

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §101.27, Emissions Fees. The commission proposes these amendments to Chapter 101, General Air Quality Rules; Subchapter A, General Rules; and corresponding revisions to the state implementation plan in order to implement Senate Bill 1 (General Appropriations Act), Article VI (Natural Resources), Rider 30 (Appropriation: Operating Permit Fees) as passed by the 77th Texas Legislature, 2001 (SB 1, Article VI, Rider 30).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The commission collects operating permit fees (emissions fees) from sources that are subject to the permitting requirements of Title IV or V of the Federal Clean Air Act Amendments of 1990 as required by Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.0621, Operating Permit Fee.

The current rule language in §101.27 only includes emissions during normal operations in the calculation of the total emissions from an account upon which the fee is based. Upset and maintenance emissions are not currently included in the basis for calculating the fee due. Senate Bill 1, Article VI, Rider 30 requires that these upset and maintenance emissions be included in the total emissions for each account. Funds generated by the inclusion of upset and maintenance emissions shall be used for enforcement and monitoring activities for air quality permitting, air quality assessment and planning, and enforcement and compliance support.

SECTION BY SECTION DISCUSSION

Section 101.27(c), concerning basis for fees, currently states that the fee applies to emissions during normal operations. These proposed amendments state that emissions during all operational conditions

will be included in the fee basis. These proposed amendments also specifically state that all emission events and all emissions from them, including upset, maintenance, start-up, and shutdown conditions are to be included in the fee basis. The intent of these proposed amendments is to include the total of both reportable and non-reportable quantities under commission requirements related to upset and maintenance conditions.

The proposed amendments also add a sentence to clarify that the emissions fee basis is never less than the actual emissions at an account during the basis year.

The proposed amendments reformat the fee table, and delete the definition of “normal operations” which is no longer needed.

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 amendments are in effect, the commission will experience an increase in revenues estimated to be \$1.1 million each year in air emissions fees. These revenues are dependent on the magnitude and number of upset and maintenance emissions events by facilities paying annual operating permit fees. There will be fiscal implications which are not anticipated to be significant, for units of state and local government which pay annual operating permit fees to the commission, as a result of administration or enforcement of the proposed amendments. The proposed amendments will require accounts that remit air emissions fees to the commission to pay emissions fees based on emissions resulting from upset, maintenance, start-up, and shutdown events, as well as

allowable levels and/or actual emissions at the account. Units of state and local government that experience these emission events are anticipated to pay an additional \$500 to \$1,000 per account annually to comply with the proposed amendments.

The proposed amendments are intended to implement SB 1, Article VI, Rider 30. This rider requires the commission to include upset and maintenance emissions when calculating the emissions fees. Emissions fees are currently determined by multiplying the current rate (\$26 per emission ton) by the annual amount of emissions at an account. The fee basis has a maximum of 4,000 tons per regulated pollutant. The commission currently includes only emissions resulting from normal operations, not upset, maintenance, start-up, or shutdown emissions in the calculation of the fee basis. The inclusion of upset and maintenance emissions into the calculation will increase the emissions fees for those accounts that experience these emission events.

The proposed amendments will affect new or existing accounts that are subject to the current rule which experience these emissions events. The agency estimates that there are approximately 1,800 accounts subject to the current rule. Of these, the agency estimates that less than 5% of the total number of accounts are owned and operated by units of state and local government. Examples of state and local government sites that could be affected by the proposed amendments include: landfills, boilers, and power plants at universities or municipalities.

Only accounts that experience upset, maintenance, start-up, or shutdown emissions will be required to pay additional fees. Based on analysis of 1998 emissions inventory data, the commission estimates

there are less than ten accounts that are owned by units of state and local governments that will be impacted each year and required to pay the additional \$500 - \$1,000 to comply with the proposed amendments.

The commission's costs to enforce and monitor the inclusion of upset, maintenance, start-up, and shutdown emissions into an account's fee basis will be included within the estimated annual \$1.1 million additional revenues received from emissions fees.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of implementing the proposed amendments will be a potential decrease in emissions from the increased fees that may result from improved maintenance activities.

The proposed amendments are intended to implement SB 1, Article VI, Rider 30 which requires the commission to include upset and maintenance emissions when calculating emissions fees. Emissions fees are currently determined by multiplying the current rate (\$26 per emission ton) by the annual amount of emissions from an account. The fee basis has a maximum of 4,000 tons per regulated pollutant. The commission currently includes only emissions resulting from normal operations, not upset, maintenance, start-up, or shutdown emissions in the calculation of the fee basis. The inclusion of upset and maintenance emissions into the calculation will increase the emissions fees for those accounts that experience these emission events.

