

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** July 1, 2011

Thru: Melissa Chao, Acting Chief Clerk
Mark R. Vickery, P.G. Executive Director

From: Susana M. Hildebrand, P.E., Chief Engineer
Chief Engineers Office

Docket No.: 2010-2013-RUL

Subject: Commission Approval for Adopted Rulemaking
Chapter 101, General Air Quality Rules
Title V Air Emissions Fees
Rule Project No. 2011-006-101-EN

Background and reason(s) for the rulemaking:

Under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0621, Operating Permit Fee, the Texas Commission on Environmental Quality (TCEQ) assesses and collects an annual fee based on emissions for each source that is subject to the permitting requirements of Title IV or V of the 1990 Federal Clean Air Act (FCAA) amendments. Federal requirements under 40 Code of Federal Regulations (CFR) §70.9 states that the revenue generated from the collection of this fee must be sufficient to fund the direct and indirect costs for administering the federal operating permits program.

Beginning in Fiscal Year (FY) 2009, the total obligation of the Title V program exceeded revenues. Fund surplus will keep the balance positive until FY 2012. Beginning in FY 2012, emissions fee revenue (based on FY 2011 calculations, combined with fee balance projections) is projected to be insufficient to adequately fund the TCEQ's operating costs associated with the federal operating permits program. The FY 2011 budget to administer the FCAA, Title V (operating permit) program is estimated to remain at \$35 million while the revenues are expected to be \$26 million. This shortfall is expected to continue unless the TCEQ pursues a rule change to revise how emissions fees are calculated.

The annual fee is based on the emissions, up to a cap of 4,000 tons per regulated pollutant (all criteria and any pollutant that is permitted at a site) and is adjusted annually based on the consumer price index (CPI) and on the previous year's carbon monoxide (CO) emissions (as a percentage of emissions assessed a fee). The revenue generated by the emissions fee has declined as a result of emissions decreasing over the past eight fiscal years at an average rate of 5% annually. Additionally, although the CPI has increased by a rate of change of 3% over the past eight fiscal years, the CPI increased by only 0.19% for FY 2011 and 1.47% for FY 2012. The CO fraction has increased from 22.0% to 24.47% over the last eight fiscal years, which also impacted the fee rate.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

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The rule amendment will remove the CO fraction discount and leave the base rate at \$25 per ton for FY 2012. Because the CO fraction varies annually based on the previous year's inventory, removing the fraction would improve the predictability of the fee, aid in budgeting for fee payers, and allow the base rate to remain at \$25 per ton for FY 2012. This is a change from the original rule proposal that kept the CO fraction in the equation and increased the base fee rate to \$35 per ton for FY 2012. The rule will also allow for annual adjustments of the base rate, as required for adequate fee revenue up to a predetermined cap of \$45 per ton.

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

To meet the federal and Texas Health and Safety Code (THSC) statutory requirements to adequately fund the Title V program, the rule must be revised to increase the collection of emissions fees for Title IV and V sources.

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

Staff recommends revising the base rate of the fee calculation, allowing the base rate to be annually adjustable, and removing the CO fraction. The United States Environmental Protection Agency's (EPA) presumptive minimum fee under 40 CFR §70.9, is a base rate of \$25 per ton of emissions multiplied by the rate of change of the CPI, resulting in a fee rate of \$43.83 per ton for FY 2010 and \$44.45 in FY 2011. 40 CFR §70.9 specifies that a state may exclude actual emissions of each regulated pollutant that the source emits in excess of 4,000 tons per year (tpy) and, in 40 CFR §70.2, specifically excludes CO from presumptive fee calculation purposes. The federal government allows, but does not mandate, for CO to be disregarded for fee purposes. Because the commission regulates CO, fees are assessed on this pollutant. As a result of public comment by industry, staff recommends removing the CO fraction.

Statutory authority:

THSC, §382.011, authorizes the commission to administer the requirements of the TCAA; THSC, §382.017 authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and THSC, §382.0621 authorizes the commission to adopt, charge, and collect an annual fee from regulated entities subject to the permitting requirements of FCAA Title IV or V.

