Division 5, SCT program requirements.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency. Units of state or local government that own or operate EGFs are not expected to experience fiscal impacts as a result of the rules. The proposed rules are administrative in nature and eliminate references to the Chapter 101 SCT program rules from Chapter 117.

The proposed rules would amend Chapter 117 to remove references to the SCT program and are part of a rule package that repeals the SCT program specified in Chapter 101 for EGFs located in the 31 counties of East and Central Texas, counties in the BPA area, and counties in the HGB area. The fiscal impacts of the repeals are addressed in a separate rulemaking addressed in this issue of the *Texas Register*.

The proposed rules are administrative in nature and will not have a fiscal impact on any units of state or local government.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes in the proposed rules are increased rule clarity and efficiency regarding compliance options for EGFs.

The proposed rules will not have a fiscal impact on individuals because they are administrative in nature and because EGFs are typically owned or operated by large businesses.

The proposed rules will not have a fiscal impact on large businesses in the BPA area, the HGB area, and the 31 counties of East and Central Texas. The proposed rules are administrative in nature and merely remove references in Chapter 117 to the Chapter 101 SCT program rules, which are being repealed.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules are administrative in nature and have no fiscal impact.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of the Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The purpose of the proposed rulemaking is to remove the references to the Chapter 101 SCT rules from Chapter 117. The SCT rules in Chapter 101 are being proposed for repeal in a concurrent rulemaking, and are not a part of the Texas SIP. Therefore, the proposed rulemaking will remove the option to use the SCT program from Chapter 117 to avoid any potential concerns that a compliance option that is not federally enforceable might be used to meet a federally enforceable rule.

Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature,

1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The Federal Clean Air Act (FCAA) does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 United States Code (USC), §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require

the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by and do not exceed, federal law, including the approved SIP. In addition, these rules do not exceed any contract between the state and a federal agency.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App.

Austin 1990, no writ). Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely

under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." The proposed rulemaking will remove an obsolete compliance option from Chapter 117, and therefore avoid any potential concerns that a compliance option that is not federally enforceable might be used to meet a federally enforceable rule. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but is authorized under Texas Health and Safety Code, §§382.011, 382.012, and 382.017, as well as under 42 USC, §§7401, *et seq.*, which requires states to submit SIP revisions that specify the manner in which the NAAQS will be achieved and maintained within each air quality control region of the state.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that

affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed repeal under Texas Government Code, §2007.043. The proposed rules will remove the references to the Chapter 101 SCT program rules from Chapter 117. The SCT rules in Chapter 101 are being proposed for repeal in a concurrent rulemaking, and are not a part of the Texas SIP. Therefore, the proposed rulemaking would remove the option to use the SCT program from Chapter 117 to avoid any potential concerns that a compliance option that is not federally enforceable might be used to meet a federally enforceable rule. The proposed amendments will not create any additional burden on private real property. The proposed amendments will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed amendments will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the proposed rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRA) (31 TAC §501.12(l)). The CMP policy applicable to the proposed rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas so as to protect CNRAs and promote the public health, safety, and welfare (31 TAC §501.32). The proposed rulemaking would not increase emissions of air pollutants and is therefore consistent with the CMP goal in 31 TAC §501.12(1) and the CMP policy in 31 TAC §501.32.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 117 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the amendments to Chapter 117 are adopted, owners or operators with facilities subject to the federal operating permit program must revise their operating permit to include the new Chapter 117 requirements. The owners or operators of these facilities would have the option of initiating a permit action or waiting for the next permit action, such as a renewal, to include these requirements.

Announcement of Hearings

The commission will hold public hearings on this proposal in Houston on November 15, 2011, at 1:30 p.m. and 6:00 p.m. in Conference Room C at the Houston-Galveston Area Council located at 3555 Timmons Lane; and in Austin on November 17, 2011, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference

Rule Project Number 2011-018-101-EN. The comment period closes November 21, 2011.

Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information,

please contact Ray Shubert, Air Quality Planning Section, (512) 239-6615.

**SUBCHAPTER C: COMBUSTION CONTROL AT MAJOR UTILITY
ELECTRIC GENERATION SOURCES IN OZONE NONATTAINMENT AREAS
DIVISION 1: BEAUMONT-PORT ARTHUR OZONE NONATTAINMENT
AREA UTILITY ELECTRIC GENERATION SOURCES
§117.1020**

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendment is also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and

monitoring of air contaminant emissions and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§117.1020. System Cap.

