

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §106.4, Requirements for Permitting by Rule. Section 106.4 is adopted *without changes* to the proposed text as published in the October 20, 2000 issue of the *Texas Register* (25 TexReg 10445) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On December 6, 2000 the commission adopted rules, which were published in the January 12, 2001 issue of the *Texas Register* (26 TexReg 283), that established a system of allocation and trading of emission allowances for nitrogen oxides (NO_x) in the Houston/Galveston (HGA) nonattainment area.

An allowance is equal to one ton of NO_x emissions and facilities are required to obtain a sufficient number of allowances that are equal to or exceed its actual emissions for a calendar year. The purpose of this system is to limit emissions of NO_x from individual facilities in HGA so that a regional maximum, or cap, of emissions is not exceeded. The NO_x emission limitations apply to existing and new stationary facilities. Individual facilities may buy or sell allowances, but the total number of allowances in the HGA region may not exceed the predetermined cap.

This adoption supplements the emission cap and trade program (26 TexReg 283), by specifying that facilities or groups of facilities using authorizations under Chapter 106, Permits by Rule, will be required to obtain NO_x emission allowances prior to operation if the facilities being authorized are subject to the cap and trade program.

SECTION BY SECTION DISCUSSION

This adoption adds a new paragraph, §106.4(a)(8), stating that a facility or group of facilities must obtain allowances prior to operation if the facility or group of facilities is subject to the NO_x emission cap and trade program (26 TexReg 283). This adoption does not extend the applicability of the cap and trade program but clarifies that the program would also be applicable to certain facilities authorized under Chapter 106.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that this amendment to Chapter 106 does 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 adopts this amendment to achieve administrative consistency with amendments to Chapter 101 adopted on December 6, 2000 (26 TexReg 283). In the Chapter 101 rulemaking, the commission requires facilities which have the design capacity to emit ten tons or more of NO_x per year in HGA to hold allowances equal to, or greater than their actual NO_x emissions under a cap and trade program. This adopted amendment to Chapter 106 clarifies that an applicant subject to Chapter 101, Subchapter H, Division 3, must obtain allowances prior to operation. The amendment does not expand the applicability of the cap and trade program. The amendment to Chapter 106 does 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, this amended section 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 rule does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this rulemaking are an element of the control strategy for the HGA SIP which is necessary in order for HGA to meet the ozone national ambient air quality standard (NAAQS) set by the United States Environmental Protection Agency (EPA) under the Federal Clean Air Act (FCAA), §109 (42 United States Code (USC), §7409). Additional elements of this control strategy were adopted by the commission on December 6, 2000. These rules do not exceed an express standard set by federal law since they implement requirements of the FCAA. Provisions of 42 USC, §7410, require states to adopt a state implementation plan (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, 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. 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 commission performed photochemical grid modeling which predicts that NO_x emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain NO_x emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and

help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. 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).

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. This amendment is adopted as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the HGA nonattainment area to attain the NAAQS for ozone. Promulgation and enforcement of the amendment will not burden private real property. The amendment does 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 allowances that are the subject of this amendment are not property rights. Consequently, the amendment does not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the amendment does not directly prevent a nuisance or prevent an immediate threat to life or property, it does 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 within this adoption 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 rulemaking is to implement a NO_x strategy which is necessary for the HGA area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to this rule is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this revision will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the 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 amendment 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 the commission protect air quality in coastal areas. The amendment states

that applicants for permits by rule for new or modified facilities in HGA must comply with Chapter 101, Subchapter H, Division 3. The amendment does not authorize any new NO_x air emissions.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The amendment to §106.4, is not considered an applicable requirement under 30 TAC Chapter 122, thus this change would not require a revision to an affected facility's federal operating permit.

HEARING AND COMMENTERS

The commission held a public hearing in Houston on November 16, 2000. No comments were received at the hearing, but the commission received written comments from the EPA and the Sierra Club Houston Regional Group (Sierra-Houston) during the public comment period which closed on November 20, 2000. The EPA requested clarifications on several points of the proposal, and Sierra-Houston opposed the proposal.

ANALYSIS OF TESTIMONY

The EPA commented that the commission should clarify the application and definition of "facility." The definition of "facility" in §116.10(4) should be consistent with the intended use of the same term in proposed §106.4(a)(8). The EPA questioned whether the term was intended to mean that only the emission point that was authorized under the permit by rule would be required to obtain allowances or would all emission points of the same industrial grouping on contiguous or adjacent property, under common ownership or control, be required to obtain allowances.

The rules were not revised based on this comment. The intent of proposed §106.4(a)(8) is to notify the owner(s) seeking to authorize a facility or group of facilities under a permit by rule that if those facilities are subject to the cap and trade program, sufficient allowances will need to be obtained equal to or greater than the total actual NO_x emissions from all facilities subject to Chapter 117 at the site. All facilities at a site that are subject to Chapter 117 and that collectively have a design capacity of ten tons of NO_x emissions per year or greater will be required to obtain allowances. The term “facility” is defined in TCAA, §382.003(6).

