

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §101.27, Emissions Fees and §101.333, Allocation of Allowances. These sections are also proposed as a revision to the State Implementation Plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASE FOR THE PROPOSED RULES

The 76th Legislature passed Senate Bill (SB) 766 in 1999. In general, SB 766 recategorized the new source review authorizations under the Texas Clean Air Act (TCAA) and created the new program for the voluntary permitting of grandfathered facilities. Prior to the revisions by SB 766, the TCAA authorized the commission to issue permits for the construction or modification of facilities that will emit air contaminants; standard permits adopted by rule; and exemptions from permitting, also adopted by rule. SB 766 modified this structure by authorizing the commission to issue standard permits using a process that does not require each standard permit to be in a rule. SB 766 provided a new name, permits by rule, for authorizations of certain types of facilities which would not make a significant contribution of air contaminants to the atmosphere. Exemptions from permitting now authorize only changes at insignificant facilities. Finally, the commission is now authorized to develop criteria for facilities that emit a de minimis amount of air contaminants that do not need preconstruction authorization. Within the category of permits, SB 766 created two new permitting options: the Voluntary Emission Reduction Permit (VERP) program for permitting of grandfathered facilities, and the multiple plant permit (MPP). SB 766 also amended TCAA, §382.0621(d) to require increasing emissions fees for the largest grandfathered facilities which do not have a permit application pending on or after September 1, 2001.

The commission is implementing this legislation in two phases. The first phase of the implementation of SB 766 was adopted by the commission on December 16, 1999. Included in the first phase were the VERP program and the new standard permit issuance procedures.

This proposal implements elements of SB 766 relating to emissions fees, adds the ability for the commission to accept fee payments via electronic funds transfer, and makes administrative revisions. Other elements of SB 766, including MPPs, de minimis criteria, exemptions from permitting, and permits by rule are addressed in concurrent proposals for new and amended sections in 30 TAC Chapter 106 and Chapter 116. The authority for emissions fees is in TCAA, §382.0621, concerning Operating Permit Fee.

SECTION BY SECTION DISCUSSION

The proposed amendments to §101.27 would insert a new §101.27(c)(2) to implement the emissions fees required by TCAA, §382.0621(d). For grandfathered facilities with emissions in excess of 4,000 tons per year (tpy) which do not have a permit application pending on or after September 1, 2001, all emissions from the facility, including those emissions in excess of 4,000 tpy would be used to calculate the emissions fees required by §101.27. Currently, §101.27 only requires emissions fees to be calculated using a maximum of 4,000 tpy of each regulated air pollutant. Under the proposed amendment, for the first 4,000 tons, per pollutant, the emissions fee would be \$26 per ton. Emissions fees for emissions in excess of 4,000 tpy would be \$78 per ton for fiscal year 2002, and would triple each fiscal year thereafter. Thus, for fiscal year 2003, the fee for emissions in excess of 4,000 tpy per regulated air pollutant would be \$234 per ton. The amended section also allows for fee payments to be

made by electronic funds transfer, updates the emissions fee rate table to include Fiscal Years 1998 - 2000, would reflect the recent reorganization of the commission's permitting offices, corrects a reference to 40 Code of Federal Regulations Part 70, and would revise citations to reflect insertion of a new §101.27(c)(2).

Section 101.333 would be amended to correct an inadvertent omission of the term "NO_x."

FISCAL NOTE

Bob Orozco, Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed amendment is in effect there will be no significant fiscal implications for the commission and other units of state and local government as a result of administration or enforcement of the proposed amendment. The proposed amendment to Chapter 101, General Air Quality Rules, would implement certain provisions of SB 766, 76th Legislature, 1999, relating to the issuance of certain permits for the emission of air contaminants. The first phase of the implementation of SB 766 was adopted by the commission on December 16, 1999. Included in the first phase were the VERP program, except for the requirement for increasing emissions fees, and the new standard permit issuance procedures. The proposed amendment is the second phase of the commission's implementation of SB 766. Other elements of SB 766 are addressed in concurrent proposals for new and amended sections in Chapters 106 and 116.

