

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §106.4, Requirements for Permitting by Rule.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On August 9, 2000 the commission proposed rules, which were published in the August 25, 2000 issue of the *Texas Register* (25 TexReg 8137), that would establish a system of allocation and trading of emission allowances for nitrogen oxides (NO_x) in the Houston/Galveston (HGA) nonattainment area. An allowance would be equal to one ton of NO_x emissions and sources would be required to obtain a sufficient number of allowances to equal or exceed its emissions for a calendar year. The purpose of this system is to limit emissions of individual sources of NO_x in HGA so that a regional maximum, or cap, of emissions is not exceeded. The NO_x emission limitations would apply to existing and new stationary sources. Individual sources may buy or sell allowances, but the total number of allowances in the HGA region may not exceed the predetermined cap.

This proposal would supplement the proposed emission cap and trade program, published in the August 25, 2000 issue of the *Texas Register* (25 TexReg 8137), by specifying that facilities or groups of facilities using permits by rule under Chapter 106 of this title may be required to obtain NO_x emission allowances prior to operation if the facilities being authorized are subject to the cap.

SECTION BY SECTION DISCUSSION

This proposal would add a new paragraph to §106.4(a) 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

limitations proposed in Chapter 117 (25 TexReg 8175). This proposal does not extend the applicability of the cap and trade program but clarifies that the program would also be applicable to certain sources authorized under Chapter 106.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for each year of the first five-year period the proposed amendment is in effect beginning January 1, 2002, there may be positive fiscal implications, which are not anticipated to be significant, for any single unit of state or local government that owns or operates NO_x sources with the capacity to emit ten tons of NO_x or more per year as a result of administration or enforcement of the proposed amendment. There would be no fiscal implications to units of state and local government that do not emit more than ten tons of NO_x per year. The proposed amendment would require smaller NO_x sources in the HGA ozone nonattainment area to obtain allowances prior to commencing operations.

In the rulemaking, approved on August 9, 2000 and published in the August 25, 2000 issue of the *Texas Register* (25 TexReg 8137), the commission proposed the requirement for a mass emissions cap and trade program for the HGA area. The mass emissions cap and trade program would implement and manage a mandatory annual NO_x emission cap, phased-in between January 1, 2002 to January 1, 2005, on all existing and new stationary sources located in the HGA, which consists of: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The NO_x emission cap only affects sources or groups of sources in the HGA that have the capacity to emit ten tons of NO_x or more per year and requires affected facilities to obtain allowances (NO_x emissions in tons) which a source

would be permitted to emit during the calendar year. The source is not allowed to exceed this number of allowances unless it obtains additional allowances from another source's surplus allowances.

Examples of equipment at smaller facilities, or groups of facilities, that would be subject to the mass emissions cap and trade program, if they emit more than ten tons of NO_x per year include, but are not limited to, small power generators, reciprocating gas-fired engine compressors, boilers, and incinerators.

Since the proposed amendment does not add additional regulatory requirements that have not already been proposed in rulemaking (25 TexReg 8137), the commission estimates there will be no additional costs to units of state and local government as a result of implementing the proposed amendment other than the cost to purchase and trade allowances, which was estimated to be approximately \$500 - \$5,000 per allowance (ton). Although the total number of emission sources owned or operated by units of state and local government is unknown, there are approximately 6,000 emission sources in the HGA that may be affected by the proposed rulemaking. The allowance trading provision of the mass emissions cap and trade 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 source's surplus allowances to meet emission reduction requirements. Additionally, NO_x sources that remain within their allowances may receive additional revenue through the sale of surplus allowances to other emission sources.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of implementing the proposed amendment will be clarification that sources subject to the emissions cap and trade program will be required to obtain allowances and operate within the established NO_x emissions cap, which is intended to decrease NO_x emissions in the HGA area.

The proposed amendment would state that a facility, or group of facilities that fall into the category of small NO_x sources and have the capacity to emit more than ten tons of NO_x per year, would be subject to the mass emissions cap and trade program. Affected sources would have to obtain NO_x emission allowances prior to operation.

