

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** October 17, 2012

**DATE OF REQUEST:** September 28, 2012

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Bruce McAnally, (512) 239-2141

**CAPTION: Docket No. 2012-0896-RUL.** Consideration for publication of, and hearing on, proposed amendments to 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds, Subchapter A, Definitions, Section 117.10; proposed amendments to Chapter 101, General Air Quality Rules, Subchapter H, Emissions Banking and Trading, Division 4, Discrete Emission Credit Banking and Trading, Section 101.379; and corresponding revisions to the state implementation plan.

The proposed rulemaking would revise §101.379 and the definition of emergency situation in §117.10 to reference the most recent version of the Electric Reliability Council of Texas, Inc. (ERCOT) protocols for emergency notice. The proposed rulemaking would also revise the definition of emergency situation in §117.10 to reflect changes made by ERCOT to promote reliability during energy emergencies by allowing the operation of generators for purpose of selling power back to the electric grid under limited circumstances. (Ray Schubert, Alexis Lorick) (Rule Project No. 2012-025-117-AI)

Steve Hagle, P.E.  
\_\_\_\_\_  
**Deputy Director**

David Brymer  
\_\_\_\_\_  
**Division Director**

Bruce McAnally  
\_\_\_\_\_  
**Agenda Coordinator**

**Copy to CCC Secretary? NO YES X**

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** September 28, 2012

**Thru:** Bridget C. Bohac, Chief Clerk  
Zak Covar, Executive Director

**From:** Steve Hagle, P.E., Deputy Director  
Office of Air

**Docket No:** 2012-0896-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 117, Control of Air Pollution from Nitrogen Compounds  
Chapter 101, General Air Quality Rules  
Chapter 117 Definition Update and Revisions to Chapter 101  
Rule Project No. 2012-025-117-AI

**Background and reason(s) for the rulemaking:**

The Electric Reliability Council of Texas, Inc. (ERCOT) manages the electrical grid within the ERCOT region of Texas with oversight by the Public Utility Commission of Texas (PUCT). On March 22, 2012, the PUCT repealed Title 16 Texas Administrative Code (TAC) Chapter 25, Subchapter S, §25.507, to replace the Emergency Interruptible Load Service (EILS) program with the Emergency Response Service (ERS) program. Like the EILS program, the new ERS program is designed to help decrease the likelihood of requiring firm load shedding (i.e., rolling black-outs) during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. Under the ERS program, participants commit to decrease their power consumption from the electrical grid during a declared energy emergency. ERS program participants might meet this commitment by decreasing overall power use, replacing power consumption from the grid with local generation by operating local emergency backup generators, or a combination of both. However, unlike the EILS program, the new ERS program allows qualified participants to provide power back into the electrical grid for sale during an ERCOT-declared energy emergency under limited circumstances.

Operating an emergency generator as part of ERCOT's former EILS program meets the existing definition of an emergency situation in 30 TAC Chapter 117, Subchapter A, §117.10. The existing definition of an emergency situation in §117.10 includes the period of time that an emergency notice issued by ERCOT is applicable to the serving electric power generating system and references the specific ERCOT protocols that detail the emergency notice. However, the Chapter 117 definition of an emergency situation also specifically excludes operation for purposes of supplying power for distribution to the electrical grid. Therefore, operation of an emergency generator that also provides power back to the electrical grid would not be considered an emergency situation under the current Chapter 117 definition even if the operation was at the directive of ERCOT under the ERS program.

While Chapter 117 would not prohibit companies from participating in the new ERS program, the Chapter 117 rules that apply in the Dallas-Fort Worth and Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment areas have specific provisions

Re: Docket No. 2012-0896-RUL

that restrict the non-emergency operational hours of emergency generators. For these sources to qualify for an exemption from the rule control requirements, participants in the ERS program would have to count hours of operation during an ERCOT emergency as non-emergency use if power is sold to the grid and might risk losing exemption status under Chapter 117 if the operational hours exceed the exemption criteria.

The revised ERCOT protocols for emergency notice referenced in Chapter 117 are also referenced in 30 TAC Chapter 101. Currently, §101.379 provides an exemption from the discrete emission reduction credit (DERC) flow control limit for DERCs used in response to ERCOT-declared emergencies. The exemption was put in place to ensure that should there be an ERCOT-declared emergency, a regulated entity would not be put into a situation of either non-compliance with agency rules or contributing to electrical grid instability by not responding to an ERCOT-declared emergency notice.

**Scope of the rulemaking:**

**A.) Summary of what the rulemaking will do:**

The proposed rulemaking would revise Chapters 101 and 117 to update references to ERCOT protocols and reflect changes to ERCOT's new ERS program. The proposed rulemaking would revise §101.379 and the definition of emergency situation in §117.10 to reference the most recent version of the ERCOT protocols. The proposed rulemaking would also revise the definition of emergency situation in §117.10 to reflect changes made by ERCOT to promote reliability during energy emergencies by allowing the operation of generators for purposes of selling power to the electric grid under limited circumstances. If adopted, the proposed changes to Chapters 101 and 117 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

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

None

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

None

**Statutory authority:**

The 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 amendments would also be proposed under THSC, §382.002, concerning Policy and Purpose, that establishes

Re: Docket No. 2012-0896-RUL

the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §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 the 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:** The proposed rulemaking would prevent ERS program participants from potentially losing exemption status under Chapter 117 if they provide power to the electrical grid during an ERCOT-declared energy emergency. Eliminating this potential disincentive may improve reliability of electric service in the ERCOT region while also promoting participation in the ERS program.

**B.) Public:** The proposed rulemaking would prevent ERS program participants from potentially losing exemption status under Chapter 117 if they provide power to the electrical grid during an ERCOT-declared emergency. Eliminating this potential disincentive may help promote participation in the ERS program and improve reliability of electric service in the ERCOT region.

**C.) Agency programs:** The proposed rulemaking will have no impact on agency programs.

**Stakeholder meetings:**

No stakeholder meetings were held for this rulemaking project.

