

The Texas Commission on Environmental Quality (commission or TCEQ) adopts an amendment to §101.27 *with changes* to the proposed text as published in the December 25, 2009, issue of the *Texas Register* (34 TexReg 9305).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The commission collects annual fees from sources that are subject to the permitting requirements of Title IV or V of the 1990 Federal Clean Air Act Amendments (FCAAA) as required by Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0621, Operating Permit Fee. The existing rule language in §101.27 structures the emissions fees as a billed system, and the emissions fee rate per ton is adjusted annually based on the rate of change of the consumer price index (CPI). The revenue collected from the emissions fee is deposited in the Operating Permits Fees Account 5094.

As part of its air program activities, the commission implements an approved federal operating permit program (FCAAA, Titles IV and V, hereinafter referred to as "Title V"). As part of that approval, the commission is required to demonstrate that the fees collected from Title V sources are sufficient to support the Title V program. Additionally, this fee must be dedicated for use only on Title V activities. This fee is commonly referred to as the air emissions fee and is currently set at \$33.71 per ton for Fiscal Year 2010.

Since the air emissions fees are to be collected from Title V sources to support the Title V program, the commission will require only the owners or operators of Title V sources to be assessed an air emissions fee. Approximately 483 entities that are not Title V sources are paying an air emissions fee because they satisfy the criteria in the existing rule language to be assessed an air emissions fee. Federal regulations

have been promulgated requiring certain emission sources, such as municipal solid waste landfills and air curtain incinerators, to obtain Title V permits; however, there are approximately 147 of these types of entities that have obtained a Title V permit and do not meet the criteria in the existing rule language to be assessed an air emissions fee.

#### SECTION DISCUSSION

In addition to the adopted amendment associated with this rulemaking, various stylistic non-substantive changes are included to update rule language to current Texas Register style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally are not specifically discussed in this preamble.

The adopted revision to §101.27(a), concerning applicability, will require the owners or operators of Title V sources to be subject to an air emissions fee and improve the readability of this subsection. The adopted rule revision will delete the nine applicability requirements in the current rule language and include a requirement for the owner or operator of an account that must obtain a Title V permit to be subject to the emissions fee. The intent of this adopted language is to require only the owners or operators of Title V sources to be subject to an emissions fee.

The adopted revision to §101.27(b), concerning self reported/billed information, will improve the readability of this subsection. The intent of this adopted amendment is to clarify that the completed emissions/inspection fees basis form must be returned within 60 calendar days of the date the TCEQ sends the emissions/inspection fees information packet.

The adopted revision to §101.27(c), concerning requesting an emissions/inspection fees information packet, will provide a procedure for those account owners or operators who do not receive the fee information packet described in adopted subsection (b). The intent of this adopted amendment is to set a date by which every account owner or operator that did not receive an emissions/inspection fees information packet to notify the commission by June 1 and request a fee information packet by July 1 prior to the fiscal year that the fee is due. The language also includes a provision for new account owners or operators who begin operation during the fiscal year after September 1, to request a packet within 30 calendar days of commencing operation.

The adopted revision to §101.27(d), concerning payment, will improve the readability of this subsection by clarifying the different methods of payment that are accepted by the commission.

The adopted revision to §101.27(e), concerning due date, will improve the readability of this subsection by clarifying that the payment of the entire emissions fee amount is due within 30 calendar days of the date of the invoice.

The adopted revision to §101.27(f), concerning basis for fees, will improve the readability of this subsection. Since the proposal of this rulemaking, the rule language was updated to reflect the current Texas Register style and format requirements. Section 101.27(f) currently states that the emissions fee is based on the allowable levels and/or actual emissions at the account. The emissions fee will be based on the amount of the allowable levels or actual emissions. These adopted revisions will include certified registered emissions in a site's allowable levels, will define the allowable levels as those that are in effect

when the fee is due, and will define the actual emissions as the emissions from all regulated pollutants emitted at the site during the last full calendar year preceding the beginning of the fiscal year that a fee is due. The adopted rule revisions will clarify that the basis for the emissions fee should include the emissions from all operating conditions, including all emissions from emissions events and maintenance, startup, and shutdown activities. The adopted rule language will allow the owner or operator of an account to use all of the actual emissions from the site in lieu of the allowable levels in determining the basis for the emissions fee as long as a complete and verifiable emissions inventory was submitted; however, if a complete and verifiable emissions inventory was not submitted, the emissions fee will be based on all of the allowable levels. The intent of this adopted rule language is to clarify how the basis for the emissions fee is determined. Section 101.27(f)(1) and (2) have also been changed to meet agency style and formatting requirements.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "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 amendment to Chapter 101 is not, itself, intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants. Therefore, the commission finds that it is not a