(a) An owner or operator of an electric generating facility (EGF) may achieve compliance with the nitrogen oxides (NO_x) emission specifications of §117.1010 of this title (relating to Emission Specifications for Attainment Demonstration) by achieving equivalent NO_x emission reductions obtained by compliance with a daily and 30-day system cap emission limitation in accordance with the requirements of this section.

(b) Each EGF within an electric power generating system, as defined in §117.10 of this title (relating to Definitions), that would otherwise be subject to the NO_x emission rates of §117.1010 of this title must be included in the system cap.

(c) The system cap must be calculated as follows.

(1) A rolling 30-day average emission cap must be calculated using the following equation.

Figure: 30 TAC §117.1020(c)(1) (No change)

$$Cap_{30day} = \sum_{i=1}^N (H_i \times R_i)$$

Where:

Cap_{30day} = the NO_x 30-day rolling average emission cap in pounds per day;

i = each EGF in the electric power generating system;

N = the total number of EGFs in the emission cap;

H_i = the average of the daily heat input for each EGF in the emission cap, in million British thermal units per day, as certified to the executive director, for the system highest 30-day period in the nine months of July, August, and September 1996, 1997, and 1998. For an EGF exempt from the 40 Code of Federal Regulations (CFR) Part 75 monitoring requirements, if the heat input data corresponding to the system highest 30-day period (as determined for an EGF in the system subject to 40 CFR Part 75 monitoring) is not available, the daily average of the highest calendar month heat input in 1996 - 1998 may be used; and

R_i = the emission specification of §117.1010(a) of this title.

(2) A maximum daily cap must be calculated using the following equation.

Figure: 30 TAC §117.1020(c)(2) (No change)

$$Cap_{daily} = \sum_{i=1}^N (H_{mi} \times R_i)$$

Where:

Cap_{daily} = the NO_x maximum daily cap in pounds per day;

i = as defined in paragraph (1) of this subsection;

N = as defined in paragraph (1) of this subsection;

H_{mi} = the maximum daily heat input, as certified to the executive director, allowed or possible (whichever is lower) in a day; and

R_i = as defined in paragraph (1) of this subsection.

(3) Each EGF in the system cap is subject to the emission limits of both paragraphs (1) and (2) of this subsection at all times.

(d) The NO_x emissions monitoring required by §117.1040 of this title (relating to Continuous Demonstration of Compliance) for each EGF in the system cap must be used to demonstrate continuous compliance with the system cap.

(e) For each operating EGF, the owner or operator shall use one of the following methods to provide substitute emissions compliance data during periods when the NO_x monitor is off-line:

(1) if the NO_x monitor is a continuous emissions monitoring system

(CEMS):

(A) subject to 40 Code of Federal Regulations (CFR) Part 75, use the missing data procedures specified in 40 CFR Part 75, Subpart D (Missing Data Substitution Procedures); or

(B) subject to 40 CFR Part 75, Appendix E, use the missing data procedures specified in 40 CFR Part 75, Appendix E, §2.5 (Missing Data Procedures);

(2) use Appendix E monitoring in accordance with §117.1040(d) of this title;

(3) if the NO_x monitor is a predictive emissions monitoring system

(PEMS):

(A) use the methods specified in 40 CFR Part 75, Subpart D; or

(B) use calculations in accordance with §117.8110(b) of this title (relating to Emission Monitoring System Requirements for Utility Electric Generation Sources); or

(4) use the maximum block one-hour emission rate as measured by the 30-day testing.

(f) The owner or operator of any EGF subject to a system cap shall maintain daily records indicating the NO_x emissions and fuel usage from each EGF and summations of total NO_x emissions and fuel usage for all EGFs under the system cap on a daily basis. Records must also be retained in accordance with §117.1045 of this title (relating to Notification, Recordkeeping, and Reporting Requirements).

(g) The owner or operator of any EGF subject to a system cap shall report any exceedance of the system cap emission limit within 48 hours to the appropriate regional office. The owner or operator shall then follow up within 21 days of the exceedance with a written report to the regional office that includes an analysis of the cause for the exceedance with appropriate data to demonstrate the amount of emissions in excess of the applicable limit and the necessary corrective actions taken by the company to assure

future compliance. Additionally, the owner or operator shall submit semiannual reports for the monitoring systems in accordance with §117.1045 of this title.