**Potential controversial concerns and legislative interest:**

If the definition of emergency situation in Chapter 117 is not revised to include limited operation for purposes of supplying power to the electric grid during an ERCOT emergency, the current definition could prove to be a potential disincentive for ERCOT's ERS program. Participants would not be able to consider the operation as emergency use when they are supplying power back to the grid.

The definition section of Chapter 117 and the associated divisions that reference the definition of emergency situation are included in the SIP. If the proposed rulemaking is adopted, the revised §117.10 would be submitted to the EPA as a SIP revision. Because the proposed revisions to the definition of emergency situation would be limited to ERCOT-declared emergencies, the revision would not expand the use of emergency backup generation and should not be considered as backsliding under the Federal Clean Air Act. However, the revised definition would still be subject to EPA review and approval as a SIP revision.

Re: Docket No. 2012-0896-RUL

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

No

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

The commission could decide not to revise Chapters 101 and 117 to update references to ERCOT protocols and reflect changes to ERCOT's new ERS program. Not revising Chapters 101 and 117 to reference the new ERCOT protocols could potentially cause confusion for regulated entities and delay the processing of DERC usage requests. If the Chapter 117 definition is not revised, ERS program participants could potentially lose exemption status under Chapter 117 if they provide power to the electrical grid during an ERCOT-declared emergency. The potential loss of exemption status under Chapter 117 may discourage participation in the ERS program and negatively impact reliability of electric service in the ERCOT region.

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** October 17, 2012

**Anticipated *Texas Register* publication date:** November 2, 2012

**Public hearing date:** November 28, 2012

**Public comment period:** November 2, 2012 - December 5, 2012

**Anticipated adoption date:** April 10, 2013

**Agency contacts:**

Ray Schubert, Rule Project Manager, 239-6615, Air Quality Division

Alexis Lorick, Staff Attorney, 239-0649

Bruce McAnally, Texas Register Coordinator, 239-2141

**Attachments:**

None

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Susana M. Hildebrand, P.E.  
Anne Idsal  
Curtis Seaton  
Tucker Royall  
Office of General Counsel  
Ray Schubert  
Bruce McAnally

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §101.379.

If adopted, amended §101.379 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

### **Background and Summary of the Factual Basis for the Proposed Rules**

The Electric Reliability Council of Texas, Inc. (ERCOT) manages the electrical grid within the ERCOT region of Texas, with oversight by the Public Utility Commission of Texas (PUCT). On March 22, 2012, the PUCT repealed 16 TAC §25.507, to replace the Emergency Interruptible Load Service (EILS) program with the Emergency Response Service (ERS) program (new 16 TAC §25.507). Like the EILS program, the new ERS program is designed to help decrease the likelihood of requiring firm load shedding (i.e., rolling black-outs) during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. Subsequent changes to ERCOT's Nodal Protocols reflecting the new ERS program became effective on June 1, 2012.

On December 10, 2008, the commission adopted the amendment to §101.379 to restrict the use of discrete emissions reduction credits (DERCs) in the Dallas-Fort Worth 1997 eight-hour ozone nonattainment area (DFW area) to a level consistent with the attainment and maintenance of the 1997 eight-hour ozone National Ambient Air Quality

Standard (NAAQS). The rule requires an annual review of the DFW area DERC program to determine the flow control limit and apportion available DERCs for potential use. The rule also provides an exemption from the DFW flow control limit for DERCs used in response to an ERCOT-declared emergency situation and reference the specific ERCOT protocols that detail the emergency notice. The existing rule references the previous version of the ERCOT protocols, which could potentially cause confusion for regulated entities and delay the processing of DERC usage requests. The proposed rulemaking would update §101.379 to reference the version of the ERCOT protocols effective on June 1, 2012.

The amendment to §101.379 is proposed concurrently with the amendment to 30 TAC §117.10 that will be published in a separate rulemaking in this issue of the *Texas Register*.

### **Section Discussion**

The commission proposes to revise §101.379(c)(2)(D) to reference the version of the ERCOT Protocols effective on June 1, 2012.

### **Fiscal Note: Costs to State and Local Government**

Jeffrey Horvath, Strategic Planning and Assessment Section analyst, has determined that for the first five-year period the proposed rule is in effect, no fiscal implications are

anticipated for the TCEQ or other units of state or local government. The amendment to Chapter 101 is proposed concurrently with an amendment to Chapter 117.

The new ERS program is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. The proposed amendment in Chapter 101 would merely update a reference in agency rules to reflect the version of the ERCOT Protocols effective on June 1, 2012. The proposed amendment to Chapter 101 does not add or delete administrative or regulatory requirements for the TCEQ or other units of state or local government and therefore, no fiscal implications are anticipated due to the administration or enforcement of the proposed change.

### **Public Benefits and Costs**

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rules will be the facilitation of the new ERS program administered by ERCOT, which is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid.

The proposed rule is not expected to have a fiscal impact on individuals or businesses. The proposed amendment to Chapter 101 would merely update a reference in agency

rules to reflect the version of the ERCOT Protocols effective June 1, 2012, which reflect changes to ERCOT's new ERS program.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The amendment to §101.379 is proposed concurrently with the amendment to §117.10. Together, the proposed amendment is intended to facilitate the implementation of the new ERS program administered by ERCOT. The new ERS program is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. The proposed amendment to Chapter 101 would merely update a reference in agency rules to reflect the version of the ERCOT Protocols effective June 1, 2012, which reflect changes to ERCOT's new ERS program.

### **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 rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is 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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

### **Draft Regulatory Impact Analysis**

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking does not meet the definition of a major environmental rule. Texas Government Code, §2001.0225 states that a major environmental rule is a rule for which the specific intent 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. Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law. Specifically, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this proposed rulemaking; and 4) the proposed rulemaking is authorized by specific sections of Texas Health and Safety Code (THSC), 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 preamble.

The proposed rule implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the FCAA (meaning 42

USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the proposed rulemaking is to update references to the ERCOT protocols in §101.379 to be consistent with §117.10.

While the proposed rulemaking protects the environment or reduces risks to human health from environmental exposure, it does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3), because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would the rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. The rulemaking as a result is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225, because it is not a major environmental rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules 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 TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: 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 rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area 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 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and 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 revision to the SIP 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 rules have a broad impact, that 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 federal law.

