

The Texas Commission on Environmental Quality (commission) adopts the repeal of §§101.380, 101.382, 101.383, and 101.385 *without changes* to the proposed text as published in the October 21, 2011, issue of the *Texas Register* (36 TexReg 7124).

Background and Summary of the Factual Basis for the Adopted Rules

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

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

Wharton.

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

emissions allowables with other owners or operators of EGFs located in these counties.

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

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

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

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

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

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

Section by Section Discussion

The adopted repeal of Division 5, System Cap Trading, §§101.380, 101.382, 101.383, and 101.385 will remove all rules related to the SCT program from Chapter 101. The SCT program was established to provide additional compliance flexibility to owners of EGFs subject to the system cap emission limits specified in Chapter 117; however, the program has seen minimal participation by affected sources. The Chapter 101 SCT program rules have been withdrawn from consideration by the EPA as a revision to the SIP and are not federally enforceable. The Chapter 117 rules specifying the system cap emission limits have been approved by the EPA as a SIP revision and are therefore federally enforceable. The repeal of the SCT program rules will avoid any potential regulatory confusion among owners or operators of affected EGFs regarding the use of a compliance option that is no longer federally enforceable to meet a federally enforceable rule.

Final Draft Regulatory Impact Analysis

The commission reviewed the repeal of the SCT program rules from Chapter 101 in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225,

and determined that the repeal does not meet the definition of a major environmental rule as defined in that statute, and in addition, if the rule did meet the definition, it would not be subject to the requirement to prepare a regulatory impact analysis.

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

the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

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

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

Code, which are cited in the Statutory Authority section of this rulemaking.

Therefore, this repeal is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

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

The commission completed a takings impact analysis for the adopted repeal under Texas Government Code, §2007.043. The adopted rulemaking repeals rules related to the SCT program from Chapter 101. The repeal will not create any additional burden on private real property. The repeal will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The repeal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the repeal will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that it 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 adopted rulemaking in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the adopted rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource

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

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

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 101 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators with facilities subject to the federal operating

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

Public Comment

The commission scheduled public hearings in Houston on November 15, 2011, and in Austin on November 17, 2011. However, since no one registered to provide comments, the hearings were not officially opened. The comment period closed on October 21, 2011. The commission received one written comment from the EPA.

Response to Comments

The EPA stated its support of the repeal of the SCT program and all associated references to the SCT program in Chapter 117. The EPA further stated that the repeal of the SCT program will clarify the available compliance options for electric generating units in Texas.

The commission appreciates the support and makes no changes to the rule based on this comment.

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

Statutory Authority

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

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

§101.380. Definitions.

§101.382. Applicability.

§101.383. General Provisions.

§101.385. Recordkeeping and Reporting.