(h) The owner or operator of any EGF subject to a system cap shall demonstrate initial compliance with the system cap in accordance with the schedule specified in §117.9100 of this title (relating to Compliance Schedule for Beaumont-Port Arthur Ozone Nonattainment Area Utility Electric Generation Sources).

(i) An EGF that is permanently retired or decommissioned and rendered inoperable may be included in the system cap emission limit, provided that the permanent shutdown occurred after January 1, 1999. The system cap emission limit is calculated in accordance with subsection (b) of this section.

(j) Emission reductions from shutdowns or curtailments that have been used for netting or offset purposes under the requirements of Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) may not be included in the baseline for establishing the cap.

(k) For the purposes of determining compliance with the system cap emission limit, the contribution of each affected EGF that is operating during a startup, shutdown, or emissions event as defined in §101.1 of this title (relating to Definitions)

must be calculated from the NO_x emission rate measured by the NO_x monitor, if operating properly. If the NO_x monitor is not operating properly, the substitute data procedures identified in subsection (e) of this section must be used. If neither the NO_x monitor nor the substitute data procedure are operating properly, the owner or operator shall use the maximum daily rate measured during the initial demonstration of compliance, unless the owner or operator provides data demonstrating to the satisfaction of the executive director and the United States Environmental Protection Agency that actual emissions were less than maximum emissions during such periods.

(l) An owner or operator of a source of NO_x who is participating in the system cap under this section may exceed their system cap provided that the owner or operator is complying with the requirements of §117.9800 of this title (relating to Use of Emission Credits for Compliance) or Chapter 101, Subchapter H, Division 1 or 4 [, 4, or 5] of this title (relating to Emission Credit Banking and Trading; and Discrete Emission Credit Banking and Trading[; and System Cap Trading]).

(m) In the event that a unit within an electric power generating system is sold or transferred, the unit must become subject to the transferee's system cap.

**SUBCHAPTER C: COMBUSTION CONTROL AT MAJOR UTILITY
ELECTRIC GENERATION SOURCES IN OZONE NONATTAINMENT AREAS
DIVISION 2: DALLAS-FORT WORTH OZONE NONATTAINMENT AREA
UTILITY ELECTRIC GENERATION SOURCES
§117.1120**

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendment is also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and

monitoring of air contaminant emissions and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§117.1120. System Cap.

(a) An owner or operator of an electric generating facility (EGF) may achieve compliance with the nitrogen oxides (NO_x) emission specifications of §117.1110 of this title (relating to Emission Specifications for Attainment Demonstration) by achieving equivalent NO_x emission reductions obtained by compliance with a daily and 30-day system cap emission limitation in accordance with the requirements of this section.

(b) Each EGF within an electric power generating system, as defined in §117.10 of this title (relating to Definitions), that would otherwise be subject to the NO_x emission rates of §117.1110 of this title must be included in the system cap.

(c) The system cap must be calculated as follows.

(1) A rolling 30-day average emission cap must be calculated using the following equation.

Figure: 30 TAC §117.1120(c)(1) (No change)

$$Cap_{30\text{day}} = \sum_{i=1}^N (H_i \times R_i)$$

Where:

Cap_{30day} = the NO_x 30-day rolling average emission cap in pounds per day;

i = each EGF in the electric power generating system;

N = the total number of EGFs in the emission cap;

H_i = the average of the daily heat input for each EGF in the emission cap, in million British thermal units per day, as certified to the executive director, for the system highest 30-day period in the nine months of July, August, and September 1996, 1997, and 1998. For an EGF exempt from the 40 Code of Federal Regulations (CFR) Part 75 monitoring requirements, if the heat input data corresponding to the system highest 30-day period (as determined for an EGF in the system subject to 40 CFR Part 75 monitoring) is not available, the daily average of the highest calendar month heat input in 1996 - 1998 may be used; and

R_i = the emission specification of §117.1110(a) of this title.

(2) A maximum daily cap must be calculated using the following equation.