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) *superseded by statute on another point of law*, Tax Code § 112.108, Other Actions Prohibited, *as recognized in, First State Bank of Dumas v. Sharp*, 863 S.W.2d 81, 83 (Tex. App. Austin 1993, 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 as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rulemaking does

not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law (NAAQS). The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Env'tl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the proposed rulemaking is to update references to the ERCOT protocols in §101.379 to be consistent with §117.10. This proposal, therefore, does not exceed an express requirement of federal law. The amendment is needed to implement state law but does exceed those new requirements. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the Statutory Authority section of this preamble, including THSC, §382.012 and §382.019. Because this proposed rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply and a regulatory impact analysis is not required.

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**

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) 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 Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) 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 (ii) is the producing cause of a reduction of at least 25 percent 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."

Promulgation and enforcement of the rulemaking would be neither a statutory nor a

constitutional taking of private real property. The primary purpose of the rulemaking is an update to Chapter 101, Subchapter H to ensure consistency with ERCOT's new ERS program. This rule is not burdensome, restrictive, or limiting of rights to private real property because the rulemaking regulates the use of electric generators in certain limited emergency situations. Furthermore, the rulemaking benefits the public by potentially decreasing the likelihood of requiring firm load shedding (i.e., rolling black-outs) when additional control measures are needed to achieve or maintain attainment of the federal air quality standards through the use of electric generators. The rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, this rule does not constitute 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 rule 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 (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 (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 rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies and because this rule 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**

The proposed amendment will not require any changes to federal operating permits.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on November 28, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is 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 the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing 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 Bruce McAnally, 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 2012-025-117-AI. The comment period closes December 5, 2012. Copies of the proposed rulemaking can be obtained from the commission's website at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Ray Schubert, Air Quality Planning Section, (512) 239-6615.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

**DIVISION 4: DISCRETE EMISSION CREDIT**

**BANKING AND TRADING**

**§101.379**

**Statutory Authority**

The amendment is proposed under the authority of the following: Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, and §5.105, General Policy (these provisions authorize the commission to adopt rules necessary to carry out its powers and duties as well as all general policies under the TWC); Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, Policy and Purpose, which 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, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, §382.051(d), Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382. Finally, 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 Standard will be achieved and maintained within each air quality control region of the state.

The proposed amended 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.*

**§101.379. Program Audits and Reports.**

(a) No later than three years after the effective date of this section, and every three years thereafter, the executive director will audit this program.

(1) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of discrete emission credits may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(3) The audit data and results will be completed and submitted to the United States Environmental Protection Agency and made available for public inspection within six months after the audit begins.

(b) No later than February 1 of each calendar year, the executive director shall develop and make available to the general public and the United States Environmental Protection Agency a report that includes the following information for the previous calendar year:

(1) the amount of each pollutant emission credits generated under this division;

(2) the amount of each pollutant emission credits used under this division;

(3) a summary of all trades completed under this division; and

(4) the amount of discrete emission reduction credits (DERC) approved for use under subsection (c) of this section.

(c) No later than October 1 of each year, the executive director will complete, and make available to the general public and the United States Environmental Protection Agency, an annual review to determine the number of DERCS available for potential use in the upcoming calendar year for the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area. The annual review will include the calculation of the flow control limit as specified in subsection (c)(2)(A) of this section to ensure noninterference with attainment and maintenance of the ozone National Ambient Air Quality Standard (NAAQS) and the apportionment of approved DERCS.

(1) For the 2009 control period, the flow control limit for DERCS available for use is the number prescribed in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(2) For any control period after 2009, the annual review will establish a flow control limit for that year, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(A) The flow control limit for a particular year will be determined using the following equation:

Figure: 30 TAC §117.379(c)(2)(A) (No change to the figure as it currently exists in TAC.)

(B) If use of the entire DERC bank would not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area, then the number of DERCs potentially available for use is the total number of DERCs in the bank.

(C) If the flow control limit, as calculated in the equation in subparagraph (A) of this paragraph, is greater than the total number of DERCs requested for use in accordance with §101.376(d) of this title (relating to Discrete Emission Credit Use) the executive director:

(i) may approve all requested Notice of Intent to Use Discrete Emission Credits (DEC-2 Form) submittals; and

(ii) will consider any late DEC-2 Forms submitted as provided under §101.376(d)(3) of this title that is not an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation as defined in subparagraph (D) of this paragraph, but will not otherwise approve a late submittal that would exceed the flow control limit established by the equation under subsection (c)(2)(A) of this section.

(D) If the DEC-2 Forms are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the flow control limit and may be approved provided all other requirements are met. For the purposes of this subparagraph, an ERCOT-declared emergency situation is defined as the period of time that an ERCOT-issued emergency notice, (as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (June 1, 2012) and issued as specified in *ERCOT Protocols, Section 6: Adjustment Period and Real-Time Operations* (June 1, 2012)). [, as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (April 25, 2006), issued by ERCOT as specified in *ERCOT Protocols, Section 5: Dispatch* (April 26, 2006),] is applicable to the serving electric power generating system. The emergency situation is considered to end upon expiration of the emergency notice issued by ERCOT.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §117.10.

If adopted, amended §117.10 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

### **Background and Summary of the Factual Basis for the Proposed Rules**

The Electric Reliability Council of Texas, Inc. (ERCOT) manages the electrical grid within the ERCOT region of Texas, with oversight by the Public Utility Commission of Texas (PUCT). On March 22, 2012, the PUCT repealed 16 TAC §25.507, to replace the Emergency Interruptible Load Service (EILS) program with the Emergency Response Service (ERS) program (new 16 TAC §25.507). Like the EILS program, the new ERS program is designed to help decrease the likelihood of requiring firm load shedding (i.e., rolling black-outs) during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. Under the ERS program, participants commit to decrease their power consumption from the electrical grid during a declared energy emergency. ERS program participants might meet this commitment by decreasing overall power use, replacing power consumption from the grid with local generation by operating local emergency backup generators, or a combination of both. However, unlike the EILS program, the new ERS program allows qualified participants to provide power back into the electrical grid for sale during an ERCOT-declared emergency under

limited circumstances.