The proposed amendment would implement elements of SB 766 relating to emissions fees, add the ability for the commission to accept fee payments via electronic funds transfer, and make administrative

revisions to this chapter. The proposed amendment would affect major source grandfathered facilities with over 4,000 tons of emissions per year. A survey of grandfathered facilities in Texas indicated that 14 facilities at seven sites have emissions over 4,000 tons per year. Currently, emissions fees for each regulated pollutant are capped at 4,000 tons per year at \$26 per ton or \$104,000 per year per pollutant. SB 766 specifies that the commission shall impose a fee on grandfathered facilities that do not have a permit application pending on or after September 1, 2001 for all emissions, including emissions in excess of 4,000 tons; and triple the amount of the fee imposed for emissions in excess of 4,000 tons each fiscal year. In the proposed amendment, grandfathered facilities with emissions in excess of 4,000 tons per year that do not have a permit application pending on or after September 1, 2001 would be assessed emissions fees of \$26 per ton for the first 4,000 tons of emissions of a pollutant, \$78 per ton for each ton over 4,000 tons in fiscal year 2002, \$234 per ton in 2003, and \$702 per ton in 2004. The fee for emissions in excess of 4,000 tons of a pollutant would continue to triple each fiscal year thereafter. For example, with the proposed amendment, the fiscal impact on a facility with emissions of one pollutant totaling 6,450 tons per year would be \$295,100 in 2002, \$677,200 in 2003, and \$1.8 million in 2004. It is anticipated that most or all of the facilities that emit over 4,000 tons per year will apply for a VERP or another permit because of the increasing emissions fees.

PUBLIC BENEFIT

Mr. Orozco has also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be a potential reduction of air contaminants by providing an increased incentive for owners or operators of grandfathered facilities to apply for a permit by September 1, 2001.

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SMALL AND MICRO-BUSINESS ANALYSES

No significant adverse effects are anticipated to small or micro-businesses as a result of implementing the proposed amendment to Chapter 101 because there are no known small or micro-businesses in Texas that are considered major sources or that emit in excess of 4,000 tons of a pollutant per year.

Therefore, there are no known small or micro-businesses in Texas that will be affected by the proposed amendment to this chapter.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking does not meet the definition of a “major environmental rule” as defined in that statute. “Major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment is intended to protect the environment and reduce risks to human health from environmental exposure. The amendment requires emissions fees for grandfathered facilities that do not have a permit application pending on or after September 1, 2001, on all emissions, including emissions in excess of 4,000 tons; and triple the amount of the fee imposed for emissions in excess of 4,000 tons each fiscal year. These increasing fees could adversely affect 14 facilities at seven sites in Texas which emit over 4,000 tons of emissions if those facilities do not have a permit application pending on or after September 1, 2001. However, implementation of the statutorily mandated fees 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. Section 2001.0225(a) 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 does not meet any of these four applicability requirements of §2001.0225(a). Specifically, the proposed amendment does not exceed a standard set by state or federal law, but complies with provisions in SB 766 and the Texas Health and Safety Code, concerning Operating Permit Fees. The proposed amendment does not exceed a requirement of a delegation agreement and was not developed solely under the general powers of the agency, but was specifically developed to implement the provisions of the Texas Health and Safety Code as amended by SB 766. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ANALYSIS

The commission has prepared a takings impact assessment for the proposed rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The proposed rule would increase emissions fees on emissions in excess of 4,000 tpy for grandfathered facilities that do not have a permit application pending on or after September 1, 2001. This proposed action does not restrict or limit an owner's right to their property that would otherwise exist in the absence of governmental action and therefore does not constitute a takings. This action meets an exception to §2007.043, because it is implementing the specific requirement of TCAA, §382.0621(d).

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has 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 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, commission 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 with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council. The proposed rule is intended to provide incentive for the reduction of emissions at grandfathered facilities, and the commission has determined that the 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 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. This action does not authorize any new emissions. This action is consistent with Title 40 Code of Federal Regulations because it does not authorize an emission rate in excess of that specified by federal requirements. Interested persons may submit comments during the public comment period on the consistency of the proposed rule with the CMP goals and policies.

PUBLIC HEARING

The commission will hold a public hearing on this proposal in Austin at 10:00 a.m. on May 4, 2000 in Room 201A of Texas Natural Resource Conservation Commission Building B, 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, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 1999-029B-116-AI. Comments must be received by 5:00 p.m., May 8, 2000. For further information, please contact Beecher Cameron, Policy and Regulations Division, (512) 239-1495.

STATUTORY AUTHORITY

The amendment is proposed under TCAA, §382.0621, which authorizes the commission to triple emissions fees for grandfathered facilities over 4,000 tpy which do not have a permit application pending on or after September 1, 2001. The amendment is also proposed under TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission with the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; and §382.0622, which defines Clean Air Act fees and their use.

