

The Texas Natural Resource Conservation Commission (commission) adopts new §117.571 and corresponding revisions to the state implementation plan (SIP). Section 117.571 is adopted *with changes* to the proposed text as published in the November 23, 2001 issue of the *Texas Register* (26 TexReg 9519).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The commission adopts this new section in order to control ground-level ozone in the Houston/Galveston (HGA) and Dallas/Fort Worth (DFW) ozone nonattainment areas and as part of the implementation of Senate Bill (SB) 5 (an act relating to the Texas emissions reduction plan), 77th Legislature, 2001. The 77th Legislature adopted SB 5 to establish and provide for the administration of the Texas Emissions Reduction Plan (TERP), which is a comprehensive plan to reduce emissions of air contaminants from mobile sources. The program offers subsidies for the replacement of older diesel engines with more efficient engines, and older diesel-powered vehicles with vehicles with lower emissions, and for the purchase of new automobiles with lower emissions. The program is funded in part through surcharges and fees on the lease, sale, and registration of certain diesel-powered vehicles. The plan is also partially funded by contributions from the owners or operators of stationary nitrogen oxides (NO<sub>x</sub>) sources in the HGA and DFW ozone nonattainment areas. These owners or operators may substitute emission reductions made under the plan for those reductions otherwise required under the commission rules; such substitutions require a contribution to the fund based on the amount of emissions reductions substituted. This adopted new section implements the relevant portions of SB 5 concerning these contributions to the TERP fund for certain sources in the HGA and DFW areas as described in greater detail in the SECTION DISCUSSION portion of this preamble.

## SECTION DISCUSSION

The adopted new §117.571, Use of Emission Reductions Generated from the Texas Emissions Reduction Plan (TERP), allows site owners or operators in the DFW and HGA nonattainment areas to defer a portion of their required NO<sub>x</sub> emissions under applicable commission rules by using emissions reductions generated under the TERP. The TERP reductions may be used if the owner or operator contributes to the TERP fund \$75,000 per ton of NO<sub>x</sub> reductions used, not to exceed 25 tons per year or 0.5 tons per day (tpd) on a site-wide basis; demonstrates to the executive director that the site will be in full compliance with applicable rules no later than the fifth anniversary of the date the emissions reductions would have normally been required; reduces emissions from the site area at least 80% of the required reductions; and receives approval from the executive director of a petition from the owner or operator that demonstrates that it is technically infeasible to comply with the applicable emission reductions of Chapter 117. In order to ensure that TERP reductions are not used twice to meet SIP reductions, the commission added a restriction that TERP emissions used to meet stationary source reduction requirements must not have been previously used to meet reduction requirements under a SIP attainment demonstration. For consistency with SB 5, the commission also added a restriction that TERP credits must be used in the same nonattainment area in which they are generated and a requirement that emission reduction projects funded under TERP must be used to benefit the community in which the site using TERP emission reduction credits is located. In response to public comment, the commission added language describing the emissions baseline used to determine TERP reductions and a description of the criteria used to determine technical infeasibility.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking does not meet the definition of “major environmental rule.” Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). A “major environmental rule” is a rule which is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and which may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The new section implements certain requirements of SB 5 and allows the deferral of NO<sub>x</sub> emissions reductions in the DFW and the HGA nonattainment areas under specific conditions described in the SECTION DISCUSSION portion of this preamble. This adopted section increases the compliance options for industries currently regulated by the commission. The adopted new section does not increase the stringency of existing rules and will not 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.

In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This

rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the adopted rule does not meet any of the four applicability requirements. Specifically, the new section implements the requirements of Texas Health and Safety Code (THSC), §386.056.

#### TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the adopted rule. Promulgation and enforcement of the rule will not burden private real property. The adopted rule does not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, the new rule does not meet the definition of a takings under Texas Government Code, §2007.002(5). The new rule is specifically adopted to implement the requirements of THSC, §386.056 and address alternative methods of meeting emission reduction requirements. Therefore, this adopted rule does not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP

goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the adopted rule is consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in §501.14(q), which requires that the commission protect air quality in coastal areas. The adopted rulemaking addresses alternative methods of meeting emission reduction requirements. No new emissions of air contaminants are authorized by this adoption.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The adopted new section is part of the state's ozone attainment strategy; therefore, the section will be submitted as part of the SIP. As a result, the section will become an applicable requirement under the federal operating permit program.

#### HEARINGS AND COMMENTERS

The commission held public hearings on this proposal in Houston on December 18, 2001, and in Irving on December 20, 2001. The public comment period closed on January 7, 2002. The Environmental Defense (ED); Galveston-Houston Association for Smog Prevention (GHASP); Sierra Club, Houston Regional Group (Sierra-Houston); and United States Environmental Protection Agency (EPA) submitted comments during the comment period. The GHASP and ED comments were submitted on GHASP letterhead. EPA, GHASP, and ED generally supported the proposal with suggested changes. Sierra-Houston generally opposed the proposal.

#### RESPONSE TO COMMENTS

Sierra-Houston stated that a severe ozone nonattainment area such as HGA should be required to make all available reductions. They stated that this is particularly important because the current Houston SIP has a 56 tpd reduction deficit. Sierra-Houston also stated that TERP emission reductions should not be allowed as a substitution for reductions currently required of stationary sources, but rather both sets of reductions should be made.