Figure: 30 TAC §117.1120(c)(2) (No change)

$$Cap_{daily} = \sum_{i=1}^N (H_{mi} \times R_i)$$

Where:

Cap_{daily} = the NO_x maximum daily cap in pounds per day;

i = as defined in paragraph (1) of this subsection;

N = as defined in paragraph (1) of this subsection;

H_{mi} = the maximum daily heat input, as certified to the executive director, allowed or possible (whichever is lower) in a day; and

R_i = as defined in paragraph (1) of this subsection.

(3) Each EGF in the system cap is subject to the emission limits of both paragraphs (1) and (2) of this subsection at all times.

(d) The NO_x emissions monitoring required by §117.1140 of this title (relating to Continuous Demonstration of Compliance) for each EGF in the system cap must be used to demonstrate continuous compliance with the system cap.

(e) For each operating EGF, the owner or operator shall use one of the following methods to provide substitute emissions compliance data during periods when the NO_x monitor is off-line:

(1) if the NO_x monitor is a continuous emissions monitoring system

(CEMS):

(A) subject to 40 Code of Federal Regulations (CFR) Part 75, use the missing data procedures specified in 40 CFR Part 75, Subpart D (Missing Data Substitution Procedures); or

(B) subject to 40 CFR Part 75, Appendix E, use the missing data procedures specified in 40 CFR Part 75, Appendix E, §2.5 (Missing Data Procedures);

(2) use Appendix E monitoring in accordance with §117.1140(d) of this title;

(3) if the NO_x monitor is a predictive emissions monitoring system

(PEMS):

(A) use the methods specified in 40 CFR Part 75, Subpart D; or

(B) use calculations in accordance with §117.8110(b) of this title (relating to Emission Monitoring System Requirements for Utility Electric Generation Sources); or

(4) if the methods specified in paragraphs (1) - (3) of this subsection are not used, the owner or operator shall use the maximum block one-hour emission rate as measured by the 30-day testing.

(f) The owner or operator of any EGF subject to a system cap shall maintain daily records indicating the NO_x emissions and fuel usage from each EGF and summations of total NO_x emissions and fuel usage for all EGFs under the system cap on a daily basis. Records must also be retained in accordance with §117.1145 of this title (relating to Notification, Recordkeeping, and Reporting Requirements).

(g) The owner or operator of any EGF subject to a system cap shall report any exceedance of the system cap emission limit within 48 hours to the appropriate regional office. The owner or operator shall then follow up within 21 days of the exceedance with a written report to the regional office that includes an analysis of the cause for the exceedance with appropriate data to demonstrate the amount of emissions in excess of the applicable limit and the necessary corrective actions taken by the company to assure

future compliance. Additionally, the owner or operator shall submit semiannual reports for the monitoring systems in accordance with §117.1145 of this title.

(h) The owner or operator of any EGF subject to a system cap shall demonstrate initial compliance with the system cap in accordance with the schedule specified in §117.9110 of this title (relating to Compliance Schedule for Dallas-Fort Worth Ozone Nonattainment Area Utility Electric Generation Sources).

(i) An EGF that is permanently retired or decommissioned and rendered inoperable may be included in the system cap emission limit, provided that the permanent shutdown occurred after January 1, 1999. The system cap emission limit is calculated in accordance with subsection (b) of this section.

(j) Emission reductions from shutdowns or curtailments that have been used for netting or offset purposes under the requirements of Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) may not be included in the baseline for establishing the cap.

(k) For the purposes of determining compliance with the system cap emission limit, the contribution of each affected EGF that is operating during a startup, shutdown, or emissions event as defined in §101.1 of this title (relating to Definitions)

must be calculated from the NO_x emission rate measured by the NO_x monitor, if operating properly. If the NO_x monitor is not operating properly, the substitute data procedures identified in subsection (e) of this section must be used. If neither the NO_x monitor nor the substitute data procedure are operating properly, the owner or operator shall use the maximum daily rate measured during the initial demonstration of compliance, unless the owner or operator provides data demonstrating to the satisfaction of the executive director and the United States Environmental Protection Agency that actual emissions were less than maximum emissions during such periods.

(l) An owner or operator of a source of NO_x who is participating in the system cap under this section may exceed their system cap provided that the owner or operator is complying with the requirements of §117.9800 of this title (relating to Use of Emission Credits for Compliance) or Chapter 101, Subchapter H, Division 1 or 4 [, 4, or 5] of this title (relating to Emission Credit Banking and Trading; and Discrete Emission Credit Banking and Trading[; and System Cap Trading]).