Operating an emergency generator as part of ERCOT's former EILS program meets the existing definition of an emergency situation in §117.10. The existing definition of an emergency situation in §117.10 includes the period of time that an emergency notice issued by ERCOT is applicable to the serving electric power generating system and references the specific ERCOT protocols that detail the emergency notice. However, the Chapter 117 definition of an emergency situation also specifically excludes operation for purposes of supplying power for distribution to the electrical grid. Therefore, operation of an emergency generator that also provides power back to the electrical grid would not be considered an emergency situation under the current Chapter 117 definition even if the operation was at the directive of ERCOT under the ERS program.

While Chapter 117 would not prohibit companies from participating in the new ERS program, the Chapter 117 rules that apply in the Dallas-Fort Worth and Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment areas have specific provisions that restrict the non-emergency operational hours of emergency generators. For these sources to qualify for an exemption from the rule control requirements, participants in the ERS program would have to count hours of operation during an ERCOT emergency as non-emergency use if power is sold to the grid and might risk losing exemption status under Chapter 117 if the operational hours exceed the exemption criteria.

The proposed rulemaking would update the definition of emergency situation in §117.10 to ensure consistency with ERCOT's new ERS program. The proposed rulemaking would reference the most recent version of the ERCOT protocols. The proposed rulemaking would also revise the definition of emergency situation to reflect changes made by ERCOT to promote reliability during energy emergencies by allowing the operation of generators for purposes of selling power to the electric grid under limited circumstances.

The amendment to §117.10 is proposed concurrently with an amendment to §101.379 that will be published in a separate rulemaking in this issue of the *Texas Register*.

*Demonstrating Noninterference under Federal Clean Air Act, Section 110(l)*

The commission provides the following information to demonstrate why the proposed change to the definition of emergency situation in Chapter 117 will not negatively impact the status of the state's progress towards attainment with the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS), will not interfere with control measures, and will not prevent reasonable further progress toward attainment of the ozone NAAQS.

As mentioned elsewhere in this preamble, the Chapter 117 rules provide exemptions for certain sources in the Dallas-Fort Worth and Houston-Galveston-Brazoria 1997 eight-

hour ozone nonattainment areas that operate exclusively during emergency situations or operate for a limited number of hours in non-emergency situations. Under the existing Chapter 117 rules, the period of time during an ERCOT-declared emergency is considered an emergency situation. The commission has interpreted this to mean that when demonstrating compliance with the Chapter 117 exemption criteria, participants in ERCOT's former EILS program were not required to include the hours of operation for generators operated during an ERCOT-declared emergency as non-emergency operation.

ERCOT's new ERS program promotes reliability during energy emergencies by allowing qualified participants to provide power for distribution to the electrical grid during an ERCOT-declared emergency. Under the existing Chapter 117 rules, participants in ERCOT's new ERS program are not required to include the hours of operation for generators operated during an ERCOT-declared emergency when demonstrating compliance with the Chapter 117 exemption criteria as long as these sources do not provide power for distribution to the electrical grid. Because the existing Chapter 117 definition of an emergency situation specifically excludes operation for purposes of supplying power for distribution to the electrical grid, ERS program participants would have to count hours of operation during an ERCOT-declared emergency when demonstrating compliance with the Chapter 117 exemption criteria if power is provided back into the grid. This practice could result in ERS program participants losing

exemption status under Chapter 117 if the non-emergency hours exceed the exemption criteria and potentially discourage ERS program participants from supplying excess generation back to the grid during an ERCOT-declared energy emergency. The proposed rulemaking would prevent ERS program participants from potentially losing exemption status under Chapter 117 if they provide power to the electrical grid during an ERCOT-declared emergency. The proposed rulemaking ensures that the changes made to ERCOT's new ERS program do not narrow the scope of what the commission currently considers an emergency situation.

The period of time during an ERCOT-declared emergency is currently considered an emergency situation under the existing Chapter 117 rules. The proposed revisions to the definition of emergency situation would limit the circumstances under which a generator could provide power for distribution to the electrical grid to only those operations that are part of an ERCOT emergency response program and in direct response to an instruction by ERCOT during the period of an ERCOT emergency notice. Therefore, the proposed amendment would not increase the number of sources that could qualify for exemption under the Chapter 117 rules or increase the frequency or duration of the operation during an emergency situation. For these reasons, the commission determined that the proposed rulemaking will not negatively impact the status of the state's attainment with the 1997 eight-hour ozone NAAQS and should not be considered as backsliding under the Federal Clean Air Act.

### **Section Discussion**

The commission proposes to amend the definition of emergency situation in §117.10(15).

The commission proposes to revise §117.10(15)(A)(ii) to reference the version of the ERCOT Protocols effective on June 1, 2012. The commission proposes §117.10(15)(A)(vii) to include operation of an emergency generator as part of an ERCOT emergency response program when the operation is in direct response to an instruction by ERCOT during the period of an ERCOT emergency notice as specified in §117.10(15)(A)(ii). The commission is requesting comment on whether an ERCOT energy emergency alert level should be specified in proposed §117.10(15)(A)(vii).

The commission also proposes to reformat the existing §117.10(15)(B) description of the situations that are not considered emergency situations. Proposed clause (i) incorporates the existing portion of the definition indicating that an emergency situation does not include operation for training purposes or other foreseeable events. Existing §117.10(15)(B) indicates that an emergency situation does not include operation for purposes of supplying power for distribution to the electric grid. Proposed clause (ii) indicates that an emergency situation does not include operation for purposes of supplying power for distribution to the electric grid except as specified under proposed §117.10(15)(A)(vii) regarding emergency generator operation that is part of an ERCOT emergency response program and is in direct response to an instruction by ERCOT

during the period of an ERCOT emergency notice. Proposed clause (ii) is necessary to reflect changes made by ERCOT to promote reliability during energy emergencies by allowing the operation of generators for purposes of selling power to the electric grid under limited circumstances.

