

The Texas Natural Resource Conservation Commission (commission) proposes new §117.109, System Cap Flexibility; §117.110, Change of Ownership - System Cap; and §117.139, System Cap Flexibility. The new sections 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

On April 19, 2000 the commission adopted rules, which were published in the May 5, 2000 issue of the *Texas Register* (25 TexReg 4101 and TexReg 4140), that required electric generating facilities (EGFs) in the Dallas/Fort Worth (DFW) ozone nonattainment area and east and central Texas to meet specific nitrogen oxides (NO_x) emission limits. The counties of Dallas, Tarrant, Collin, and Denton are included in the DFW area. The counties affected in the attainment area are: Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton.

Under the adopted rules, owners or operators of EGFs were given the option of participating in a system cap to meet the emission requirements in Chapter 117. Under a system cap owners or operators of EGFs would have the option of averaging emissions among as long as the facilities were under common ownership or control and an overall cap on the system is not exceeded. The purpose of this proposal is give the owners and operators of EGFs in the affected areas additional flexibility in meeting their system caps either through the use of emission reduction credits (ERCs), discrete emission

reduction credits (DERCs), or through the transfer of emissions between EGFs participating in a system cap that are in the same nonattainment or attainment area.

SECTION BY SECTION DISCUSSION

The proposed new §117.109 would allow owners or operators of NO_x sources in the DFW ozone nonattainment area who are participating in a system cap under proposed §117.108 to trade emissions with other participating owners or operators of NO_x sources in the DFW ozone nonattainment area under the requirements in amendments to Chapter 101, Subchapter H, Division 1, 4, or 5, relating to Emission Credit Banking and Trading; Discrete Emission Credit and Trading Program; and System Cap Trading. The new Chapter 101, Subchapter H, Division 5 is proposed in a concurrent rulemaking and appears in this edition of the *Texas Register*.

The new §117.110 states that in the event that a unit of electric power generation is sold or transferred, the unit shall become subject to the transferee's emission cap. The value Ri in §117.108(c), System Cap is based on a unit's status as of January 1, 2000 and does not change as a result of the sale or transfer of a unit regardless of the size of the transferee's system.

The proposed new §117.139 states that an owner or operator of a source of NO_x in an east or central Texas attainment area who is participating in the system cap under §117.138, System Cap may exceed their system cap provided the owner or operator is complying with Chapter 101, Subchapter H, Division 1, 4, or 5, relating to Emission Credit Banking and Trading; Discrete Emission Credit and

Trading Program; and System Cap Trading. The new Chapter 101, Subchapter H, Division 5 is proposed in a concurrent rulemaking and appears in this edition of the *Texas Register*.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined for each year of the first five-year period the proposed rules are in effect, there may be positive fiscal implications, which are not anticipated to be significant, for owners of boilers and turbines in the four-county DFW nonattainment area and the 95-county central and east Texas attainment area as a result of administration or enforcement of the proposed rules. There are 23 investor-owned boilers and 13 boilers owned by municipalities in the DFW area that could be affected by the proposed rules. In addition, there are approximately 65 investor-owned boilers and turbines and 36 boilers and turbines owned by municipalities, cooperatives, or river authorities in the east and central Texas attainment area that could be affected by the proposed rules. The transfer of emission allowable remains restricted to the area, nonattainment or attainment, in which it originates. There will be no fiscal implications for units of state and local government that do not own or operate boilers at EGFs.

The system cap trading program is intended to provide another emission trading alternative for regulated EGFs in the DFW area, which consists of Collin, Dallas, Denton, and Tarrant Counties and in the attainment counties of east and central Texas. The EGFs affected by Chapter 117 are in the following counties: Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton.

This program is intended to provide increased flexibility for regulated NO_x sources by adding another emission trading alternative to meet required emission levels. Regulated NO_x sources in the affected areas that are operating under a system cap are eligible to participate in the system cap trading program. This program would allow the trading of emissions between different entities as long as participating sources are operating under a system cap. A NO_x source would only be allowed to exceed the system cap by obtaining surplus emissions from other sources.