(m) In the event that a unit within an electric power generating system is sold or transferred, the unit must become subject to the transferee's system cap. The value R_i in this section is based on the unit's status as part of a large or small system as of January 1, 2000, and does not change as a result of sale or transfer of the unit, regardless of the size of the transferee's system.

**SUBCHAPTER C: COMBUSTION CONTROL AT MAJOR UTILITY
ELECTRIC GENERATION SOURCES IN OZONE NONATTAINMENT AREAS
DIVISION 3: HOUSTON-GALVESTON-BRAZORIA OZONE
NONATTAINMENT AREA UTILITY ELECTRIC GENERATION SOURCES
§117.1220**

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendment is also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and

monitoring of air contaminant emissions and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*

§117.1220. System Cap.

(a) An owner or operator of an electric generating facility (EGF) shall comply with a daily and 30-day system cap nitrogen oxides (NO_x) emission limitation in accordance with the requirements of this section.

(b) Each EGF within an electric power generating system, as defined in §117.10 of this title (relating to Definitions), that is subject to §117.1210(a) of this title (relating to

Emission Specifications for Attainment Demonstration) must be included in the system cap.

(c) The system cap must be calculated as follows.

(1) A rolling 30-day average emission cap must be calculated using the following equation.

Figure: 30 TAC §117.1220(c)(1) (No Change)

$$Cap_{30\text{day}} = \sum_{i=1}^N (H_i \times R_i)$$

Where:

Cap_{30day} = the NO_x 30-day rolling average emission cap in pounds per day;

i = each EGF in the electric power generating system;

N = the total number of EGFs in the emission cap;

H_i = (A) the average of the daily heat input for each EGF in the emission cap, in million British thermal units per day, as certified to the executive director, for any system 30-day period in the nine months of July, August, and September 1997, 1998, and 1999;

(B) for an EGF exempt from the 40 Code of Federal Regulations (CFR) Part 75 monitoring requirements, if the heat input data corresponding to any system 30-day period (as determined for an EGF in the system subject to 40 CFR Part 75 monitoring) is not available, the daily average of the highest calendar month heat input in 1997 - 1999 may be used;

(C) the level of activity authorized by the executive director for the third quarter (July, August, and September), until such time two consecutive third quarters of actual level of activity data are available, must be used for the following:

- (i) an EGF that the owner or operator has submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), an application determined to be administratively complete by the executive director before January 2, 2001;
 - (ii) an EGF that qualifies for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and has commenced construction before January 2, 2001; and
 - (iii) an EGF that was not in operation before January 1, 1997;
- (D) after two consecutive third quarters of actual level of activity data are available for an EGF described in subsection (c)(1) of this section, variable (C) of this figure, the owner or operator may calculate the baseline as the average of any two consecutive third quarters in the first five years of operation. The five-year period begins at the end of the adjustment period as defined in §101.350 of this title (relating to Definitions); and
- (E) in extenuating circumstances, the owner or operator of an EGF may request, subject to approval of the executive director, up to two additional calendar years to establish the baseline period described in subsection (c)(1) of this section, variables (A) - (D) of this figure. Applications seeking an alternate baseline period must be submitted by the owner or operator of the EGF to the executive director:
- (i) no later than December 31, 2001; or
 - (ii) for an EGF that the baseline period as described in subsection (c)(1) of this section, variables (A) - (D) of this figure is not complete by December 31, 2001, no later than 90 days after completion of the baseline period; and

R_i = the emission specification of §117.1210(a) of this title.

(2) A maximum daily cap must be calculated using the following equation.

Figure: 30 TAC §117.1220(c)(2) (No Change)

$$Cap_{daily} = \sum_{i=1}^N (H_{mi} \times R_i)$$

Where:

Cap_{daily} = the NO_x maximum daily cap in pounds per day;

i = as defined in paragraph (1) of this subsection;

N = as defined in paragraph (1) of this subsection;

H_{mi} = the maximum daily heat input, as certified to the executive director, allowed or possible (whichever is lower) in a day; and

R_i = as defined in paragraph (1) of this subsection.

(3) Each EGF in the system cap is subject to the emission limits of both paragraphs (1) and (2) of this subsection at all times.

(d) The NO_x emissions monitoring required by §117.1240 of this title (relating to Continuous Demonstration of Compliance) for each EGF in the system cap must be used to demonstrate continuous compliance with the system cap.