**Fiscal Note: Costs to State and Local Government**

Jeffrey Horvath, Strategic Planning and Assessment Section analyst, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the TCEQ. Other state agencies or units of local government that participate in the ERS program may benefit under the proposed rule in that they could more easily maintain their Chapter 117 exemption status while providing power to the electrical grid during an ERCOT-declared emergency.

The proposed rulemaking would revise the Chapter 117 definition of an emergency situation and is intended to facilitate the implementation of the new ERS program administered by ERCOT. The new ERS program is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. Program participants would commit to decrease their overall power consumption from the electrical grid during a declared energy emergency by decreasing overall power use, replacing power consumption by operating local emergency backup generators, or a combination of both. However,

unlike the current emergency program, the new ERS program allows qualified participants to sell power back into the electrical grid during an ERCOT-declared emergency under limited circumstances.

Because the existing Chapter 117 definition of an emergency situation specifically excludes generator operation for purposes of supplying power for distribution to the electrical grid, ERS program participants would have to count generator hours of operation during an ERCOT-declared emergency when demonstrating compliance with the Chapter 117 exemption criteria. This practice could result in ERS program participants losing exemption status under Chapter 117 if the non-emergency hours exceed the exemption criteria. The proposed rulemaking would remedy this situation by allowing ERS program participants to not have to count these generator operational hours as non-emergency hours and to sell power back to the electrical grid during an ERCOT-declared emergency.

The proposed rulemaking does not add additional administrative or regulatory requirements for the TCEQ and therefore, no significant fiscal implications are anticipated for the TCEQ. Other state agencies or units of local government that participate in the ERS program may benefit under the proposed rule in that they could maintain their Chapter 117 exemption status while providing power to the electrical grid during an ERCOT-declared emergency. These participants may also benefit from the

sale of electric power back to the grid during one of these emergencies, but those benefits do not result from this rulemaking.

### **Public Benefits and Costs**

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rules will be the facilitation of the new ERS program administered by ERCOT, which is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid.

The proposed rule is not expected to have a fiscal impact on individuals or businesses. Businesses who participate in the ERS program may benefit under the proposed rule in that they could maintain their Chapter 117 exemption status while providing power to the electrical grid during an ERCOT-declared emergency. These participants may also benefit from the sale of electric power back to the grid during one of these emergencies, but those benefits do not result from this rulemaking.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule would allow ERS program participants to sell power back into the power grid during an ERCOT-declared emergency without having to

count those generator operational hours towards Chapter 117 compliance.

### **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 rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is 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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking does not meet the definition of a major environmental rule. Texas Government Code, §2001.0225 states that a major environmental rule is a rule for which the specific intent 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. Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law. Specifically, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this proposed rulemaking; and 4) the proposed rulemaking is authorized by specific sections of Texas Health and Safety Code (THSC), 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 preamble.

The proposed rule implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the FCAA (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the proposed rulemaking is merely an update to the definition of emergency situation in §117.10, ensuring consistency with ERCOT's new ERS program while also reflecting changes

made by ERCOT to promote reliability during energy emergencies throughout the state under limited circumstances

While the proposed rulemaking protects the environment or reduces risks to human health from environmental exposure, it does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3), because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would the rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. The rulemaking as a result is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225 because it is not a major environmental rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules 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 TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: 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 rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area 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 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and 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 revision to the SIP 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 rule has a broad impact, that 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 federal law.

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) *superseded by statute on another point of law*, Tax Code § 112.108, Other Actions Prohibited, *as recognized in, First State Bank of Dumas v. Sharp*, 863 S.W.2d 81, 83 (Tex. App. Austin 1993, 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 as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law (NAAQS). The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Env'tl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the proposed rulemaking is merely an update to the definition of emergency situation in §117.10, ensuring consistency with ERCOT's new ERS program while also reflecting

changes made by ERCOT to promote reliability during energy emergencies throughout the state under limited circumstances. This proposal, therefore, does not exceed an express requirement of federal law. The amendment is needed to implement state law but does exceed those new requirements. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the Statutory Authority section of this preamble, including THSC, §382.012 and §382.019. Because this proposed rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply, and a regulatory impact analysis is not required.

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**

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) 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 Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) 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 (ii) is the producing cause of a reduction of at least 25 percent 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."

Promulgation and enforcement of the rulemaking would be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rule is an update to Chapter 117, Subchapter A to ensure consistency with ERCOT's new ERS program. This rule is not burdensome, restrictive, or limiting of rights to private real property because the rulemaking regulates the use of electric generators in certain limited emergency situations. Furthermore, the rulemaking benefits the public by potentially decreasing the likelihood of requiring firm load shedding (i.e., rolling black-outs) when additional control measures are needed to achieve or maintain attainment of

the federal air quality standards through the use of electric generators. The rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, this rule does not constitute 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 (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 (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 rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies and because the rule 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**

The proposed amendment will not require any changes to federal operating permits.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on November 28, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located

at 12100 Park 35 Circle. The hearing is 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 the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing 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 Bruce McAnally, 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 2012-025-117-AI. The comment period closes December 5, 2012. 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](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Ray Schubert, Air Quality Planning Section, (512) 239-6615.

## **SUBCHAPTER A: DEFINITIONS**

### **§117.10**

#### **Statutory Authority**

The amendment is proposed under the authority of the following: Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, and §5.105, General Policy (these provisions authorize the commission to adopt rules necessary to carry out its powers and duties as well as all general policies under the TWC); Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.002, Policy and Purpose, which 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, General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, §382.051(d), Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382. Finally, the amendment is also proposed under FCAA, 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.

The proposed amended 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.*

**§117.10. Definitions.**

Unless specifically defined in the Texas Clean Air Act or Chapter 101 of this title (relating to General Air Quality Rules), the terms in this chapter have the meanings commonly used in the field of air pollution control. Additionally, the following meanings apply, unless the context clearly indicates otherwise. Additional definitions for terms used in this chapter are found in §3.2 and §101.1 of this title (relating to Definitions).