The system cap trading program differs from the emission credit banking and trading program because there is no banking of emissions with the commission. All trading is done between entities with overall trading reports and emission levels provided for the agency on a quarterly basis. The proposed system cap trading program is intended to enhance daily trading of emissions by allowing direct trades between entities without prior commission approval. The commission does not anticipate significant fiscal impacts to units of state and local government owned and operated sources due to the quarterly reporting requirement.

Since the proposed rules do not add additional regulatory requirements that have not already been proposed, the commission estimates there will be no additional costs to units of state and local government as a result of implementing the proposed rules other than the cost to purchase and trade emissions, which was estimated to be approximately \$3,600 per ton per year for ERCs. There are 23 investor-owned boilers and 13 boilers owned by municipalities in the DFW area that could be affected by the proposed rules if the owners of these boilers decide to participate in the system cap trading program. In addition, there are approximately 65 investor-owned boiler and turbine EGFs and 36

boiler and turbine EGFs owned by river authorities, cooperatives, or municipalities in the east and central Texas attainment area which could be affected by the proposed rules if the owners of these boilers and turbines decide to participate in the system cap trading program. Actual costs for purchased and traded emissions will be dependent on availability and demand. Total costs to state and local government sites that elect to participate in the system cap trading program will depend on the amount of emissions purchased. Emission trading under this program is intended to provide flexibility for regulated NO_x sources and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other sources' surplus emissions to meet emission reduction requirements. Additionally, facilities that remain within their emission caps may receive additional revenue from selling surplus emissions to other emission sources.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result of implementing the proposed rule will be a reduction in NO_x emissions in the affected areas and increased flexibility for EGFs to meet emission reduction requirements. The proposed rules would allow EGFs in the affected areas that are operating under a system cap to participate in the system cap trading program.

This program is intended to provide increased flexibility for regulated NO_x sources by adding another emission trading alternative to meet required emission levels. Regulated NO_x sources in the affected areas that are operating under a system cap would be eligible to participate in the system cap trading program, which would allow the trading of emissions between different entities as long as participating

sources are operating under a system cap. A NO_x source would only be allowed to exceed the system cap by obtaining surplus emissions from other sources, unless it was in compliance with §117.570 of this title (relating to Use of Emissions Credits for Compliance).

Since the proposed rules do not add additional regulatory requirements that have not already been proposed, the commission estimates there will be no additional costs to individuals and businesses as a result of implementing the proposed rules other than the cost to purchase and trade emissions, which was estimated to be approximately \$3,600 per ton per year for ERCs. It is anticipated that the majority of owners and operators of the investor-owned and operated power boilers located at EGFs in the DFW and the east and central Texas areas would be affected by the proposed rulemaking by electing to participate in the system cap trading program. Emission trading under this program is intended to provide flexibility for regulated NO_x sources and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other NO_x sources' surplus emissions to meet emission reduction requirements. Additionally, facilities that remain within their emission caps may receive additional revenue from selling surplus emissions to other emission sources.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of administration or enforcement of the proposed rules. The proposed rules would allow EGFs in the affected areas to participate in the system cap trading program. There are no known small or micro-businesses that own

or operate affected EGFs in the affected areas; therefore, the commission anticipates there will be no fiscal impact for small or micro-businesses as a result of the proposed rules.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that these proposed new sections do not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225. "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 commission is proposing these new sections to allow greater flexibility for EGFs in the affected areas to meet NO_x emission limitations and for NO_x emissions trading. The proposed new sections do 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; therefore, these proposed sections does not constitute a major environmental rule. In addition, Texas Government Code, §2001.0225, 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 is not subject to the

regulatory analysis provisions of §2001.0225(b), because the proposed rules does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements were developed in order to meet the ozone national ambient air quality standard (NAAQS) set by the EPA under the Federal Clean Air Act (FCAA), §109 (42 United States Code (USC), §7409), and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for “implementation, maintenance, and enforcement” of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state 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 this chapter,” (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC 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 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These 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 agency. 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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The commission bases these actions on the presumption that the legislature understands 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 SIP rule would require the full RIA 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. Because it is a rule of statutory interpretation that 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 RIA for rules that are extraordinary in nature. While the SIP rules will 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 proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

