

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §101.379.

If adopted, amended §101.379 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rule

The Electric Reliability Council of Texas, Inc. (ERCOT) manages the electrical grid within the ERCOT region of Texas, with oversight by the Public Utility Commission of Texas (PUCT). On March 22, 2012, the PUCT repealed 16 TAC §25.507, to replace the Emergency Interruptible Load Service (EILS) program with the Emergency Response Service (ERS) program (new 16 TAC §25.507). Like the EILS program, the new ERS program is designed to help decrease the likelihood of requiring firm load shedding (i.e., rolling black-outs) during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. Subsequent changes to ERCOT's Nodal Protocols reflecting the new ERS program became effective on June 1, 2012.

On December 10, 2008, the commission adopted the amendment to §101.379 to restrict the use of discrete emissions reduction credits (DERCs) in the Dallas-Fort Worth 1997 eight-hour ozone nonattainment area (DFW area) to a level consistent with the attainment and maintenance of the 1997 eight-hour ozone National Ambient Air Quality

Standard (NAAQS). The rule requires an annual review of the DFW area DERC program to determine the flow control limit and apportion available DERCs for potential use. The rule also provides an exemption from the DFW flow control limit for DERCs used in response to an ERCOT-declared emergency situation and reference the specific ERCOT protocols that detail the emergency notice. The existing rule references the previous version of the ERCOT protocols, which could potentially cause confusion for regulated entities and delay the processing of DERC usage requests. The proposed rulemaking would update §101.379 to reference the version of the ERCOT protocols effective on June 1, 2012.

The amendment to §101.379 is proposed concurrently with the amendment to 30 TAC §117.10 that will be published in a separate rulemaking in this issue of the *Texas Register*.

Section Discussion

The commission proposes to revise §101.379(c)(2)(D) to reference the version of the ERCOT Protocols effective on June 1, 2012.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Strategic Planning and Assessment Section analyst, has determined that for the first five-year period the proposed rule is in effect, no fiscal implications are

anticipated for the TCEQ or other units of state or local government. The amendment to Chapter 101 is proposed concurrently with an amendment to Chapter 117.

The new ERS program is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. The proposed amendment in Chapter 101 would merely update a reference in agency rules to reflect the version of the ERCOT Protocols effective on June 1, 2012. The proposed amendment to Chapter 101 does not add or delete administrative or regulatory requirements for the TCEQ or other units of state or local government and therefore, no fiscal implications are anticipated due to the administration or enforcement of the proposed change.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rules will be the facilitation of the new ERS program administered by ERCOT, which is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid.

The proposed rule is not expected to have a fiscal impact on individuals or businesses. The proposed amendment to Chapter 101 would merely update a reference in agency

rules to reflect the version of the ERCOT Protocols effective June 1, 2012, which reflect changes to ERCOT's new ERS program.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The amendment to §101.379 is proposed concurrently with the amendment to §117.10. Together, the proposed amendment is intended to facilitate the implementation of the new ERS program administered by ERCOT. The new ERS program is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. The proposed amendment to Chapter 101 would merely update a reference in agency rules to reflect the version of the ERCOT Protocols effective June 1, 2012, which reflect changes to ERCOT's new ERS program.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking does not meet the definition of a major environmental rule. Texas Government Code, §2001.0225 states that a major environmental rule is a rule for which the specific intent 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. Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law. Specifically, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this proposed rulemaking; and 4) the proposed rulemaking is authorized by specific sections of Texas Health and Safety Code (THSC), 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 preamble.

The proposed rule implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the FCAA (meaning

42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the proposed rulemaking is to update references to the ERCOT protocols in §101.379 to be consistent with §117.10.

While the proposed rulemaking protects the environment or reduces risks to human health from environmental exposure, it does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3), because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would the rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. The rulemaking as a result is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225, because it is not a major environmental rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program; or are adopted solely under the general powers of the TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application. The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule proposed for

inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that, when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App.

Austin 1990, no writ) *superseded by statute on another point of law*, Tax Code § 112.108, Other Actions Prohibited, *as recognized in, First State Bank of Dumas v. Sharp*, 863 S.W.2d 81, 83 (Tex. App. Austin 1993, no writ); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of substantial compliance as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rulemaking does

not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law (NAAQS). The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Env'tl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the proposed rulemaking is to update references to the ERCOT protocols in §101.379 to be consistent with §117.10. This proposal, therefore, does not exceed an express requirement of federal law. The amendment is needed to implement state law but does exceed those new requirements. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the Statutory Authority section of this preamble, including THSC, §382.012 and §382.019. Because this proposed rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply and a regulatory impact analysis is not required.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) 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 Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) 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 (ii) is the producing cause of a reduction of at least 25 percent 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."

