

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** February 4, 2011

Thru: LaDonna Castañuela, 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 Proposed 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:

Per the 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 Amendments. Federal requirements under 40 Code of Federal Regulations (CFR) Part 70, §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 revenue¹ is projected to be insufficient to adequately fund the operating costs associated with the federal operating permits program. The FY 2011 budget to administer the Federal Clean Air Act Title V (operating permit) program is estimated to be \$35 million while the revenues are expected to be \$26.2 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 pollutant 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 overall emissions). The revenue generated by the emissions fee has declined as a result of emissions declining 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 09 and 1.47% for FY 10. 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 proposed rulemaking:

A) Summary of what the rulemaking will do: The proposed rule amendment will increase a base rate from \$25 per ton to \$35 per ton in the emissions fee calculation for fiscal year 2012 and allow annual adjustments of the base rate, as required for adequate fee revenue up to a predetermined cap of \$45 per ton. The base rate may be further adjusted based on the January 2011 CPI and emissions amounts. The proposal will also take comments on removing the CO fraction from the fee assessment equation. Because the CO fraction varies annually based on the

¹ Based on FY 2010 calculations, combined with fee balance projections

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previous year's inventory, removing the fraction would improve the stability of the fee and could reduce the amount of the required base adjustment.

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 emission fees for Title 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 and requesting comment on the appropriateness of removing the CO fraction. The United States Environmental Protection Agency's (EPA) presumptive minimum fee per 40 CFR Part 70 §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. Section 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 §70.2, specifically excludes carbon monoxide (CO) from presumptive fee calculation purposes. Removing the CO fraction would align the fee rate with the federal presumptive minimum. The federal government allows, but does not mandate, for CO to be disregarded for fee purposes.

Statutory authority:

THSC, Texas Clean Air Act (TCAA), §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 Title IV or V of the Federal Clean Air Act of 1990.

Effect on the:

A) Regulated community: A total of 905 sources have been invoiced \$26.2 million for FY 11. In 2010, 853 sources paid Title V emissions fees. The proposed rule would increase the base rate 40% from \$25 to \$35 or the amount necessary to generate at least \$35 million in FY 2012. However, emissions are estimated to continue their 5% annual decrease. Assuming a flat CPI and using the FY 11 assessed amount, the first year increase would be \$9.2 million statewide with an average increase of 35% for each regulated entity.

B) Public: This rule making 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 very 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 time-line for stakeholder comments was short and did not leave much time to generate comments.

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Potential controversial concerns and legislative interest:

Changing the base rate from \$25 to \$35 would differ from the EPA presumptive minimum fee of \$25 per ton. However, 40 CFR Part 70 §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. Providing for an ability to annually adjust the base rate could be more difficult for industry to make an early estimate of its fee obligation.

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

The fee rate is currently calculated each year by the Emissions Assessment staff based on the percentage of CO in the inventory and CPI. The proposed policy will require an additional calculation of determining the required base rate to cover expected Title V expenses.

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. 40 CFR Part 70 §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.

Key dates in the proposed rulemaking schedule:

Anticipated proposal date: February 23, 2011
Anticipated *Texas Register* publication date: March 3, 2011
Public hearing date: Austin and Houston, week of April 4-8, 2011
Public comment period: March 11, 2011 – April 11 2011
Anticipated adoption date: July 27, 2011

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Attachments

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