

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes new §117.571, Use of Emission Reductions Generated from the Texas Emissions Reduction Plan (TERP) and corresponding revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission proposes this new section as part of the implementation of Senate Bill 5 (SB 5), relating to the TERP, 77th Legislature, 2001. The 77th Legislature adopted SB 5 to establish and provide for the administration of the TERP, which is a comprehensive plan to reduce emissions of air contaminants from mobile sources. The program offers subsidies for the replacement of older diesel engines with more efficient engines and diesels with lower emissions and for the purchase of automobiles with low emissions. The program is funded in part through surcharges and fees on the lease, sale, and registration of certain diesel-powered vehicles. The plan is also partially funded by contributions from the owners or operators of stationary sources of NO_x in the Houston/Galveston (HGA) and Dallas/Fort Worth (DFW) ozone nonattainment (NA) areas. These owners or operators may substitute emission reductions made under the plan for those reductions otherwise required under the commission's rules and make a contribution to the fund based on the amount of emissions reductions substituted. This proposed new section would implement the relevant portions of SB 5 concerning these contributions to the TERP fund for certain sources in the HGA and DFW areas, and is described in greater detail in the SECTION BY SECTION DISCUSSION portion of this preamble.

SECTION BY SECTION DISCUSSION

Proposed new §117.571 will allow site owners or operators in the DFW and HGA NA areas to defer a

portion of their required NO_x emissions under applicable commission rules by using emissions reductions generated under the TERP. The TERP reduction may be used if the owner or operator does the following: contributes to the TERP fund \$75,000 per ton of NO_x reductions used, not to exceed 25 tons per year (typ) or 0.5 tons per day (tpd) on a site-wide basis; demonstrates to the executive director (ED) that the site will be in full compliance with applicable rules no later than the fifth anniversary of the date the emissions reductions would have normally been required; reduces emissions from the site area at least 80% from the established baseline; and submits for ED approval a petition that demonstrates that it is technically infeasible to comply with the applicable emission reductions of Chapter 117.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed rulemaking is in effect there will be no significant fiscal implications for units of state and local government due to administration and enforcement of the proposal, because the commission anticipates that the majority of affected units of government will use less expensive alternatives for emission reductions than provisions available in this rulemaking. The proposed rulemaking would allow units of state and local government to use emission reductions generated by the TERP to help meet required emission reductions. Units of government using these credits would have to remit to the TERP fund \$75,000 per ton of emission reduction credits used.

The proposed rulemaking is intended to implement certain provisions of SB 5 (an act relating to the TERP). Senate Bill 5 allows affected site owners or operators in the HGA or DFW NA areas to defer a

portion of their required NO_x emissions reductions by using emissions reductions generated under the TERP.

Senate Bill 5 established the TERP, providing financial incentives for reducing emissions of on-road and non-road motor vehicles and equipment, grants for the development of new emission control technology, and new building energy efficiency standards. The commission anticipates that the provisions in SB 5 will result in a pool of excess emission reductions available for purchase. Affected entities that seek to use TERP emission reductions would have to remit to the TERP fund \$75,000 per ton of TERP emission credits used, and each entity would be limited to 25 tpy or 0.5 tpd per site. The maximum annual expense per site for TERP emission credits would be \$1,875,000. Additional requirements include a demonstration to the ED that the site will be in full compliance within five years of applicable deadlines, reduction in emissions from the site by 80% of the established baseline, and determination by the ED that the required emission reductions are not technically feasible.

The voluntary provisions of the proposed rulemaking would affect over 6,000 pieces of equipment, some of which are owned and operated by units of state or local government, at sites and operations operating in the HGA and DFW NA areas. Owners and operators of affected equipment would have the option to utilize the voluntary provisions of this rulemaking to help meet emission reduction requirements. Examples of equipment and processes at sources that would be affected by the proposed rulemaking include: industrial commercial institutional (ICI) boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and carbon monoxide (CO)

boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and boiler and industrial furnace (BIF) units.