(e) For each operating EGF, the owner or operator shall use one of the following methods to provide substitute emissions compliance data during periods when the NO_x monitor is off-line:

(1) if the NO_x monitor is a continuous emissions monitoring system (CEMS):

(A) subject to 40 Code of Federal Regulations (CFR) Part 75, use the missing data procedures specified in 40 CFR Part 75, Subpart D (Missing Data Substitution Procedures); or

(B) subject to 40 CFR Part 75, Appendix E, use the missing data procedures specified in 40 CFR Part 75, Appendix E, §2.5 (Missing Data Procedures);

(2) use 40 CFR Part 75, Appendix E monitoring in accordance with §117.1240(e) of this title;

(3) if the NO_x monitor is a predictive emissions monitoring system (PEMS):

(A) use the methods specified in 40 CFR Part 75, Subpart D; or

(B) use calculations in accordance with §117.8110(b) of this title (relating to Emission Monitoring System Requirements for Utility Electric Generation Sources); or

(4) if the methods specified in paragraphs (1) - (3) of this subsection are not used, the owner or operator shall use the maximum block one-hour emission rate as measured by the 30-day testing.

(f) The owner or operator shall maintain daily records indicating the NO_x emissions and fuel usage from each EGF and summations of total NO_x emissions and fuel usage for all EGFs under the system cap on a daily basis. Records must also be retained in accordance with §117.1245 of this title (relating to Notification, Recordkeeping, and Reporting Requirements).

(g) The owner or operator shall report any exceedance of the system cap emission limit within 48 hours to the appropriate regional office. The owner or operator shall then follow up within 21 days of the exceedance with a written report to the regional office that includes an analysis of the cause for the exceedance with appropriate data to demonstrate the amount of emissions in excess of the applicable limit and the necessary corrective actions taken by the company to assure future compliance. Additionally, the owner or operator shall submit semiannual reports for the monitoring systems in accordance with §117.1245 of this title.

(h) The owner or operator shall demonstrate initial compliance with the system cap in accordance with the schedule specified in §117.9120 of this title (relating to

Compliance Schedule for Houston-Galveston-Brazoria Ozone Nonattainment Area
Utility Electric Generation Sources).

(i) An EGF that is permanently retired or decommissioned and rendered inoperable may be included in the system cap emission limit, provided that the permanent shutdown occurred after January 1, 2000. The system cap emission limit is calculated in accordance with subsection (b) of this section.

(j) Emission reductions from shutdowns or curtailments that have been used for netting or offset purposes under the requirements of Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) may not be included in the baseline for establishing the cap.

(k) For the purposes of determining compliance with the system cap emission limit, the contribution of each affected EGF that is operating during a startup, shutdown, or emissions event as defined in §101.1 of this title (relating to Definitions) must be calculated from the NO_x emission rate measured by the NO_x monitor, if operating properly. If the NO_x monitor is not operating properly, the substitute data procedures identified in subsection (e) of this section must be used. If neither the NO_x monitor nor the substitute data procedure are operating properly, the owner or operator shall use the maximum daily rate measured during the initial demonstration of

compliance, unless the owner or operator provides data demonstrating to the satisfaction of the executive director and the United States Environmental Protection Agency that actual emissions were less than maximum emissions during such periods.

(l) An owner or operator of a source of NO_x who is participating in the system cap under this section may exceed their system cap provided that the owner or operator is complying with the requirements of §117.9800 of this title (relating to Use of Emission Credits for Compliance) or Chapter 101, Subchapter H, Division 1 or 4 [, 4, or 5] of this title (relating to Emission Credit Banking and Trading; and Discrete Emission Credit Banking and Trading[; and System Cap Trading]).

(m) In the event that a unit within an electric power generating system is sold or transferred, the unit must become subject to the transferee's system cap.

**SUBCHAPTER E: MULTI-REGION COMBUSTION CONTROL
DIVISION 1: UTILITY ELECTRIC GENERATION IN EAST AND CENTRAL
TEXAS
§117.3020**

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendment is also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions and THSC, §382.021, concerning Sampling

Methods and Procedures, that authorizes the commission to prescribe sampling methods. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§117.3020. System Cap.

(a) An owner or operator may achieve compliance with the nitrogen oxides (NO_x) emission specifications of §117.3010 of this title (relating to Emission Specifications) by achieving equivalent NO_x emission reductions obtained by compliance with a system cap emission limitation in accordance with the requirements of this section.