(1) Annual capacity factor--The total annual fuel consumed by a unit divided by the fuel that could be consumed by the unit if operated at its maximum rated capacity for 8,760 hours per year.

(2) Applicable ozone nonattainment area--The following areas, as designated under the 1990 Federal Clean Air Act Amendments.

(A) Beaumont-Port Arthur ozone nonattainment area--An area consisting of Hardin, Jefferson, and Orange Counties.

(B) Dallas-Fort Worth ozone nonattainment area--An area consisting of Collin, Dallas, Denton, and Tarrant Counties.

(C) Dallas-Fort Worth eight-hour ozone nonattainment area--An area consisting of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(D) Houston-Galveston-Brazoria ozone nonattainment area--An area consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(3) Auxiliary steam boiler--Any combustion equipment within an electric power generating system, as defined in this section, that is used to produce steam for purposes other than generating electricity. An auxiliary steam boiler produces steam as a replacement for steam produced by another piece of equipment that is not operating due to planned or unplanned maintenance.

(4) Average activity level for fuel oil firing--The product of an electric utility unit's maximum rated capacity for fuel oil firing and the average annual capacity factor for fuel oil firing for the period from January 1, 1990, to December 31, 1993.

(5) Block one-hour average--An hourly average of data, collected starting at the beginning of each clock hour of the day and continuing until the start of the next clock hour.

(6) Boiler--Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Btu--British thermal unit.

(8) Chemical processing gas turbine--A gas turbine that vents its exhaust gases into the operating stream of a chemical process.

(9) Continuous emissions monitoring system (CEMS)--The total equipment necessary for the continuous determination and recordkeeping of process gas concentrations and emission rates in units of the applicable emission limitation.

(10) Daily--A calendar day starting at midnight and continuing until midnight the following day.

(11) Diesel engine--A compression-ignited two- or four-stroke engine that liquid fuel injected into the combustion chamber ignites when the air charge has been compressed to a temperature sufficiently high for auto-ignition.

(12) Duct burner--A unit that combusts fuel and that is placed in the exhaust duct from another unit (such as a stationary gas turbine, stationary internal combustion engine, kiln, etc.) to allow the firing of additional fuel to heat the exhaust gases.

(13) Electric generating facility (EGF)--A unit that generates electric energy for compensation and is owned or operated by a person doing business in this state, including a municipal corporation, electric cooperative, or river authority.

(14) Electric power generating system--One electric power generating system consists of either:

(A) for the purposes of Subchapter C of this chapter (relating to Combustion Control at Major Utility Electric Generation Sources in Ozone

Nonattainment Areas), all boilers, auxiliary steam boilers, and stationary gas turbines (including duct burners used in turbine exhaust ducts) at electric generating facility (EGF) accounts that generate electric energy for compensation; are owned or operated by an electric cooperative, municipality, river authority, public utility, or a Public Utility Commission of Texas regulated utility, or any of its successors; and are entirely located in one of the following ozone nonattainment areas:

(i) Beaumont-Port Arthur;

(ii) Dallas-Fort Worth;

(iii) Dallas-Fort Worth eight-hour; or

(iv) Houston-Galveston-Brazoria;

(B) for the purposes of Subchapter E, Division 1 of this chapter (relating to Utility Electric Generation in East and Central Texas), all boilers, auxiliary steam boilers, and stationary gas turbines at EGF accounts that generate electric energy for compensation; are owned or operated by an electric cooperative, independent power producer, municipality, river authority, or public utility, or any of its successors; and are located in 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, or Wharton County; or

(C) for the purposes of Subchapter B of this chapter (relating to Combustion Control at Major Industrial, Commercial, and Institutional Sources in Ozone Nonattainment Areas), all units in the Houston-Galveston-Brazoria ozone nonattainment area that generate electricity but do not meet the conditions specified in subparagraph (A) of this paragraph, including, but not limited to, cogeneration units and units owned by independent power producers.

(15) Emergency situation--As follows.

(A) An emergency situation is any of the following:

(i) an unforeseen electrical power failure from the serving electric power generating system;

(ii) the period of time that an Electric Reliability Council of Texas, Inc. (ERCOT)-issued emergency notice, (as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (June 1, 2012) and issued as specified in *ERCOT*

*Protocols, Section 6: Adjustment Period and Real-Time Operations (June 1, 2012)*, [, as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms (April 25, 2006)*, issued by the Electric Reliability Council of Texas, Inc. (ERCOT) as specified in *ERCOT Protocols, Section 5: Dispatch (April 26, 2006)*,] is applicable to the serving electric power generating system. The emergency situation is considered to end upon expiration of the emergency notice issued by ERCOT;

(iii) an unforeseen failure of on-site electrical transmission equipment (e.g., a transformer);

(iv) an unforeseen failure of natural gas service;

(v) an unforeseen flood or fire, or a life-threatening situation;

[or]

(vi) operation of emergency generators for Federal Aviation Administration licensed airports, military airports, or manned space flight control centers for the purposes of providing power in anticipation of a power failure due to severe storm activity; or [.]

(vii) operation of an emergency generator as part of an ERCOT emergency response program if the operation is in direct response to an instruction by ERCOT during the period of an ERCOT emergency notice as specified in clause (ii) of this subparagraph.

(B) An emergency situation does not include: [operation for purposes of supplying power for distribution to the electric grid, operation for training purposes, or other foreseeable events.]

(i) operation for training purposes or other foreseeable events; or

(ii) operation for purposes of supplying power for distribution to the electric grid, except as specified in subparagraph (A)(vii) of this paragraph.

(16) Functionally identical replacement--A unit that performs the same function as the existing unit that it replaces, with the condition that the unit replaced must be physically removed or rendered permanently inoperable before the unit replacing it is placed into service.

(17) Heat input--The chemical heat released due to fuel combustion in a unit, using the higher heating value of the fuel. This does not include the sensible heat of the incoming combustion air. In the case of carbon monoxide (CO) boilers, the heat input includes the enthalpy of all regenerator off-gases and the heat of combustion of the incoming CO and of the auxiliary fuel. The enthalpy change of the fluid catalytic cracking unit regenerator off-gases refers to the total heat content of the gas at the temperature it enters the CO boiler, referring to the heat content at 60 degrees Fahrenheit, as being zero.