The proposed amendments will affect new or existing accounts which experience these emissions. The commission estimates that there are approximately 1,700 non-governmentally owned and operated accounts that are required to pay emissions fees. Examples of accounts affected by the proposed amendments include: oil refineries, chemical plants, large oil and gas operations, and steam electric power plants.

Only accounts that experience upset, maintenance, start-up, or shutdown emissions will be required to pay additional fees beyond what is currently owed to the commission. The commission estimates that the majority of accounts that experience upset, maintenance, start-up, or shutdown emissions will pay additional fees averaging between \$3,000 and \$5,000 annually per account to comply with the proposed amendments. There will be accounts, however, that may pay over \$50,000 annually per account to comply with the amendments. These accounts include large oil refineries and electric generating facilities.

SMALL BUSINESS AND MICRO BUSINESS ASSESSMENT

There will be adverse economic effects, which are not anticipated to be significant, to small or micro-business as a result of the implementation of the proposed amendments. The proposed amendments require accounts that remit air emissions fees to the commission to include in the basis for the fee emissions from upset, maintenance, start-up, and shutdown conditions in addition to emissions from normal operations.

The proposed amendments will affect new or existing accounts which experience these emissions. The commission estimates that there are approximately 1,700 non-governmentally owned and operated accounts that are required to pay emissions fees, some of which will be small or micro-businesses.

Examples of small and micro-businesses that could be affected by the proposed amendments include: cotton seed oil mills; landfills; furniture manufacturing; asphalt batch plant operators; and small manufacturers with coatings operations.

The commission estimates that although there are small or micro-businesses affected by the proposed amendments, very few are likely to have upset, maintenance, start-up, or shutdown emissions. Only accounts that experience upset or maintenance emissions will be required to pay additional fees beyond what is currently owed to the commission. The commission estimates that less than 20 small and micro-businesses will experience these emissions each year. They may pay additional fees less than \$100 annually on average to comply with the amendments.

The following is an analysis of the cost per employee for small or micro-businesses affected by the proposed amendments. Small and micro-business are defined as having fewer than 100 or 20 employees respectively. A small business that reports annual upset, maintenance, start-up, or shutdown emissions totaling five tons would incur additional costs of approximately \$130 or \$1.30 per employee. A micro-business that emits the same amount of upset, maintenance, start-up, or shutdown emissions would incur additional costs of approximately \$130 or \$6.50 per employee. The overall cost per employee will vary depending on the annual amount of upset, maintenance, start-up, or shutdown

emissions, and the number of persons employed by an affected business. The cost per ton would be the same for larger businesses affected by the proposed rulemaking.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed amendments do not meet the definition of a “major environmental rule” as defined in that statute. A “major environmental rule” is a rule that: 1) has the specific intent to protect the environment or reduce risks to human health from environmental exposure; and 2) 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. While the proposed amendments are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, there could be a benefit to the environment from both how the fees are utilized (for enforcement monitoring activities) and some deterrent effect for companies who desire to avoid increased fees, where possible. The intent of the proposed amendments is to include the total of both reportable and non-reportable quantities under commission requirements related to upset and maintenance conditions for the purpose of calculating the total emission fees owed to the commission. While this may result in a larger amount of fees collected by the commission, fee collection does not provide protection for the environment or reduce risks to human health from environmental exposure. The commission does not believe that these rule amendments will 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, because the proposed amendments do not change the existing provision “capping” the total fees owed to the agency.

Additionally, even if the proposed amendments did meet the definition of a major environmental rule, the requirement to conduct a regulatory analysis would not apply. A regulatory analysis is only required if an agency adopts a major environmental rule: 1) which exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) which exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) which exceeds 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) solely under the general powers of the agency instead of under a specific state law.