Sierra-Houston commented that the proposed amendments in Chapters 101, 106, and 116 should have been part of the Houston SIP proposal that went through public hearings in September 2000. Sierra-Houston stated that very few people would know about the proposals because there was no publicity surrounding them, and that the proposals are far reaching.

The rules were not revised based on this comment. This amendment is directly related to the NO_x cap and trade program, but could not be proposed and adopted on the same schedule. One of the affected sections in this adoption was open under another rulemaking related to the implementation of SB 766 from the 1999 session of the Texas Legislature when the cap and trade rules were proposed. The SB 766 implementation and the cap and trade rules were proceeding under fixed but different schedules due to statutory and federal deadlines. Under the Administrative Procedures Act (APA), the commission must wait until a section undergoing amendment is completed and effective before that section may be opened again for amendment. This rulemaking was proposed and published consistent with the APA requirements.

Sierra-Houston commented that the emission cap and trade program will result in no emission reductions in plants close to poor and minority neighborhoods.

The rules were not revised based on this comment. The effect of implementing the NO_x cap and trade program will be an overall NO_x reduction of approximately 90% from stationary facilities in the HGA nonattainment area. Facilities subject to the cap and trade program will be required to reduce actual emissions to a level equal to or lower than their individual cap, or purchase allowances from another facility participating under the cap and trade program. This trading will result in a zero net effect on the level of the cap, and will not result in increased emissions based on the location of the facility.

Sierra-Houston opposed the cap and trade program in general and stated that requiring emission reductions at all facilities will result in the greatest reduction of ozone. Sierra-Houston also stated that many emission controls will not be required until 2005, which will reduce the chances of the HGA area obtaining the ozone standard by 2007.

The rules were not revised based on this comment. The overall NO_x cap was set at an annual level believed necessary for stationary facilities in order for the HGA nonattainment area to reach attainment by 2007. Thus, compliance with the cap will achieve the necessary reduction from the stationary source category. For facilities not wishing to make reductions to meet their individual cap, additional allowances will need to be obtained from another facility or facilities. Because these purchased allowances will be obtained from a facility participating in the cap and trade

program, this results in an equal reduction from the seller. There is no net increase in the number of allowances. In addition, the cap is being initially set at historical emission levels and will reduce over time with the final reduction taking place in 2007. Based on the existing SIP, the reductions necessary from stationary facilities need to be in full effect by 2007 and not 2005 to demonstrate attainment.

STATUTORY AUTHORITY

The amendment is adopted 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; §382.05196, which authorizes the commission to adopt permits by rule for types of facilities which will not make a significant contribution of air contaminants to the atmosphere; and 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.

CHAPTER 106 - PERMITS BY RULE

SUBCHAPTER A: GENERAL REQUIREMENTS

§106.4

§106.4. Requirements for Permitting by Rule.

(a) To qualify for a permit by rule, the following general requirements must be met.

(1) Total actual emissions authorized under permit by rule from the facility shall not exceed 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO₂) or inhalable particulate matter (PM₁₀); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

(2) Any facility or group of facilities, which constitutes a new major stationary source, as defined in §116.12 of this title (relating to Nonattainment Review Definitions), or any modification which constitutes a major modification, as defined in §116.12 of this title, under the new source review requirements of the Federal Clean Air Act (FCAA), Part D (Nonattainment) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and cannot qualify for a permit by rule under this chapter. Persons claiming a permit by rule under this chapter should see

the requirements of §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) to ensure that any applicable netting requirements have been satisfied.

(3) Any facility or group of facilities, which constitutes a new major stationary source, as defined in 40 Code of Federal Regulations (CFR) §52.21, or any change which constitutes a major modification, as defined in 40 CFR §52.21, under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title and cannot qualify for a permit by rule under this chapter.

(4) Unless at least one facility at an account has been subject to public notification and comment as required in Chapter 116, Subchapter B or Subchapter D of this title (relating to New Source Review Permits or Permit Renewals), total actual emissions from all facilities permitted by rule at an account shall not exceed 250 tpy of CO or NO_x; or 25 tpy of VOC or SO₂ or PM₁₀; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

(5) Construction or modification of a facility commenced on or after the effective date of a revision of this section or the effective date of a revision to a specific permit by rule in this chapter must meet the revised requirements to qualify for a permit by rule.

(6) A facility shall comply with all applicable provisions of the FCAA, §111 (Federal New Source Performance Standards) and §112 (Hazardous Air Pollutants), and the new source review requirements of the FCAA, Part C and Part D and regulations promulgated thereunder.

(7) There are no permits under the same commission account number that contain a condition or conditions precluding the use of a permit by rule under this chapter.

(8) The proposed facility or group of facilities shall obtain allowances for NO_x if they are subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(b) No person shall circumvent by artificial limitations the requirements of §116.110 of this title (relating to Applicability).

(c) The emissions from the facility shall comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of health and property of the public, and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(d) Facilities permitted by rule under this chapter are not exempted from any permits or registrations required by local air pollution control agencies. Any such requirements must be in accordance with TCAA, §382.113 and any other applicable law.