The proposed rulemaking is intended to provide affected facilities additional compliance options to meet required emission reductions. The decision to utilize provisions in this rulemaking would be a business decision by owners and operators of affected sites. The proposed rulemaking does not introduce additional regulatory requirements and is not anticipated to result in significant fiscal impacts unless affected entities voluntarily seek to utilize emission reductions generated by the TERP program. The commission does not anticipate significant increases in revenues to the TERP fund due to implementation of the proposed rulemaking, because the majority of affected entities will utilize less expensive emission reduction compliance alternatives.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined that for each of the first five years the proposed new section is in effect, the public benefit anticipated as a result of implementing the proposal will be providing flexibility to those affected sources which will potentially facilitate the reduction of emissions of NO_x in the HGA and DFW ozone NA areas to a level that will allow the areas to meet the national ambient air quality standards for ozone.

The proposed rulemaking is intended to implement certain provisions of SB 5, which allows affected site owners or operators in the HGA and DFW NA areas to defer a portion of their required NO_x

emissions reductions by using emissions reductions generated under the TERP.

Affected entities that seek to use TERP emission reductions would have to remit to the TERP fund \$75,000 per ton of TERP emission credits, and each entity would be limited to 25 tpy or 0.5 tpd per site. The maximum annual expense per site for TERP emission credits would be \$1,875,000.

Additional requirements include a demonstration to the ED that the site will be in full compliance within five years of applicable deadlines, reduction in emissions from the site by 80% of the established baseline, and determination by the ED that the required emission reductions are not technically feasible.

The voluntary provisions of the proposed rulemaking would affect over 6,000 pieces of equipment, the majority of which are owned and operated by industry, at sites and operations operating in the HGA and DFW NA areas. Owners and operators of affected equipment would have the option to utilize the voluntary provisions of this rulemaking to help meet emission reduction requirements. Examples of equipment and processes at sources that would be affected by the proposed rulemaking include: ICI boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units.

The proposed rulemaking is intended to provide affected facilities additional compliance options to meet required emission reductions. The decision to utilize provisions in this rulemaking would be a business

decision by owners and operators of affected sites. The proposed rulemaking does not introduce additional regulatory requirements and is not anticipated to result in significant fiscal impacts unless affected entities voluntarily seek to utilize emission reductions generated by the TERP program.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impacts for small or micro-businesses, if the affected entities use less expensive alternatives for emissions reductions than provisions available in this rulemaking. Small or micro-businesses would only incur fiscal impacts if they voluntarily decided to utilize emissions reductions generated by the TERP program. The proposed rulemaking is intended to implement certain provisions of SB 5, which allows affected site owners or operators in the HGA and DFW NA areas to defer a portion of their required NO_x emissions reductions by using emissions reductions generated under the TERP.

Affected entities that seek to use TERP emissions reductions would have to remit to the TERP fund \$75,000 per ton of TERP emission credits, and each entity would be limited to 25 tpy or 0.5 tpd per site. The maximum annual expense per site for TERP emission credits would be \$1,875,000.

Additional requirements include a demonstration to the ED that the site will be in full compliance within five years of applicable deadlines, reduction in emissions from the site by 80% of the established baseline, and determination by the ED that the required emissions reductions are not technically feasible.

The voluntary provisions of the proposed rulemaking would affect over 6,000 pieces of equipment at

sites and operations operating in the DFW and HGA NA areas. Examples of equipment and processes at sources likely to be small or micro-businesses affected by the proposed rulemaking include: ICI boilers and stationary gas turbines; stationary internal combustion engines; incinerators; and BIF units.

The proposed rulemaking is intended to provide affected facilities additional compliance options to meet required emissions reductions. The decision to utilize provisions in this rulemaking would be a business decision by owners and operators of affected sites. The proposed rulemaking does not introduce additional regulatory requirements and is not anticipated to result in significant fiscal impacts unless affected entities voluntarily seek to utilize emission reductions generated by the TERP program.

The following is an analysis of the potential costs per employee for small or micro-businesses affected by the proposed amendments. Small and micro-businesses are defined as having fewer than 100 or no more than 20 employees respectively. A small business that decides to utilize five tons of TERP emissions reductions would incur costs up to approximately \$3,750 per employee. A micro-business that decides to utilize five tons of TERP emissions reductions would incur costs up to approximately \$18,750 per employee.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225 and has determined that the proposed rulemaking does not meet the definition of “major environmental rule.” Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). “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 proposed new section would implement certain requirements of SB 5 and would allow the deferral of NO_x emissions reductions in the DFW and the HGA NA areas under specific conditions described in the SECTION BY SECTION DISCUSSION portion of this preamble. This proposed section would increase the compliance options for industries currently regulated by the commission. The proposed new section does not increase the stringency of existing rules and will 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.