Title V of the Federal Clean Air Amendments of 1990 contains the statutory requirements for the federal operating permit program, which these fees are collected to support. The commission collects emissions fees under the specific authority in the TCAA, §382.0621, Operating Permit Fee. Senate Bill 1, Article VI, Rider 30 requires that upset and maintenance emissions be included in the total emissions for each account. The requirements of the federal operating permit program, 40 Code of Federal Regulations (CFR) Part 70, for which the commission has been granted interim approval, do not contain any requirement prohibiting the collection of fees for upset and maintenance emissions. Therefore, the proposed amendments do not exceed a standard set by federal law; do not exceed an express requirement of state law; do not 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; and are not proposed solely under the general powers of the agency instead of under a specific state law.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission reviewed the proposed amendments considering the requirements of Texas Government Code, Chapter 2007. The following assessment is provided in compliance with the requirements of Texas Government Code, Chapter 2007. The intent of the proposed amendments is to include the total emissions of both reportable and non-reportable quantities under commission requirements related to upset and maintenance conditions for the purpose of calculating the total emission fees owed to the commission. The expansion of the fees to include upset and maintenance conditions will meet the express requirement contained in SB 1, Article VI, Rider 30. There are no alternative actions that would meet the express requirement contained in SB 1, Article VI, Rider 30. The calculation of total emissions upon which fees must be based will not burden private real property, since they do not affect private real property, and therefore does not constitute a taking under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the 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 CMP. 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 rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The specific purpose of this rulemaking action is to include the total emissions of both reportable and non-reportable quantities under commission requirements related to upset and maintenance conditions for the purpose of calculating the total emission fees owed to the commission. The expansion of the fees to include upset and maintenance conditions will meet the express requirement contained in SB 1, Article VI, Rider 30. No new sources of air contaminants will be authorized as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 51. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal on August 13, 2001, at 2:00 p.m., Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Building F, Room 2210, Austin.

The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, agency staff members 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, and 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

Written comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-030-101-AI. Comments must be received by 5:00 p.m., August 13, 2001. This proposal is available on the commission's web site at <http://www.tnrcc.state.tx.us/oprd/rules/propadopt.html>. For further information, please contact Paul Henry at (512) 239-1527 or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103 and §5.105, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under the Texas Health and Safety Code, TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment 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 general, comprehensive plan for the control of the state's air; §382.0335, concerning Air Control Account, which authorizes the commission to collect money from any source to carry out its duties under TCAA; and §382.0621, concerning Operating Permit Fee, which requires the commission to adopt, charge, and collect an annual fee based on emissions for each source; and SB 1, Article VI, Rider 30, which requires upset and maintenance emissions be included in the calculation of fees collected under TCAA, §382.0621.

The proposed amendment implements TCAA, §§382.011, 382.012, and 382.0621; TWC, §5.103 and §5.105; and SB 1, Article VI, Rider 30.

CHAPTER 101: GENERAL AIR QUALITY RULES

SUBCHAPTER A: GENERAL RULES

§101.27

§101.27. Emissions Fees.

(a) - (b) (No change).

(c) Basis for fees.

(1) The emissions fee shall be based on allowable levels and/or actual emissions at the account during the last full calendar year preceding the beginning of the fiscal year for which the fee is assessed. For purposes of this section, the term "allowable levels" are those limits as specified in an enforceable document such as a permit or Commission Order which are in effect on the date the fee is due. Under no circumstances shall the fee basis be less than the actual emissions at the account. The fee applies to the tonnage of regulated pollutant emissions [pollutants] at the account, including those emissions from point and fugitive sources [during normal operations]. The fee basis shall include emissions during all operational conditions. For upset, maintenance, start-up, and shutdown conditions, the basis shall include all events and all quantities. Although certain fugitive emissions are excluded for applicability determination purposes under subsection (a) of this section, all fugitive emissions must be considered for fee calculations after applicability of the fee has been established. A maximum of 4,000

tons of each regulated pollutant will be used for fee calculations except as provided in paragraph (2) of this subsection. The fee for each fiscal year is set at the following rates.

Figure: 30 TAC §101.27(c)(1)

Fiscal Year	Rate Per Ton	Minimum Fee
1992	\$3	
1993	\$5	\$25
1994	\$25	\$25
1995 - 2002	\$26	\$26
[1996]	[\$26]	[\$26]
[1997]	[\$26]	[\$26]
[1998]	[\$26]	[\$26]
[1999]	[\$26]	[\$26]
[2000]	[\$26]	[\$26]

The rate of \$26 per ton will remain effective for future fiscal years until amended. If the fee is applicable, the company responsible for the account shall pay the calculated emissions fee or the minimum fee, whichever is greater.

(2) - (3) (No change).

(4) For purposes of this section, the term "regulated pollutant" shall include any VOC, any pollutant subject to the FCAA, §111, any pollutant listed as a hazardous air pollutant under the FCAA, §112, each pollutant for which a national primary ambient air quality standard has been promulgated (including carbon monoxide), and any other air pollutant subject to requirements under commission rules, regulations, permits, orders of the commission, or court orders. [The term "normal operations" shall mean all operations other than those documented under §101.6 of this title (relating to

Upset Reporting and Recordkeeping Requirements) or §101.7 of this title (relating to Maintenance, Start-up and Shutdown Reporting, Recordkeeping, and Operational Requirements).]

(d) - (f) (No change).