(b) Each unit within an electric power generating system, as defined in §117.10 of this title (relating to Definitions), that would otherwise be subject to the NO_x emission specifications of §117.3010 of this title must be included in the system cap.

(c) The annual average emission cap must be calculated using the following equation.

Figure: 30 TAC §117.3020(c) (No change)

$$Cap_{annual} = \sum_{i=1}^N \frac{(H_i \times R_i)}{2000}$$

Where:

Cap_{annual} = the NO_x annual average emission cap in tons per year;

i = each unit in the electric power generating system;

N = the total number of units in the emission cap;

H_i = the average of the annual heat input for each unit in the emission cap, in million British thermal units per year, as certified to the executive director, for 1996, 1997, and 1998;
and

R_i = the emission specification of §117.3010 of this title.

(d) The NO_x emissions monitoring required by §117.3040 of this title (relating to Continuous Demonstration of Compliance) for each unit in the system cap must be used to demonstrate continuous compliance with the system cap.

(e) For each operating unit, the owner or operator shall use one of the following methods to provide substitute emissions compliance data during periods when the NO_x monitor is off-line:

(1) if the NO_x monitor is a continuous emissions monitoring system

(CEMS):

(A) subject to 40 Code of Federal Regulations (CFR) Part 75, use the missing data procedures specified in 40 CFR Part 75, Subpart D (Missing Data Substitution Procedures); or

(B) subject to 40 CFR Part 75, Appendix E, use the missing data procedures specified in 40 CFR Part 75, Appendix E, §2.5 (Missing Data Procedures);

(2) use Appendix E monitoring in accordance with §117.3040(e) of this title;

(3) if the NO_x monitor is a predictive emissions monitoring system

(PEMS):

(A) use the methods specified in 40 CFR Part 75, Subpart D; or

(B) use calculations in accordance with §117.8110(b) of this title (relating to Emission Monitoring System Requirements for Utility Electric Generation Sources); or

(4) use the maximum emission rate as measured by the testing conducted in accordance with §117.3035(d) of this title (relating to Initial Demonstration of Compliance).

(f) The owner or operator of any unit subject to a system cap shall maintain daily records indicating the NO_x emissions and fuel usage from each unit and summations of total NO_x emissions and fuel usage for all units under the system cap on a daily basis. Records must also be retained in accordance with §117.3045 of this title (relating to Notification, Recordkeeping, and Reporting Requirements).

(g) The owner or operator of any unit subject to a system cap shall submit annual reports for the monitoring systems in accordance with §117.3045 of this title. The owner or operator shall also report any exceedance of the system cap emission limit in the annual report and shall include an analysis of the cause for the exceedance with appropriate data to demonstrate the amount of emissions in excess of the applicable limit and the necessary corrective actions taken by the company to assure future compliance.

(h) The owner or operator of any unit subject to a system cap shall demonstrate initial compliance with the system cap in accordance with the schedule specified in

§117.9300 of this title (relating to Compliance Schedule for Utility Electric Generation in East and Central Texas).

(i) A unit that is permanently retired or decommissioned and rendered inoperable may be included in the system cap emission limit, provided that the permanent shutdown occurred on or after January 1, 1999. The system cap emission limit is calculated in accordance with subsection (b) of this section.

(j) Emission reductions from shutdowns or curtailments that have been used for netting or offset purposes under the requirements of Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) may not be included in the baseline for establishing the cap.

(k) For the purposes of determining compliance with the system cap emission limit, the contribution of each affected unit that is operating during a startup, shutdown, or emissions event as defined in §101.1 of this title (relating to Definitions) must be calculated from the NO_x emission rate measured by the NO_x monitor, if operating properly. If the NO_x monitor is not operating properly, the substitute data procedures identified in subsection (e) of this section must be used. If neither the NO_x monitor nor the substitute data procedure are operating properly, the owner or operator shall use the maximum daily rate measured during the initial demonstration of compliance, unless

the owner or operator provides data demonstrating to the satisfaction of the executive director and United States Environmental Protection Agency that actual emissions were less than maximum emissions during such periods.