The proposed amendment implements TCAA, §382.0621, concerning Emission Fees; §382.011, concerning General Powers and Duties; §382.012, concerning State Air Control Plan; and §382.017, concerning Rules.

CHAPTER 101 - GENERAL AIR QUALITY RULES

SUBCHAPTER A : GENERAL RULES

§101.27

§101.27. Emissions Fees.

(a) Applicability. The owner or operator of each account to which this rule applies shall remit to the commission an emissions fee each fiscal year. A fiscal year is defined as the period from September 1 through August 31. A fiscal year, having the same number as the next calendar year, begins on the September 1 prior to that calendar year. An account subject to both an emissions fee and an inspection fee, under §101.24 of this title (relating to Inspection Fees), is required to pay only the greater of the two fees. Each account will be assessed a separate emissions fee. Provisions of this section apply to all accounts, including accounts which have not been assigned specific commission account numbers. The owner or operator of an account subject to an emissions fee requirement is responsible for contacting the appropriate commission regional office to obtain an account number. The commission will not initiate the combination or separation of accounts solely for fee assessment purposes. If an account is operated at any time during the fiscal year for which the fee is assessed, a full emissions fee is due. If the commission is notified in writing that the plant is not and will not be in operation during that fiscal year, a fee will not be due. All regulated air pollutants, as defined in subsection (c)(4) [(3)] of this section, including, but not limited to, those emissions from point and fugitive sources during normal operations with the exception of (for applicability purposes only) hydrogen, oxygen, carbon dioxide, water, nitrogen, methane, and ethane, are used to determine

applicability of this section. In accordance with rules promulgated [proposed] by EPA [the United States Environmental Protection Agency (EPA)] at 40 Code of Federal Regulations (CFR) 70, concerning the use of fugitive emissions in major source determinations, fugitive emissions shall be considered toward applicability of this section only for those source categories listed at 40 CFR 51.166(b)(1)(iii). For purposes of this section, an affected account shall have met one or more of the following conditions:

(1) - (9) (No change.)

(b) Payment. Fees shall be remitted by check, electronic funds transfer, or money order made payable to the Texas Natural Resource Conservation Commission (TNRCC) [TNRCC] and sent to the TNRCC address printed on the fee return form. A completed fee return form shall accompany fees remitted. The fee return form shall include, at least, the company name, mailing address, site name, air emissions inventory [OAQ] account number, Standard Industrial Classification (SIC) category, the allowable levels and/or actual emissions of all regulated air pollutants at the account for the reporting period, and the name and telephone number of the person to contact in case questions arise regarding the fee payment.

(c) Basis for fees.

(1) The emissions fee shall be based on allowable levels and/or actual emissions at the account during the last full calendar year preceding the beginning of the fiscal year for which the fee is assessed. For purposes of this section, the term "allowable levels" are those limits as specified in an enforceable document such as a permit or Commission Order which are in effect on the date the fee is due. The fee applies to the tonnage of regulated pollutants at the account, including those emissions from point and fugitive sources during normal operations. Although certain fugitive emissions are excluded for applicability determination purposes under subsection (a) of this section, all fugitive emissions must be considered for fee calculations after applicability of the fee has been established. A maximum of 4,000 tons of each regulated pollutant will be used for fee calculations except as provided in paragraph (2) of this subsection. The fee for each fiscal year is set at the following rates.

Figure: 30 TAC §101.27(c)(1)

| Fiscal Year | Rate Per Ton | Minimum Fee |
|--------------------|---------------------|--------------------|
| 1992 | \$3 | |
| 1993 | \$5 | \$25 |
| 1994 | \$25 | \$25 |
| 1995 | \$26 | \$26 |
| 1996 | \$26 | \$26 |
| 1997 | \$26 | \$26 |
| 1998 | \$26 | \$26 |
| 1999 | \$26 | \$26 |
| 2000 | \$26 | \$26 |

The rate of \$26 per ton will remain effective for future fiscal years until amended. If the fee is applicable, the company responsible for the account shall pay the calculated emissions fee or the minimum fee, whichever is greater.