The commission invites public comment on the draft RIA.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed rules. The following is a summary of that assessment. The sections are proposed as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the DFW nonattainment area to attain the NAAQS for ozone and to maintain air quality in east and central Texas. Promulgation and enforcement of the rules will not burden private real property. The proposed new sections do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the NO_x emissions under the system cap that are the subject of these rules are not property rights. Consequently, the proposed sections do not meet the

definition of a takings under Texas Government Code, §2007.002(5). Although the proposed sections do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the USC, §7410. Specifically, the emission limitations and control requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a NO_x strategy which is necessary for the DFW area to meet the air quality standards established under federal law and to maintain air quality in east and central Texas. Consequently, the exemption which applies to this proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Plan (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 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 reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined the proposed rules are 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 the commission protect air quality in coastal areas. The proposed new sections would allow greater flexibility in meeting system cap requirements by trading NO_x emissions between EGFs in the affected areas. The proposed sections do not authorize any new NO_x air emissions. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The proposed new sections, if adopted, would become part of the state's ozone attainment strategy; therefore, these revisions would be submitted as part of the SIP. As a result, the proposed sections would become an applicable requirement under the federal operating permit program and source would be required to amend their permits.

ANNOUNCEMENT OF HEARING

The commission will hold public hearings on this proposal in Irving on January 3, 2001 at 6:00 p.m. at the City of Irving Public Library Auditorium, located at 801 West Irving Boulevard and in Austin on January 4, 2001, at 2:00 p.m., at the Texas Natural Resource Conservation Commission, Building B, Room 201A, located at 12100 Park 35 Circle. The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in

order of registration. There will be no open discussion during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearings, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-046-101-AI. Comments must be received by 5:00 p.m., January 5, 2001. For further information, please contact Matthew R. Baker at (512) 239-1091 or Beecher Cameron at (512) 239-1495.

STATUTORY AUTHORITY

These new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control

measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

SUBCHAPTER B: COMBUSTION AT MAJOR SOURCES

DIVISION 1: UTILITY ELECTRIC GENERATION IN OZONE NONATTAINMENT AREAS

§117.109, §117.110

§117.109. System Cap Flexibility.

An owner or operator of a source of nitrogen oxides (NO_x) in the Dallas/Fort Worth ozone nonattainment area who is participating in the system cap under §117.108 of this title (relating to System Cap) may exceed their system cap provided that the owner or operator is complying with the requirements of §117.570 of this title (relating to Use of Emissions Credits for Compliance) or Chapter 101, Subchapter H, Division 1, 4, or 5 of this title (relating to Emission Credit Banking and Trading; Discrete Emission Credit and Trading Program; and System Cap Trading).

§117.110. Change of Ownership - System Cap.

In the event that a unit within an electric power generating system is sold or transferred, the unit shall become subject to the transferee's system cap. The value Ri in §117.108(c) of this title (relating to System Cap) is based on the unit's status as part of a large or small system as of January 1, 2000, and does not change as a result of sale or transfer of the unit, regardless of the size of the transferee's system.

SUBCHAPTER B: COMBUSTION AT MAJOR SOURCES

DIVISION 2: UTILITY ELECTRIC GENERATION IN EAST AND CENTRAL TEXAS

§117.139

STATUTORY AUTHORITY

This new section is proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new section implements TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

§117.139. System Cap Flexibility.

An owner or operator of a source of nitrogen oxides (NO_x) in east and central Texas attainment area who is participating in the system cap under §117.138 of this title (relating to System Cap) may exceed their system cap provided that the owner or operator is complying with the requirements of

Chapter 101, Subchapter H, Division 1, 4, or 5 of this title (relating to Emission Credit Banking and Trading; Discrete Emission Credit and Trading Program; and System Cap Trading).