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 new section would implement the requirements of Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §386.056. The commission invites public comment regarding the draft RIA determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed rule. The following is a summary of that assessment. Promulgation and enforcement of the rule will not burden private real property. The new section 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. Consequently, the proposed new section does not meet the definition of a takings under Texas Government Code, §2007.002(5). The new section is specifically proposed to implement the requirements of THSC, §386.056 and address alternative methods of meeting emission reduction requirements. Therefore, this proposed rule does not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM (CMP)

The commission determined that this rulemaking relates to an action or actions subject to the CMP in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources 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 §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 proposed rule 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 §501.14(q), which requires that the commission protect air quality in coastal areas. The proposed rulemaking addresses alternative methods of meeting emission reduction requirements. No new emissions of air contaminants are authorized by this proposal. The commission invites public comment regarding 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 section is part of the state's ozone attainment strategy; therefore, the section would be submitted as part of the SIP. As a result, the section would become an applicable requirement under the federal operating permit program.

ANNOUNCEMENT OF HEARINGS

The commission will hold two public hearings on this proposal at the following locations and times: 1.) in Houston on December 18, 2001 at 7:00 p.m. at the Houston City Hall Chambers, 2nd Floor, 901 Bagby; and 2.) in Irving on December 20, 2001 at 7:00 p.m. at the City of Irving Central Library Auditorium, 801 West Irving Blvd. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each hearing. Individuals

may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes before each hearing and will answer questions before and after each hearing.

Persons planning to attend a hearing who have special communication or other accommodation needs, 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

Written comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments should reference Rule Log Number 2001-025d-117-AI. Comments must be received by 5:00 p.m. on January 7, 2002. For further information, please contact Beecher Cameron at (512) 239-1495, or Joe Thomas at (512) 239-4580.

STATUTORY AUTHORITY

The new section is proposed under Texas Water Code (TWC), §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under TWC; and under THSC, TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new section is also proposed under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the

commission to prepare and develop a comprehensive plan for proper control of the state's air. The new section is also proposed under §386.056, concerning Availability of Emissions Reductions in Certain Nonattainment Areas, as amended by SB 5, and which authorizes the commission to allow alternative methods of compliance with air pollution regulations. The amendment is also proposed under SB 5 as passed by the 77th Legislature, 2001.

The proposed new section implements TCAA, §§382.002, 382.011, §382.012, §382.017, and §382.056. The proposed new section implements certain sections of SB 5, which allows owners or operators to substitute emissions reductions made under the plan for those reductions otherwise required under the commission's rules and to make a contribution to the fund based on the amount of emissions reductions substituted.

CHAPTER 117: CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS

SUBCHAPTER E: ADMINISTRATIVE PROVISIONS

§117.571

§117.571. Use of Emission Reductions Generated from the Texas Emissions Reduction Plan (TERP).

An owner or operator of a unit located in the Dallas/Fort Worth nonattainment area or in the Houston/Galveston nonattainment area that is not subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) may meet emission control requirements of §117.105 or §117.205 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT), respectively), §117.106 or §117.206 of this title (relating to Emission Specifications for Attainment Demonstrations, respectively), §117.207 of this title (relating to Alternative Plant-Wide Emission Specifications), §117.108 of this title (relating to System Cap), or §117.223 of this title (relating to Source Cap), by obtaining emission reductions generated from the TERP if:

(1) the owner or operator of the site as defined in §122.10 of this title (relating to General Definitions) contributes to the TERP fund, \$75,000 per ton of nitrogen oxides emissions used, not to exceed 25 tons per year or 0.5 tons per day on a site-wide basis;

(2) the owner or operator of the site demonstrates to the executive director that the site

will be in full compliance with the applicable emission reduction requirements of this chapter no later than the fifth anniversary of the date on which the emission reductions would otherwise be required;

(3) emissions from the site are reduced by at least 80% from the established baseline;

and

(4) the executive director approves a petition submitted by the owner or operator of the site that demonstrates that it is technically infeasible to comply with applicable emission reduction requirements of this division and Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) above 80% of the established baseline.