

The commission adopts new §101.12, concerning Temporary Exemptions During Drought Conditions, with changes to the proposed text as published in the December 10, 1996, issue of the *Texas Register* (21 TexReg 11813).

EXPLANATION OF ADOPTED RULE

The new section is adopted to allow the agency flexibility regarding air quality requirements when emergency drought conditions dictate the need for conservation of the state's water resources. The new section would allow owners and operators of sources which are required to suppress emissions, such as dust, through the application or use of water to receive a temporary exemption from air quality requirements upon written request. A source must be located in an area classified as severe or extreme under the Palmer Drought Severity Index for a minimum of 30 days to be eligible for this exemption. The types of requirements from which an exemption may be granted are permit conditions, standard exemption conditions, permit representations, air quality rules, and commission orders. The rule will not relieve a source from compliance with any applicable Prevention of Significant Deterioration (PSD) permit, New Source Performance Standards (NSPS), or National Emission Standards for Hazardous Air Pollutants (NESHAPs) requirement. The rule specifies the type of information to be submitted for consideration of whether such relief will be granted and the period of time for which the exemption is valid. The rule also limits the length of time the executive director may authorize this temporary exemption and specifies that commission approval is required for long-term exemptions.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rule is to afford flexibility related to air regulations which require the use of water when it is necessary to maximize conservation of the state's water resources during specific drought conditions. The rule will substantially advance this specific purpose by providing a mechanism to request a temporary exemption from the requirement to apply water when complying with rules, permit or standard exemption conditions, or orders of the commission. Promulgation and enforcement of the rule will not burden private real property which is the subject of the rule because it offers a temporary exemption from requirements which would otherwise require the application of water.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this rulemaking action is 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.), the rules of the Coastal Coordination Council (31 TAC Chapters 501-506), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency, and has determined that this rulemaking is consistent with the applicable CMP goals and policies. The proposed section will allow only a temporary exemption from air quality requirements which require the use of water during a drought if certain criteria can be met.

No new sources of air contaminants will be authorized by this section. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rule is consistent with CMP goals and policies.

HEARING AND COMMENTERS

A public hearing was held on January 6, 1997, in Austin. The comment period closed January 10, 1997. Comments were received from an individual and from the United States Environmental Protection Agency, Region 6 (EPA).

The individual was opposed to the rule because it is so broad in scope and in theory would allow exemptions for operations unaffected by drought conditions. The commenter also noted that the term “reasonably available alternative control measures” is not defined and is left to subjective interpretation and that there is no provision in the rule which prevents a nuisance condition from occurring.

The commission agrees with the commenter that the language is broad in scope, and intends for the language to be broad to allow the commission to consider an exemption from any state air requirement that may impede conservation of water during a drought. However, the commission does not agree that the rule will allow operations not affected by drought conditions to qualify for an exemption under the rule. The commission believes that the rule language is clear with respect to the conditions under which an exemption would be granted. The term “reasonably available alternative control measures” is not defined because of the wide variety of sources which could potentially request an exemption, and to define the term could limit the intended flexibility of the rule. During the review of a request, the executive director will evaluate the type of industry and

the types of control techniques associated with the specific industry. For example, an acceptable alternative for a concentrated animal feeding operation controlling dust emissions through the application of water may be to increase the number of animals per square foot of pen space and clean the pens of loose materials more frequently. The commission does not believe it is necessary to specifically address nuisance conditions in the rule, because the nuisance potential of a source operating under an exemption will be considered in the review of any request prior to an exemption being granted. The commission believes that the language of the rule and the case-by-case review of such requests are sufficient to avoid abuses of the rule.

EPA suggested the establishment of alternate means of control (AMOC) strategies to replace existing control strategies that rely on the use of water for areas of the state which are anticipated to experience severe or extreme drought conditions frequently.

The commission believes that it is impractical to anticipate areas of the state which would experience severe or extreme drought conditions more frequently than other areas of the state.