Effect on the:

A.) Regulated community:

A total of 905 sources have been invoiced \$26 million for FY 2011. In 2010, 853 sources paid Title V emissions fees. The proposed rule would remove the CO fraction and, without the CO fraction, generate about \$35 million in FY 2012. Emissions are estimated to continue their 5% annual decrease. Assuming a relatively flat CPI and using the FY 2011 assessed amount, the first-year increase is anticipated to be \$9 million statewide with an average increase of 35% for each regulated entity.

B.) Public:

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This rulemaking will not directly affect the general public.

C.) Agency programs:

The Air Emissions and Inspection Fees Program is responsible for implementing and administering the emissions fee rule. Some effort will be required to evaluate and set the rate every year in coordination with the Chief Financial Officer; however, that effort will be absorbed without requiring additional staff.

Stakeholder meetings:

A stakeholder meeting was held December 10, 2010, in Austin, Texas, with video conferencing to Beaumont, Dallas, Houston, and Corpus Christi. Attendees from the regulated community included representatives from other Texas state agencies, electric utilities, the United States Army, industry, and consulting firms. Commenters wanted to see more clarification on how the funds are spent, how the TCEQ is managing the Title V cost, and whether revenue could be transferred from other funds. Commenters also mentioned the timeline for stakeholder comments was short and did not leave much time to generate comments.

Public comment:

Eleven comments were received; eight were from individual companies (including one municipal landfill) and three were from trade associations. Most sources were supportive of fully funding the program but the commission was urged to contain Title V costs with efficiencies and by removing discretionary activities. Specific activities such as all permitting, monitoring, and performing state implementation plan modeling were challenged as potentially not appropriately charged as a Title V task. Removing the CO fraction was supported for simplifying the rule and future budgeting. However, removing it should not be in conjunction with the proposed increase in the base rate from \$25 per ton to \$35 per ton. One commenter stated that the cost increase was not budgeted, will impact the available operations and maintenance budget, and requested the commission provide a 12-month notice before a rate change. A recommendation was made for an exception to the fee increase for small sources with less than 100 employees.

Significant changes from proposal:

The proposal was to increase the base rate from \$25 per ton to \$35 per ton and make the base rate adjustable up to a cap of \$45 per ton. The proposal also solicited comments on the appropriateness of removing the CO fraction. Comments regarding removing the CO fraction were supportive, indicating that removing the CO fraction would simplify the fee calculation equation. However, both removing the CO fraction and raising the base rate to \$35 per ton was not supported. The commission staff concurred that both removing the CO fraction and increasing the base rate for funding FY 2012 is not needed. The rule is changed to remove the CO fraction and to generate approximately the same revenue with the same potential impact on regulated entities. The base rate will remain at \$25 per ton for FY 2012.

Potential controversial concerns and legislative interest:

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An adjustable base rate would differ from the EPA presumptive minimum base rate of \$25 per ton. However, 40 CFR §70.9 requires sufficient revenue be collected to fund the direct and indirect costs for administering the federal operating permits program and does not mandate limiting the base rate to \$25 per ton.

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

The fee rate is currently calculated each year by the Emissions Assessment Section staff based on the percentage of CO in the inventory and CPI. However, the CO fraction will no longer need to be determined. The proposed policy will require an additional calculation of determining the required base rate to cover expected Title V expenses. This calculation will be made in conjunction with the Chief Financial Office.

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

If the rulemaking does not go forward, insufficient revenue will be generated to fund the Title V program. If the agency does not collect sufficient fees to fund Title V requirements, the agency may be forced to make reductions in service in non-Title V areas in order to shift resources to accomplish Title V requirements. Alternatively, if the agency does not sufficiently fund Title V requirements, the EPA could require the TCEQ to make a fee demonstration. 40 CFR §70.9 states that the revenue generated from the collection of this fee must be sufficient to fund the direct and indirect costs for administering the federal operating permits program. If the demonstration shows insufficient funds for Title V are collected, the EPA could issue a Notice of Deficiency for the program, and if not corrected, disapprove the Texas Title V program.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** March 11, 2011

Anticipated *Texas Register* publication date: August 5, 2011

Anticipated effective date: August 11, 2011

Six-month *Texas Register* filing deadline: September 12, 2011

Agency contacts:

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Attachments

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