(18) Heat treat furnace--A furnace that is used in the manufacturing, casting, or forging of metal to heat the metal so as to produce specific physical properties in that metal.

(19) High heat release rate--A ratio of boiler design heat input to firebox volume (as bounded by the front firebox wall where the burner is located, the firebox side waterwall, and extending to the level just below or in front of the first row of convection pass tubes) greater than or equal to 70,000 British thermal units per hour per cubic foot.

(20) Horsepower rating--The engine manufacturer's maximum continuous load rating at the lesser of the engine or driven equipment's maximum published continuous speed.

(21) Incinerator--As follows.

(A) For the purposes of this chapter, the term "incinerator" includes both of the following:

(i) a control device that combusts or oxidizes gases or vapors (e.g., thermal oxidizer, catalytic oxidizer, vapor combustor); and

(ii) an incinerator as defined in §101.1 of this title (relating to Definitions).

(B) The term "incinerator" does not apply to boilers or process heaters as defined in this section, or to flares as defined in §101.1 of this title.

(22) Industrial boiler--Any combustion equipment, not including utility or auxiliary steam boilers as defined in this section, fired with liquid, solid, or gaseous fuel, that is used to produce steam or to heat water.

(23) International Standards Organization (ISO) conditions--ISO standard conditions of 59 degrees Fahrenheit, 1.0 atmosphere, and 60% relative humidity.

(24) Large utility system--All boilers, auxiliary steam boilers, and stationary gas turbines that are located in the Dallas-Fort Worth or the Dallas-Fort Worth eight-hour ozone nonattainment area, and were part of one electric power generating system on January 1, 2000, that had a combined electric generating capacity equal to or greater than 500 megawatts.

(25) Lean-burn engine--A spark-ignited or compression-ignited, Otto cycle, diesel cycle, or two-stroke engine that is not capable of being operated with an exhaust stream oxygen concentration equal to or less than 0.5% by volume, as originally designed by the manufacturer.

(26) Low annual capacity factor boiler, process heater, or gas turbine supplemental waste heat recovery unit--An industrial, commercial, or institutional boiler; process heater; or gas turbine supplemental waste heat recovery unit with maximum rated capacity:

(A) greater than or equal to 40 million British thermal units per hour (MMBtu/hr), but less than 100 MMBtu/hr and an annual heat input less than or

equal to 2.8 (10<sup>11</sup>) British thermal units per year (Btu/yr), based on a rolling 12-month average; or

(B) greater than or equal to 100 MMBtu/hr and an annual heat input less than or equal to 2.2 (10<sup>11</sup>) Btu/yr, based on a rolling 12-month average.

(27) Low annual capacity factor stationary gas turbine or stationary internal combustion engine--A stationary gas turbine or stationary internal combustion engine that is demonstrated to operate less than 850 hours per year, based on a rolling 12-month average.

(28) Low heat release rate--A ratio of boiler design heat input to firebox volume less than 70,000 British thermal units per hour per cubic foot.

(29) Major source--Any stationary source or group of sources located within a contiguous area and under common control that emits or has the potential to emit:

(A) at least 50 tons per year (tpy) of nitrogen oxides (NO<sub>x</sub>) and is located in the Beaumont-Port Arthur ozone nonattainment area;

(B) at least 50 tpy of NO<sub>x</sub> and is located in the Dallas-Fort Worth or Dallas-Fort Worth eight-hour ozone nonattainment area;

(C) at least 25 tpy of NO<sub>x</sub> and is located in the Houston-Galveston-Brazoria ozone nonattainment area; or

(D) the amount specified in the major source definition contained in the Prevention of Significant Deterioration of Air Quality regulations promulgated by the United States Environmental Protection Agency in 40 Code of Federal Regulations §52.21 as amended June 3, 1993 (effective June 3, 1994), and is located in Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Comal, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Hays, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Red River, Robertson, Rusk, Titus, Travis, Victoria, or Wharton County.

(30) Maximum rated capacity--The maximum design heat input, expressed in million British thermal units per hour, unless:

(A) the unit is a boiler, utility boiler, or process heater operated above the maximum design heat input (as averaged over any one-hour period), in which case the maximum operated hourly rate must be used as the maximum rated capacity;  
or

(B) the unit is limited by operating restriction or permit condition to a lesser heat input, in which case the limiting condition must be used as the maximum rated capacity; or

(C) the unit is a stationary gas turbine, in which case the manufacturer's rated heat consumption at the International Standards Organization (ISO) conditions must be used as the maximum rated capacity, unless limited by permit condition to a lesser heat input, in which case the limiting condition must be used as the maximum rated capacity; or

(D) the unit is a stationary, internal combustion engine, in which case the manufacturer's rated heat consumption at Diesel Equipment Manufacturer's Association or ISO conditions must be used as the maximum rated capacity, unless limited by permit condition to a lesser heat input, in which case the limiting condition must be used as the maximum rated capacity.

(31) Megawatt (MW) rating--The continuous MW output rating or mechanical equivalent by a gas turbine manufacturer at International Standards Organization conditions, without consideration to the increase in gas turbine shaft output and/or the decrease in gas turbine fuel consumption by the addition of energy recovered from exhaust heat.

(32) Nitric acid--Nitric acid that is 30% to 100% in strength.

(33) Nitric acid production unit--Any source producing nitric acid by either the pressure or atmospheric pressure process.

(34) Nitrogen oxides (NO<sub>x</sub>)--The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(35) Parts per million by volume (ppmv)--All ppmv emission specifications specified in this chapter are referenced on a dry basis. When required to adjust pollutant concentrations to a specified oxygen (O<sub>2</sub>) correction basis, the following equation must be used.

Figure: 30 TAC §117.10(35) (No Change to the figure as it currently exists in TAC)

(36) Peaking gas turbine or engine--A stationary gas turbine or engine used intermittently to produce energy on a demand basis.