(l) An owner or operator of a source of NO_x in any of the east and central Texas attainment counties listed in §117.3000(a)(4) of this title (relating to Applicability) who is participating in the system cap under this section (relating to System Cap) may exceed their system cap provided that the owner or operator is complying with the requirements of Chapter 101, Subchapter H, Division 1 or 4 [, 4, or 5] of this title (relating to Emission Credit Banking and Trading; and Discrete Emission Credit Banking and Trading[; and System Cap Trading]).

SUBCHAPTER H: ADMINISTRATIVE PROVISIONS
DIVISION 2: COMPLIANCE FLEXIBILITY
§117.9800

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendment is also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions and THSC, §382.021, concerning Sampling

Methods and Procedures, that authorizes the commission to prescribe sampling methods. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§117.9800. Use of Emission Credits for Compliance.

(a) An owner or operator of a unit not subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) may meet emission control requirements of the sections specified in paragraphs (1) - (8) of this subsection, in whole or in part, by obtaining an emission reduction credit (ERC), mobile emission reduction credit (MERC), discrete emission reduction credit (DERC), or mobile discrete emission reduction credit (MDERC) in accordance with Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and Trading; and Discrete Emission Credit Banking and Trading), unless there are federal or

state regulations or permits under the same commission account number that contain a condition or conditions precluding such use:

(1) §§117.105, 117.205, 117.305, 117.1005, 117.1105, or 117.1205 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT));

(2) §§117.110, 117.210, 117.1010, or 117.1110 of this title (relating to Emission Specifications for Attainment Demonstration);

(3) §§117.1015, 117.1115, or 117.1215 of this title (relating to Alternative System-Wide Emission Specifications);

(4) §§117.115, 117.215, or 117.315 of this title (relating to Alternative Plant-Wide Emission Specifications);

(5) §§117.123, 117.223, 117.323, 117.423, or §117.3120 of this title (relating to Source Cap);

(6) §§117.2010, 117.3010, or 117.3110 of this title (relating to Emission Specifications);

(7) §§117.410, 117.1310, 117.2110, or 117.3310 of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration); or

(8) §117.3123 of this title (relating to Dallas-Fort Worth Eight-Hour Ozone Attainment Demonstration Control Requirements).

(b) An owner or operator of a unit subject to §§117.320, 117.1020, 117.1120, 117.1220, or 117.3020 of this title (relating to System Cap) may meet the emission control requirements of these sections in whole or in part, by complying with the requirements of Chapter 101, Subchapter H, Division 1 or 4 [Division 5] of this title, [(relating to System Cap Trading) or] by obtaining an ERC, MERC, DERC, or MDERC, [in accordance with Chapter 101, Subchapter H, Division 1 or 4 of this title,] unless there are federal or state regulations or permits under the same commission account number that contain a condition or conditions precluding such use.

(c) For the purposes of this section, the term "reduction credit (RC)" refers to an ERC, MERC, DERC, or MDERC, whichever is applicable.

(d) Any lower nitrogen oxides (NO_x) emission specification established under this chapter for the unit or units using RCs requires the user of the RCs to obtain

additional RCs in accordance with Chapter 101, Subchapter H, Division 1 or 4 of this title and/or otherwise reduce emissions prior to the effective date of such rule change. For units using RCs in accordance with this section that are subject to new, more stringent rule limitations, the owner or operator using the RCs shall submit a revised final control plan to the executive director in accordance with §§117.156, 117.256, 117.356, 117.456, 117.1056, 117.1156, 117.1256, and 117.1356 of this title (relating to Revision of Final Control Plan) to revise the basis for compliance with the emission specifications of this chapter. The owner or operator using the RCs shall submit the revised final control plan as soon as practicable, but no later than 90 days prior to the effective date of the new, more stringent rule. The owner or operator of the unit(s) currently using RCs shall calculate the necessary emission reductions per unit as follows.

Figure: 30 TAC §117.9800(d) (No change)

$$\Delta E = \left[LA \times (ER_{old} - ER_{new}) \times \frac{d}{2000} \right]$$

Where:

ΔE = the differential of emissions;

LA = the maximum level of activity;

ER_{old} = the existing NO_x emission rate for the affected unit in pounds per unit of activity;

ER_{new} = the new NO_x emission rate for the affected unit in pounds per unit of activity; and

d = (A) to calculate annual emission reductions, d = 365; and

(B) to calculate emission reductions for the remainder of a control period, d = the number of days remaining in the control period.