The current commission rules do not allow the necessary flexibility to deal with drought conditions on a statewide basis. The commission also believes that the addition of language to provide for the use of area specific AMOC would not add greatly to the rule. The rule is intended to be a temporary alternative to the use of water, which in many cases may be the most effective control strategy. The use of an AMOC would be a permanent change in control strategy that may not be appropriate.

EPA also requested the identification of procedures or practices that are currently being used in areas where water conservation is necessary and the potential for these procedures to be used in the alternative during drought conditions.

Because there is no requirement for communities to report mandatory or voluntary water conservation efforts, the commission cannot identify what practices are being used at any one time.

EPA suggested the addition of “for at least 30 days” after the phrase “Palmer Drought Severity Index” in the opening paragraph of the section and the addition of “Palmer Drought Severity Index” to paragraph (2)(A) for purposes of clarification.

The commission agrees that the suggestion could clarify the length an area must have been classified as severe or extreme and has made the suggested change.

EPA commented that the criteria for determining significant health concerns should be addressed and that the rule should include language referencing that increased emissions will not cause or contribute to an exceedance of the National Ambient Air Quality Standard (NAAQS). EPA requested that the record address that the rule does not exempt a source from compliance with any applicable NSPS or NESHAP standard unless the applicable standard specifically provides for an exemption which must be approved on a case-by-case basis by EPA.

Requests for an exemption will be subject to a health-related review which meets the requirements of protection of public health and safety as required by the Texas Clean Air Act. The commission does not believe that it is necessary to include language related to exceedances of the NAAQS. The commission agrees that the rule does not exempt a source from compliance with applicable federal requirements and has added language to the rule to clarify this point raised by EPA.

EPA further commented that a relaxation of the State Implementation Plan (SIP) generally would require approval from EPA. However, in this case, EPA agrees that approval by the executive director for exemptions of 180 days or less may not necessarily require EPA approval. Relaxations of the SIP granted by the commission for longer than 180 days should follow some form of EPA review and approval. EPA would desire a process similar to the current AMOC and including a provision for a 30-day review.

The commission agrees with EPA's comment regarding review and approval of exemptions extended beyond 180 days and agrees that it would be appropriate to afford EPA the opportunity to review and comment. The commission has included language to incorporate this change.

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103 and Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§101.12. Temporary Exemptions During Drought Conditions.

Owners and operators of sources located in an area or region which has been classified by the National Weather Service as being in a severe or extreme drought condition under the Palmer Drought Severity Index for at least 30 days that are required to control emissions through the application or use of water may request a temporary exemption from any commission air quality rule, permit condition, permit representation, standard exemption condition, or commission order. This section does not allow for an exemption from any federal requirement.

(1) The request must be submitted in writing to the Office of Air Quality, New Source Review Division, and include at a minimum the following information:

(A) the site-specific circumstances that prevent the continued or limited use of water;

(B) the specific rule, permit condition, permit representation, standard exemption condition, or commission order from which an exemption is being requested; and

(C) the reasonably available alternative control measures which will be undertaken to minimize emissions.

(2) The executive director may authorize by written permission a temporary exemption of up to 120 days upon finding that:

(A) the source or facility is located in an area or region which has been classified as severe or extreme for at least 30 days under the Palmer Drought Severity Index;

(B) such an exemption is necessary to aid in the conservation of the area's water resources;

(C) any additional emissions which may result from the exemption will not cause a significant health concern in the opinion of the executive director; and

(D) the requesting owner and operator of the source will utilize reasonably available alternative control measures to minimize emissions during this time.

(3) The executive director may specify alternative procedures or methods for controlling emissions when an exemption is granted under this section.

(4) The executive director may issue one 60-day extension of an exemption authorized under this section. A commission order is required for any exemption which would extend beyond a total of 180 days and approval shall be based on the criteria contained in this section. The executive director shall notify EPA of exemptions which will be considered for extension beyond 180 days.

The executive director shall notify EPA at least 30 days prior to the commission's consideration of such an extension.

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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