

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §101.351, Applicability. This amendment is adopted in Chapter 101; Subchapter H, Emissions Banking and Trading; Division 3, Mass Emissions Cap and Trade Program. The amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP). Section 101.351 is adopted *without changes* to the proposed text as published in the April 6, 2001 issue of the *Texas Register* (26 TexReg 2626) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

On December 6, 2000, the commission adopted rules which established a program of emissions capping and trading as part of the Houston/Galveston (HGA) SIP for the control of ozone. These rules were published in the January 12, 2001 issue of the *Texas Register* (26 TexReg 283). In the rules preamble, under the SECTION BY SECTION DISCUSSION, the commission stated its intention to propose an amendment to §101.351 shortly after the adoption of the cap and trade program rules. The commission believed that the amendment would be necessary to specify that the requirement to operate under the cap and trade program applied to all nitrogen oxides (NO_x) emitting facilities in the HGA area with emission standards under Chapter 117, Control of Air Pollution from Nitrogen Compounds, and which are located at a site where their collective design capacity to emit NO_x is ten tons or more per year. Section 101.351 was adopted on December 6, 2000 with language which could be interpreted to limit the application of the cap and trade program to individual facilities which have a NO_x design capacity of ten tons or more per year.

This adoption would apply the requirements of Chapter 101, Subchapter H, Division 3, to NO_x-emitting facilities located at a single site in the HGA area with emission standards under Chapter 117, and which have a collective design capacity to emit ten tons of NO_x or more per year. The commission believes that the intended applicability of the cap and trade was made clear in the preamble that accompanied the December 6, 2000 rules, in the SIP adopted on the same date, and in numerous contacts with representatives of the intended affected sources in the HGA area.

SECTION BY SECTION DISCUSSION

If adopted, the amendment to §101.351 would state that the requirements of Chapter 101, Subchapter H, Division 3 apply to all NO_x emitting stationary facilities with emission specifications under §117.106, Emission Specifications for Attainment Demonstration; §117.206, Emission Specifications for Attainment Demonstration; and §117.475, Emission Specifications; and which are located at a site where they collectively have a design capacity to emit ten tons or more of NO_x per year. The amendment, if adopted, would require the owner or operator of facilities at a site to obtain and use allowances for actual total NO_x emissions from all affected facilities at the site once the collective design capacity of all the affected facilities has reached ten tons.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. If adopted, this action would affect owners and operators of new and existing NO_x-emitting facilities subject to §§117.106, 117.206, and 117.475 requirements in the HGA nonattainment area which individually emit less than ten tons of NO_x per year, but which are

located at a site with a total of at least ten tons of NO_x emissions per year from subject facilities. The commission determined the rulemaking action, if adopted, meets 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. Existing facilities would be limited to NO_x emission levels under an emissions cap based on historical operating data and specific emission rates determined by Chapter 117. New facilities would be required to identify a source(s) of allowances equal to allowable emissions prior to commencing operation. All facilities subject to this division would be required to hold a quantity of allowances in their compliance account by January 31 following the end of a control period, which is equal to or greater than the total emissions from the preceding control period. The cost of allowances in similar programs about the nation ranges from approximately \$500 to \$5,000 per allowance (ton), depending on availability and demand. Actual costs in the HGA nonattainment area will be dependent upon market demand and availability. The commission is adopting this amendment as part of a strategy to reduce and permanently cap NO_x emissions to a level which would allow the HGA nonattainment area to attain the ozone NAAQS. 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 action is not subject to the regulatory analysis provisions of §2001.0225(b), because the amendment does not meet any of the four applicability requirements. Specifically, the emission cap and trade requirements within this rulemaking action were developed in order to meet the ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), §109 as codified in 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, 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 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, such as 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, 1997. 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 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 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 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 42 USC. 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 achieved by this amendment, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking action does not exceed an express requirement of state law. This rulemaking action 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 action does not exceed a standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of a delegation agreement. The rulemaking action 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 invited public comment on the draft regulatory impact analysis, but received no comment.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the rulemaking action. The following is a summary of that assessment. The amendment is adopted as part of a strategy to reduce and permanently cap NO_x emissions to a level which would allow the HGA nonattainment area to attain the ozone NAAQS. Promulgation and enforcement of the rule will not burden private real property. The amendment does not affect private real 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 credits and allowances that are the subject of this rule are not property rights. Consequently, this 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 helps prevent a real and substantial threat to public health and safety, and partially fulfills a federal mandate under the 42 USC, §7410. Specifically, the emission limitations within this amendment were developed in order to meet the ozone NAAQS set by the EPA under the 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this rulemaking action 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 amendment is that of an action reasonably taken to fulfill an obligation mandated by federal law, and therefore, this amendment will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), 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 that 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 that the commission protect air quality in coastal areas. If adopted, the amended section would require all NO_x sources in the HGA area with emission standards under Chapter 117 which are located at a site and have a collective design capacity to emit ten tons of NO_x or more per year to operate under the requirements of Chapter 101, Subchapter H, Division 3. This requirement is part of the ozone attainment strategy for the HGA area. No new contaminants will be authorized by this amendment, and a reduction of NO_x emissions should occur.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The amended section will become part of the state's ozone attainment strategy; therefore, these amendments will be submitted as part of the SIP. As a result, the amended section and any allowances

allocated under the section would become applicable requirements under the federal operating permit program.

HEARING AND COMMENTERS

The commission held a public hearing in Houston on April 26, 2001, and no comments were received. In addition, written comments were not received during the public comment period which closed on April 26, 2001.

RESPONSE TO COMMENT

There were no commenters to this proposed rule amendment, therefore, the commission made no changes to the rule language for adoption.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code, TCAA, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under 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; 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.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

§101.351

§101.351. Applicability.

This division applies to all stationary facilities which emit nitrogen oxides (NO_x) in the Houston/Galveston nonattainment area which are subject to the emission specifications under §§117.106, 117.206, and 117.475 of this title (relating to Emission Specifications for Attainment Demonstration; Emission Specifications for Attainment Demonstration; and Emission Specifications) and which are located at a site where they collectively have a design capacity to emit ten tons or more per year of NO_x.