In rulemaking approved on August 9, 2000 (25 TexReg 8137), the commission proposed a mass emissions cap and trade program for the HGA area. The proposed mass emissions cap and trade program would implement and manage a mandatory annual NO_x emission cap, phased-in between January 1, 2002 to January 1, 2005, on all existing and new stationary sources located in the HGA. The program would require affected sources to obtain allowances which a source would be permitted to emit during the calendar year. The source is not allowed to exceed this number of allowances unless it obtains additional allowances from another facility's surplus allowances.

Examples of small equipment that could be subject to the mass emissions cap and trade program and the proposed amendment, if they collectively or independently emit more than ten tons of NO_x per year

include, but are not limited to, small power generators, reciprocating gas-fired engine compressors, boilers, and incinerators.

Since the proposed amendment does 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 amendment other than the cost to purchase and trade allowances, which was estimated to be approximately \$500 - \$5,000 per allowance (ton). Although the total number of emission sources owned or operated by individuals and businesses is unknown, it is anticipated that the majority of the approximately 6,000 emission sources operating in the HGA area will be owned and operated by individuals and businesses. The allowance trading provision of the mass emissions cap and trade 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 source's surplus allowances to meet emission reduction requirements. Additionally, NO_x sources that remain within their allowances may receive additional revenue through the sale of surplus allowances to other emission sources.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-business as a result of the implementation of the proposed amendment. The proposed amendment would state that small NO_x sources or group of sources that have the capacity to emit more than ten tons of NO_x per year, are subject to the mass emissions cap and trade program. Affected sources would have to obtain NO_x emission allowances prior to operation.

The mass emissions cap and trade program would implement and manage a mandatory annual NO_x emission cap, phased-in between January 1, 2002 to January 1, 2005, on all existing and new stationary sources located in the HGA. The program would require affected sources to obtain allowances which a source would be permitted to emit during the calendar year. The source is not allowed to exceed this number of allowances unless it obtains additional allowances from another source's surplus allowances.

Examples of equipment at smaller sources that would be subject to the mass emissions cap and trade program and the proposed amendment, if they emit more than ten tons of NO_x per year include, but are not limited to, small power generators, reciprocating gas-fired engine compressors, boilers, and incinerators.

Since the proposed amendment does not add additional regulatory requirements that have not already been proposed, the commission estimates there will be no additional costs to small or micro-businesses as a result of implementing the proposed amendment other than the cost to purchase and trade allowances, which was estimated to be approximately \$500 - \$5,000 per allowance (ton). Although the total number of emission sources owned or operated by small or micro-businesses is unknown, there are approximately 6,000 emission sources in the HGA that may be affected by the proposed rulemaking. The allowance trading provision of the mass emissions cap and trade 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 source's surplus allowances to meet emission reduction requirements. Additionally, NO_x sources that

remain within their allowances may receive additional revenue through the sale of surplus allowances to other emission sources.

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 has determined that this proposed 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 is proposing this amendment to achieve administrative consistency with amendments to Chapter 101 proposed in the *Texas Register* on August 9, 2000 (25 TexReg 8137). In the Chapter 101 proposed rulemaking (25 TexReg 8137), the commission would require sources which have the capacity to emit NO_x greater than ten tons per year in HGA to hold sufficient allowances to offset their actual NO_x emissions under a cap and trade program. This proposed 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 proposed 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 proposed rule does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this proposal were developed in order 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), 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. 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).

The commission invites public comment on the draft RIA.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed amendment. The following is a summary of that assessment. This amendment is proposed 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 proposed 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 proposed amendment does not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the proposed 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 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 HGA area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to this proposed rule is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this proposed revision 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 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 proposed amendment would state that applicants for permits by rule for new or modified sources in HGA must comply with Chapter 101, Subchapter H, Division 3. The proposed amendment does 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 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 source's federal operating permit.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Houston on November 16, 2000 at 2:00 p.m. at the City of Houston Pollution Control Building Auditorium, located at 7411 Park Place Boulevard. The hearing 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 hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, 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 Ms. 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 2000-047-116-AI. Comments must be received by 5:00

p.m., November 20, 2000. For further information, please contact Matthew R. Baker at (512) 239-1091 or Beecher Cameron at (512) 239-1495.

STATUTORY AUTHORITY

The amendment 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; §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.

The proposed amendment implements TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; §382.017, Rules; and §382.05196, Permits by Rule.

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) - (7) (No change.)

(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) - (d) (No change.)