**The commission disagrees and has not changed the rule in response to this comment. The rule requires that emission substitution from the TERP occur on a ton-for-ton basis so that all reductions required under the HGA attainment demonstration would be accomplished. The TERP allows the user of TERP emission reductions to delay up to 20% of their required emissions for five years. At the end of this period, any delayed reductions will be surplus to those required under the SIP. Regarding the 56-ton emissions reduction deficit, the commission will address the deficit in its 2004 review of the HGA SIP.**

EPA stated that emission reductions under the TERP must be real, permanent, quantifiable, and enforceable, and that these issues should be addressed in proposed TERP rules. Until a TERP rule is proposed, §101.357 must require that any emissions deferral be subject to EPA review and comment. Section 101.357 must also clarify from which baseline an 80% emission reduction is accomplished.

**The commission has not changed the rule in response to this comment, but agrees with EPA that the reductions must be real, permanent, quantifiable, and enforceable. Any emission reduction**

**deferrals will be made available to the EPA until such time as a TERP rule is approved as a SIP revision. Reductions will be determined from the 1997 emission inventory (EI) for DFW and from the baseline as established under the Mass Emissions Cap and Trade (MECT) program for HGA. If a site is not subject to the MECT, the baseline will be the 1997 EI. The commission has not included the baseline within the rule to allow flexibility should the baseline require a change.**

Sierra-Houston stated that the proposal lacks the technical criteria that would determine whether it is technically infeasible for a source to make a required reduction. EPA stated that §117.571 allows impermissible executive director discretion in the determination of technical infeasibility, and that there must be direction or criteria for the executive director to determine the validity of the technical feasibility demonstration.

**The commission changed the rule in response to these comments. The commission will determine on a case-by case review whether a required reduction is technically infeasible. Technical specifications and control technology are constantly changing and involve a wide range of technologies and techniques. The commission does not believe it is possible to place a meaningful summary of these technologies within the rule, but has added rule language stating that a technical review will consider current technology, adaptability of technology to a particular source, age and projected useful life of the source, and cost benefits at the time of application.**

GHASP and ED commented that for \$75,000 per ton, the TERP fund should be able to produce more than one ton of emissions reduction deferrals. GHASP and ED stated that to prevent double counting

of SIP reductions, the money should be used to finance reductions distinct from those already in the SIP. GHASP and ED also stated that the rule should contain a provision that any reductions accomplished under TERP remain in effect over the period the substitution is granted. Finally, GHASP and ED stated that the definition of “site” must encompass an entire facility, not just single emission units.

**The commission has not changed the rule in response to these comments. Money collected from the sale of TERP reductions would go back into the TERP fund and be distributed under TERP rules. Reductions from the TERP would be based on mass tons, therefore, the reducing site does not necessarily need to continue the reductions during the span the reductions are used. For example, if a TERP reduction generates 100 tons of reductions over one year, a facility could use those reductions at 50 tons over a two-year period. In addition, the commission has not changed the definition of “site” to encompass an entire facility in this rulemaking. However, the definition is being considered for proposal in Chapter 101 as part of the upset/maintenance rule package (Rule Log Number 2001-075-101-AI) in the near future. The definition, as currently planned for that proposal, is: “(88) Site - The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control)....”**

**CHAPTER 117: CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS**

**SUBCHAPTER E: ADMINISTRATIVE PROVISIONS**

**§117.571**

**STATUTORY AUTHORITY**

The new section is adopted under Texas Water Code (TWC), §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under TWC; and under Texas Clean Air Act (TCAA), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new section is also adopted under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air. The new section is also adopted under THSC, §386.056, concerning Availability of Emissions Reductions in Certain Nonattainment Areas, as created by SB 5, which authorizes the commission to allow alternative methods of compliance with air pollution regulations.

**§117.571. Use of Emission Reductions Generated from the Texas Emissions Reduction Plan (TERP).**

(a) An owner or operator of a unit located in the Dallas/Fort Worth nonattainment area or in the Houston/Galveston nonattainment area that is not subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) may meet emission control

requirements of §117.105 or §117.205 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)), §117.106 or §117.206 of this title (relating to Emission Specifications for Attainment Demonstrations), §117.207 of this title (relating to Alternative Plant-wide Emission Specifications), §117.108 of this title (relating to System Cap), or §117.223 of this title (relating to Source Cap), by obtaining emission reductions generated from the TERP if:

(1) the owner or operator of the site as defined in §122.10 of this title (relating to General Definitions) contributes to the TERP fund, \$75,000 per ton of nitrogen oxides emissions used, not to exceed 25 tons per year or 0.5 tons per day on a site-wide basis;

(2) the owner or operator of the site demonstrates to the executive director that the site will be in full compliance with the applicable emission reduction requirements of this chapter no later than the fifth anniversary of the date on which the emission reductions would otherwise be required;

(3) emissions from the site are reduced by at least 80% of the required reductions;

(4) the reductions accomplished under the TERP have not been previously used to meet reduction requirements under a state implementation plan attainment demonstration;

(5) the reductions accomplished under the TERP are used in the same nonattainment area in which they are generated; and

(6) the executive director approves a petition submitted by the owner or operator of the site that demonstrates that it is technically infeasible to comply with applicable emission reduction requirements of this division and this chapter above 80% of the required reductions. When considering technical infeasibility the executive director may consider, but will not be limited to:

- (A) current technology;
- (B) adaptability of technology to a particular source;
- (C) age and projected useful life of a source; and
- (D) cost benefits at the time of application.

(b) The emissions reductions funded under the TERP, and used to offset commission requirements, shall be used to benefit the community in which the site using the emissions reductions is located. If there are no eligible emissions reduction projects within the community, the commission may authorize projects in an adjacent community. For purposes of this section, a community means a Justice of the Peace precinct.