(37) Plant-wide emission rate--The ratio of the total actual nitrogen oxides mass emissions rate discharged into the atmosphere from affected units at a major

source when firing at their maximum rated capacity to the total maximum rated capacities for those units.

(38) Plant-wide emission specification--The ratio of the total allowable nitrogen oxides mass emissions rate dischargeable into the atmosphere from affected units at a major source when firing at their maximum rated capacity to the total maximum rated capacities for those units.

(39) Predictive emissions monitoring system (PEMS)--The total equipment necessary for the continuous determination and recordkeeping of process gas concentrations and emission rates using process or control device operating parameter measurements and a conversion equation or computer program to produce results in units of the applicable emission limitation.

(40) Process heater--Any combustion equipment fired with liquid and/or gaseous fuel that is used to transfer heat from combustion gases to a process fluid, superheated steam, or water for the purpose of heating the process fluid or causing a chemical reaction. The term "process heater" does not apply to any unfired waste heat recovery heater that is used to recover sensible heat from the exhaust of any combustion equipment, or to boilers as defined in this section.

(41) Pyrolysis reactor--A unit that produces hydrocarbon products from the endothermic cracking of feedstocks such as ethane, propane, butane, and naphtha using combustion to provide indirect heating for the cracking process.

(42) Reheat furnace--A furnace that is used in the manufacturing, casting, or forging of metal to raise the temperature of that metal in the course of processing to a temperature suitable for hot working or shaping.

(43) Rich-burn engine--A spark-ignited, Otto cycle, four-stroke, naturally aspirated or turbocharged engine that is capable of being operated with an exhaust stream oxygen concentration equal to or less than 0.5% by volume, as originally designed by the manufacturer.

(44) Small utility system--All boilers, auxiliary steam boilers, and stationary gas turbines that are located in the Dallas-Fort Worth or the Dallas-Fort Worth eight-hour ozone nonattainment area, and were part of one electric power generating system on January 1, 2000, that had a combined electric generating capacity less than 500 megawatts.

(45) Stationary gas turbine--Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a

foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft must be treated as one unit.

(46) Stationary internal combustion engine--A reciprocating engine that remains or will remain at a location (a single site at a building, structure, facility, or installation) for more than 12 consecutive months. Included in this definition is any engine that, by itself or in or on a piece of equipment, is portable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of portability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine being replaced is included in calculating the consecutive residence time period. An engine is considered stationary if it is removed from one location for a period and then returned to the same location in an attempt to circumvent the consecutive residence time requirement. Nonroad engines, as defined in 40 Code of Federal Regulations §89.2, are not considered stationary for the purposes of this chapter.

(47) System-wide emission rate--The ratio of the total actual nitrogen oxides mass emissions rate discharged into the atmosphere from affected units in an electric power generating system or portion thereof located within a single ozone

nonattainment area when firing at their maximum rated capacity to the total maximum rated capacities for those units. For fuel oil firing, average activity levels must be used in lieu of maximum rated capacities for the purpose of calculating the system-wide emission rate.

(48) System-wide emission specification--The ratio of the total allowable nitrogen oxides mass emissions rate dischargeable into the atmosphere from affected units in an electric power generating system or portion thereof located within a single ozone nonattainment area when firing at their maximum rated capacity to the total maximum rated capacities for those units. For fuel oil firing, average activity levels must be used in lieu of maximum rated capacities for the purpose of calculating the system-wide emission specification.

(49) Thirty-day rolling average--An average, calculated for each day that fuel is combusted in a unit, of all the hourly emissions data for the preceding 30 days that fuel was combusted in the unit.

(50) Twenty-four hour rolling average--An average, calculated for each hour that fuel is combusted (or acid is produced, for a nitric or adipic acid production unit), of all the hourly emissions data for the preceding 24 hours that fuel was combusted in the unit.

(51) Unit--A unit consists of either:

(A) for the purposes of §§117.105, 117.205, 117.305, 117.1005, 117.1105, and 117.1205 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)) and each requirement of this chapter associated with §§117.105, 117.205, 117.305, 117.1005, 117.1105, and 117.1205 of this title, any boiler, process heater, stationary gas turbine, or stationary internal combustion engine, as defined in this section;

(B) for the purposes of §§117.110, 117.210, 117.310, 117.1010, 117.1110, and 117.1210 of this title (relating to Emission Specifications for Attainment Demonstration) and each requirement of this chapter associated with §§117.110, 117.210, 117.310, 117.1010, 117.1110, and 117.1210 of this title, any boiler, process heater, stationary gas turbine, or stationary internal combustion engine, as defined in this section, or any other stationary source of nitrogen oxides (NO<sub>x</sub>) at a major source, as defined in this section;

(C) for the purposes of §117.2010 of this title (relating to Emission Specifications) and each requirement of this chapter associated with §117.2010 of this title, any boiler, process heater, stationary gas turbine (including any duct burner in the

turbine exhaust duct), or stationary internal combustion engine, as defined in this section;

(D) for the purposes of §117.2110 of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration) and each requirement of this chapter associated with §117.2110 of this title, any stationary internal combustion engine, as defined in this section;

(E) for the purposes of §117.3310 of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration) and each requirement of this chapter associated with §117.3310 of this title, any stationary internal combustion engine, as defined in this section; or

(F) for the purposes of §117.410 and §117.1310 of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration) and each requirement of this chapter associated with §117.410 and §117.1310 of this title, any boiler, process heater, stationary gas turbine, or stationary internal combustion engine, as defined in this section, or any other stationary source of NO<sub>x</sub> at a major source, as defined in this section.

(52) Utility boiler--Any combustion equipment owned or operated by an electric cooperative, municipality, river authority, public utility, or Public Utility Commission of Texas regulated utility, fired with solid, liquid, and/or gaseous fuel, used to produce steam for the purpose of generating electricity. Stationary gas turbines, including any associated duct burners and unfired waste heat boilers, are not considered to be utility boilers.

(53) Wood--Wood, wood residue, bark, or any derivative fuel or residue thereof in any form, including, but not limited to, sawdust, sander dust, wood chips, scraps, slabs, millings, shavings, and processed pellets made from wood or other forest residues.