Promulgation and enforcement of the rulemaking would be neither a statutory nor a

constitutional taking of private real property. The primary purpose of the rulemaking is an update to Chapter 101, Subchapter H to ensure consistency with ERCOT's new ERS program. This rule is not burdensome, restrictive, or limiting of rights to private real property because the rulemaking regulates the use of electric generators in certain limited emergency situations. Furthermore, the rulemaking benefits the public by potentially decreasing the likelihood of requiring firm load shedding (i.e., rolling black-outs) when additional control measures are needed to achieve or maintain attainment of the federal air quality standards through the use of electric generators. The rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, this rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal 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 proposed rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed

rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the proposed rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The CMP policy applicable to the proposed 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 (31 TAC §501.32). The proposed rulemaking would 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 rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies and because this rule 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed amendment will not require any changes to federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on November 28, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office 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, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to

comments being submitted via the eComments system. All comments should reference Rule Project Number 2012-025-117-AI. The comment period closes December 5, 2012. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Ray Schubert, Air Quality Planning Section, (512) 239-6615.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: DISCRETE EMISSION CREDIT

BANKING AND TRADING

§101.379

Statutory Authority

The amendment is proposed under the authority of the following: Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, and §5.105, General Policy (these provisions authorize the commission to adopt rules necessary to carry out its powers and duties as well as all general policies under the TWC); Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, Policy and Purpose, which 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, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, §382.051(d), Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382. Finally, the amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires

states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standard will be achieved and maintained within each air quality control region of the state.

The proposed amended implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§101.379. Program Audits and Reports.

(a) No later than three years after the effective date of this section, and every three years thereafter, the executive director will audit this program.

(1) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of discrete emission credits may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(3) The audit data and results will be completed and submitted to the United States Environmental Protection Agency and made available for public inspection within six months after the audit begins.

(b) No later than February 1 of each calendar year, the executive director shall develop and make available to the general public and the United States Environmental Protection Agency a report that includes the following information for the previous calendar year:

(1) the amount of each pollutant emission credits generated under this division;

(2) the amount of each pollutant emission credits used under this division;

(3) a summary of all trades completed under this division; and

(4) the amount of discrete emission reduction credits (DERC) approved for use under subsection (c) of this section.

(c) No later than October 1 of each year, the executive director will complete, and make available to the general public and the United States Environmental Protection Agency, an annual review to determine the number of DERCS available for potential use in the upcoming calendar year for the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area. The annual review will include the calculation of the flow control limit as specified in subsection (c)(2)(A) of this section to ensure noninterference with attainment and maintenance of the ozone National Ambient Air Quality Standard (NAAQS) and the apportionment of approved DERCS.

(1) For the 2009 control period, the flow control limit for DERCS available for use is the number prescribed in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(2) For any control period after 2009, the annual review will establish a flow control limit for that year, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(A) The flow control limit for a particular year will be determined using the following equation:

Figure: 30 TAC §117.379(c)(2)(A) (No change to the figure as it currently exists in TAC.)

(B) If use of the entire DERC bank would not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area, then the number of DERCs potentially available for use is the total number of DERCs in the bank.

(C) If the flow control limit, as calculated in the equation in subparagraph (A) of this paragraph, is greater than the total number of DERCs requested for use in accordance with §101.376(d) of this title (relating to Discrete Emission Credit Use) the executive director:

(i) may approve all requested Notice of Intent to Use Discrete Emission Credits (DEC-2 Form) submittals; and

(ii) will consider any late DEC-2 Forms submitted as provided under §101.376(d)(3) of this title that is not an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation as defined in subparagraph (D) of this paragraph, but will not otherwise approve a late submittal that would exceed the flow control limit established by the equation under subsection (c)(2)(A) of this section.

(D) If the DEC-2 Forms are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the flow control limit and may be approved provided all other requirements are met. For the purposes of this subparagraph, an ERCOT-declared emergency situation is defined as the period of time that an ERCOT-issued emergency notice (as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (June 1, 2012) and issued as specified in *ERCOT Protocols, Section 6: Adjustment Period and Real-Time Operations* (June 1, 2012)) [as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (April 25, 2006), issued by ERCOT as specified in *ERCOT Protocols, Section 5: Dispatch* (April 26, 2006)], is applicable to the serving electric power generating system. The emergency situation is considered to end upon expiration of the emergency notice issued by ERCOT.