(2) On and after September 1, 2001, a grandfathered facility, as defined in §116.10(6) of this title (relating to General Definitions) that does not have a permit application pending under Chapter 116 of this title (relating to Control of Air Pollution by Permits For New Construction or Modification) shall use all emissions, including emissions in excess of 4,000 tons per pollutant, for fee calculations. For the first 4,000 tons per pollutant, the rate in paragraph (1) of this subsection shall apply. For emissions in excess of 4,000 tons, the rate will be \$78 per ton for fiscal year 2002 and will triple, each fiscal year, thereafter.

(3) [(2)] The emissions tonnage for the account for fee calculation purposes will be the sum of those allowable levels and/or actual emissions for individual emission points or process units at the account rounded up to the nearest whole number, as follows.

(A) Where there is an enforceable document, such as a permit or Commission Order, establishing allowable levels, actual emissions may be used only if a completed Emissions Inventory Questionnaire for the account is submitted with the fee payment. For stacks or vents, the inventory must include verifiable data based on continuous emission monitor measurements, other continuously monitored values, such as fuel usage and fuel analysis, or stack testing performed during normal operations using EPA approved methods and quality-assured by the executive director [OAQ].

All measurements, monitored values, or testing must have been performed during the basis year as defined in subsection (c)(1) of this section or if not performed during the basis year, must be representative of the basis year as defined in subsection (c)(1) of this section. Actual emission rates may be based upon calculations for fugitive sources, flares, and storage tanks. Actual production, throughput, and measurement records must be submitted, along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and factors used in such calculations. If the actual emissions rate submitted for fee purposes is less than 60% of the allowable emission rate, an explanation of the discrepancy must be submitted. Where inadequate or incomplete documentation is submitted, the executive director may direct that the fee be based on allowable levels. Where a complete and verifiable inventory is not submitted, allowable levels shall be used.

(B) Where there is not an enforceable document, such as a permit or a Commission Order, establishing allowable levels actual emissions shall be used. Actual production, throughput, or measurement records must be submitted along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and factors used in such calculations.

(4) [(3)] For purposes of this section, the term "regulated pollutant" shall include any VOC [volatile organic compound], any pollutant subject to the FCAA, §111, any pollutant listed as a hazardous air pollutant under the FCAA, §112, each pollutant for which a national primary ambient air quality standard has been promulgated (including carbon monoxide), and any other air pollutant subject

to requirements under commission rules, regulations, permits, orders of the commission, or court orders. The term "normal operations" shall mean all operations other than those documented under §101.6 of this title (relating to Upset Reporting and Recordkeeping Requirements) or §101.7 of this title (relating to Maintenance, Start-up and Shutdown Reporting, Recordkeeping, and Operational Requirements).

(d) - (f) (No change.)

SUBCHAPTER H : EMISSIONS BANKING AND TRADING

DIVISION 2 : ALLOCATION OF ALLOWANCES

§101.333

STATUTORY AUTHORITY

The amendment is proposed under Texas Utilities Code (TUC), §39.264, which authorizes the commission to require the permitting of grandfather electric generating facilities and issue allowances to meet those permit emission restrictions; TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission with the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; and §382.0622, which defines Clean Air Act fees and their use.

The proposed amendment implements TUC §39.264, concerning emission reductions of "Grandfathered Facilities"; TCAA, §382.011, concerning General Powers and Duties; §382.012, concerning State Air Control Plan; and §382.017, concerning Rules.

§101.333. Allocation of Allowances.

Allowances will be allocated according to the requirements of this section.

(1) Except as provided in paragraphs (2) and (3) of this section, allowances will be calculated for grandfathered electric generating facilities (EGF) using the following equation:

Figure: 30 TAC §101.333(1)

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$$A = \frac{ER * HI}{2000 \text{ lb / allowance}}$$

Where:

A = Number of allowances

HI = Total heat input (million British thermal units (MMBtu)) as listed in the 1997 Emissions Scorecard from EPA's Acid Rain Program, or if not listed in the 1997 Emissions Scorecard, by a method approved by the executive director, consistent with the emission reduction requirements of this division.

ER = Emission rate, as defined in subparagraphs (A) and (B) of this paragraph;

(A) In the East Texas Region:

(i) 0.14 pound nitrogen oxides (NO_x) per MMBtu; and

(ii) 1.38 pounds sulfur dioxide (SO₂) per MMBtu only for coal-fired grandfathered EGFs.

(B) In the West Texas and El Paso Regions, 0.195 pounds NO_x
[pound] per MMBtu.

(2) - (7) (No change.)