major "environmental" rule. Additionally, the fee collected under the adopted revisions to Chapter 101 generally should not 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 adopted rule changes will simplify the rule requirements and ensure that only Title V sources are required to pay the emission fee. The adopted changes will also require Title V sources that have not been included in the rule previously to pay the Title V emission fee.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the emissions fee is required under federal law to be sufficient to support the permit program under Titles IV and V of the FCAA (42 United States Code (USC), §§7651 *et seq.* and §§7661 *et seq.*). The emissions fee is also required by state law, THSC, TCAA, §382.0621 and §382.0622, to be sufficient to support the Titles IV and V programs. This adopted rulemaking does not exceed an express requirement of federal or state law. The adopted rulemaking does not exceed a requirement of a delegation agreement, but the emissions fee is specifically required by the United States Environmental Protection Agency's approval of the Title IV and V programs to the commission. The adopted rulemaking was not developed solely under the general powers of the commission but was specifically developed and authorized under TCAA, §§382.011, 382.017, 382.0621, and 382.0622, and generally under TCAA, §§382.001 *et seq.*

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission conducted a takings impact evaluation for this adopted rule in accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rulemaking is to ensure that all Title V sources are required to pay the emissions fee, and that non-Title V sources are not required to pay the emissions fee. Promulgation and enforcement of the adopted rule will not burden private, real property because this is a fee rule that supports air quality programs of the commission. Although the adopted rule revision does not directly prevent a nuisance or prevent an immediate threat to life or property, the change in the emissions fee requirements does fulfill a federal mandate under 42 USC, §§7651 *et seq.* and §§7661 *et seq.* The emissions fee is also required by state law, THSC, TCAA, §382.0621 and §382.0622, to be sufficient to support the Titles IV and V programs. Consequently, the adopted change to the fee requirements are actions reasonably taken to fulfill an obligation mandated by federal and state law. Therefore, this adopted rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found the rulemaking is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be

considered during the rulemaking process.

The commission reviewed this rulemaking 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 CMP goals and policies because the rulemaking is a fee rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the CMP.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The amount of the emissions fee collected is required under federal law to be sufficient to support the permit program under Title V of the FCAAA. The emissions fee revenue is also required by state law, THSC, TCAA, §382.0621 and §382.0622, to be sufficient to support the Title V programs. This adopted rulemaking does not exceed an express requirement of federal or state law. The intent of this adopted amendment is to require only the owner or operator of a regulated entity that must obtain a federal operating permit as described in 30 TAC Chapter 122 to be subject to being assessed an emissions fee each fiscal year.

#### PUBLIC COMMENT

The commission held a public hearing on January 15, 2010. The comment period closed on January 25, 2010. The commission received comments from the Houston Regional Group and Lone Star Chapter of the Sierra Club.

#### RESPONSE TO COMMENTS

The Houston Regional Group and Lone Star Chapter of the Sierra Club were in support of the proposed amendment as being fair and equitable for the collection of emissions fees.

**The commission appreciates the Sierra Club's support. The commission has made no changes in response to this comment.**

## **SUBCHAPTER A: GENERAL RULES**

### **§101.27**

#### **STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties; under TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.0621, concerning Operating Permit Fee, which requires the commission to collect fees for sources subject to Titles IV or V of the FCAA; THSC, §382.0622, concerning Clean Air Act Fees, which restricts the use of Clean Air Act fees; and the entire TCAA (§§382.001 *et seq.*), which provides authority for all of the air quality programs that the fees are necessary to support.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.0621, and 382.0622.

**§101.27. Emissions Fees.**

(a) Applicability. The owner or operator of an account that is required to obtain a federal operating permit as described in Chapter 122 of this title (relating to Federal Operating Permits Program) shall remit to the commission an emissions fee each fiscal year. A fiscal year is defined as the period from September 1 through August 31. A fiscal year, having the same number as the next calendar year, begins on the September 1 prior to that calendar year. Each account will be assessed a separate emissions fee. An account subject to both an emissions fee and an inspection fee, under §101.24 of this title (relating to Inspection Fees), is required to pay only the greater of the two fees. The commission will not initiate the combination or separation of accounts solely for fee assessment purposes. If an account is operated at any time during the fiscal year that a fee is being assessed, a full emissions fee is due. If the commission is notified in writing that the account is not and will not be in operation during that fiscal year, a fee will not be due.

(b) Self reported/billed information. Emissions/inspection fees information packets will be mailed to each account owner or operator prior to the fiscal year that a fee is due. The completed emissions/inspection fees basis form must be returned to the address specified on the emissions/inspection fees basis form within 60 calendar days of the date the agency sends the emissions fees information packet. The completed emissions/inspection fees basis form must include, at least, the company name, mailing address, site name, all commission identification numbers, applicable Standard Industrial Classification (SIC) category, the emissions of all regulated air pollutants at the account for the reporting period, and the name and telephone number of the person to contact in case questions arise regarding the fee payment. If more than one SIC category can apply to an account, the category reported must be the

one with the highest associated fee as listed in §101.24 of this title. Subsequent to a review of the information submitted, a billing statement of the fee assessment will be sent to the account owner or operator.

(c) Requesting fee information packet. If an account owner or operator has not received the fee information packet described in subsection (b) of this section by June 1 prior to the fiscal year that a fee is due, the owner or operator of the account shall notify the commission by July 1 prior to the fiscal year that a fee is due. For accounts that begin or resume operation after September 1, the owner or operator of the account shall request an information packet within 30 calendar days prior to commencing operation.

(d) Payment. Fees must be remitted by check, certified check, electronic funds transfer, or money order and sent to the address printed on the billing statement.

(e) Due date. Payment of the emissions fee is due within 30 calendar days of the date the agency sends a statement of the assessment to the account owner or operator.

(f) Basis for fees.

(1) The fee must be based on allowable levels or actual emissions at the account. For purposes of this section, allowable levels are those limits as specified in an enforceable document such as a permit, certified registration of emissions, or Commission Order that are in effect during the fiscal year that a fee is due and actual emissions are the emissions of all regulated pollutants emitted from the account during the last full calendar year preceding the beginning of the fiscal year that a fee is due.

Under no circumstances may the fee basis be less than the actual emissions at the account. The fee applies to the regulated pollutant emissions at the account, including those emissions from point and fugitive sources. The fee basis must include emissions during all operational conditions, including all emissions from emissions events and maintenance, startup, and shutdown activities as described in Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities). 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. The fee for each fiscal year is set at the following rates.

Figure: 30 TAC §101.27(f)(1)

<b>Emissions Fee Schedule</b>		
<b>Fiscal Year</b>	<b>Rate Per Ton</b>	<b>Minimum Fee</b>
1992	\$3	
1993	\$5	\$25
1994	\$25	\$25
1995 - 2002	\$26	\$26
For fiscal year 2003 and subsequent years, the rate per ton must be calculated using the following formula. The minimum fee must be equal to the rate per ton.		

$$\text{Rate per ton} = \$25.00 \times (1 - CO) \times (CPI / 122.15)$$

Where:

**CO** = carbon monoxide fraction of the fee basis, for all emissions fee payers for the previous fiscal year;

**CPI** = average of the consumer price index for the 12 months preceding the fiscal year that a fee is being assessed (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100); and

**122.15** = average consumer price index for fiscal year 1989 (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100).

(2) The emissions tonnage for the account for fee calculation purposes will be the sum of those allowable levels or actual emissions for individual emission points or process units at the account rounded up to the nearest whole number, as follows.

(A) Where there is an enforceable document such as a permit, certified registration of emissions, or a Commission Order establishing allowable levels for individual emission points or process units, the actual emissions from all individual emission points and process units at the account may be used to calculate the fee basis only if a complete and verifiable emission inventory for the account is submitted as described in §101.10 of this title (relating to Emissions Inventory Requirements). Where a complete and verifiable emissions inventory is not submitted, the executive director may direct that the fee be based on all of the allowable levels for the account.

(B) Where there is not an enforceable document such as a permit, certified registration of emissions, or a Commission Order establishing allowable levels for individual emissions points or process units; actual emissions from all individual emission points and process units must be

used to calculate the fee basis. Actual production, throughput, or measurement records must be submitted along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and emission factors used in such calculations.

(3) For purposes of this section, the term "regulated pollutant" includes any volatile organic compound, any pollutant subject to Federal Clean Air Act (FCAA), §111, any pollutant listed as a hazardous air pollutant under FCAA, §112, each pollutant that 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.

(g) Nonpayment of fees. Each emissions fee payment must be paid at the time and in the manner and amount provided by this subchapter. Failure to remit the full emissions fee by the due date must result in enforcement action under Texas Water Code, §7.178. The provisions of this section, as first adopted and amended thereafter, are and must remain in effect for purposes of any unpaid fee assessments, and the fees assessed in accordance with such provisions as adopted or as amended remain a continuing obligation.

(h) Late payments. The agency shall impose interest and penalties on owners or operators of accounts who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).