

The Texas Commission on Environmental Quality (commission) proposes the repeal of §§101.380, 101.382, 101.383, and 101.385.

Background and Summary of the Factual Basis for the Proposed Rules

On March 21, 2001, the commission adopted rules establishing the requirements for the System Cap Trading (SCT) program in Chapter 101, Subchapter H, Division 5, §§101.380, 101.382, 101.383, and 101.385.

The SCT program was established to provide the owners or operators of affected electric generating facilities (EGF) with an additional compliance option to meet the system cap emission limits specified in 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds. The EGFs affected by the Chapter 117 system cap emission limits are located in the Beaumont-Port Arthur 1997 eight-hour ozone maintenance area, consisting of Hardin, Jefferson, and Orange Counties (BPA area); the Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment area, consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties (HGB area); and in the East and Central Texas counties of Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton.

The system cap emission limits in Chapter 117 set daily, 30-day rolling average, or annual emission caps on total nitrogen oxides (NO_x) emissions from EGFs that are: subject to the Chapter 117 emission specifications for attainment demonstration (ESAD); under common ownership or control; and grouped together in an electric power generating system, as defined in §117.10(14). For example, if company A has three sites, X, Y, and Z with 3, 4, and 5 EGFs, respectively, that are subject to the Chapter 117 ESADs and are part of an electric power generating system, Chapter 117 sets a daily, 30-day rolling average, or annual emission caps on the total emissions from the 12 affected EGFs. The SCT program provides additional compliance flexibility to owners of EGFs operating under a system cap to exceed the system cap at discrete periods of time by purchasing surplus emission allowables, which were generated during the same time period, from other owners of EGFs also operating under a system cap. Surplus emission allowables are calculated as the difference between the amount of emissions in a Chapter 117 system cap emission limit and the actual emissions from that electric power generating system. Trading of surplus emissions allowables is allowed only between owners or operators of electric power generating systems that have the same type of Chapter 117 system cap emission limit (i.e., daily, 30-day rolling average, or annual emission caps) and are within the same nonattainment area. Owners or operators of EGFs located in the East and Central Texas counties can only trade surplus emissions allowables with other owners or operators of EGFs located in these counties.

The SCT program has seen minimal participation with most reports submitted for compliance purposes showing no trades. In cases where trading was reported, the purchased surplus emission allowables were not used to meet the system cap emission limit. In addition, owners or operators of affected EGFs have alternative compliance options to meet the Chapter 117 system cap emission limits. In the BPA and HGB areas, alternative compliance options are available via the Emission Credit Banking and Trading (ERC) and Discrete Emission Credit Banking and Trading (DERC) programs. In the counties of East and Central Texas, alternative compliance options are available via the DERC program.

The Chapter 101 SCT program rules were submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP) on May 1, 2001. Sections 101.383 and 101.385 were amended On July 25, 2007, to accurately reference the renumbered Chapter 117 sections related to the system cap emission limits. These amendments were submitted to the EPA as a revision to the SIP on August 16, 2007.

The EPA sent a letter, dated October 25, 2010, to the commission requesting revisions to the Chapter 101 SCT program rules. In the letter the EPA stated its intent to conditionally approve the Chapter 101 SCT program rules if the commission agreed to

commit to a rulemaking action to implement the EPA's requested revisions within a one-year time frame. The EPA required a verbal commitment by November 1, 2010, followed by a signed letter from the executive director by November 15, 2010. On November 2, 2010, the executive director responded to the EPA's request stating that due to the minimal participation in the SCT program and the limited timeline to implement the revisions requested by the EPA, the commission would not be able to commit to any rulemaking action. The letter also stated the executive director's intention to seek approval from the commission to withdraw the Chapter 101 SCT program rules from the EPA's consideration as a revision to the SIP. On November 18, 2010, the EPA published its proposed disapproval of the Chapter 101 SCT program rules in the *Federal Register* (75 FR 70654).

On February 23, 2011, the commission approved the withdrawal of the Chapter 101 SCT program rules from consideration by the EPA as a revision to the SIP. The EPA was notified of this withdrawal in a letter dated March 4, 2011. The EPA acknowledged the withdrawal of the Chapter 101 SCT program rules from consideration as a SIP revision in a letter received by the commission on April 4, 2011, and published its withdrawal of the proposed disapproval of the SCT program rules in the April 8, 2011, issue of the *Federal Register* (76 FR 19739).

The repeal of the Chapter 101 SCT program rules is proposed concurrently with amendments to sections in Chapter 117 that would remove references to the Chapter 101 SCT program rules. The amendments to Chapter 117 are published in a separate rulemaking in this issue of the *Texas Register*.

Section by Section Discussion

The proposed repeal of §§101.380, 101.382, 101.383, and 101.385 would remove all rules related to the SCT program from Chapter 101. The SCT program was established to provide additional compliance flexibility to owners of EGFs subject to the system cap emission limits specified in Chapter 117; however, the program has seen minimal participation by affected sources. The Chapter 101 SCT program rules have been withdrawn from consideration by the EPA as a revision to the SIP and are not federally enforceable. The Chapter 117 rules specifying the system cap emission limits have been approved by the EPA as a SIP revision and are therefore federally enforceable. The proposed repeal of the SCT program rules would avoid any potential regulatory confusion among owners or operators of affected EGFs regarding the use of a compliance option that is no longer federally enforceable to meet a federally enforceable rule.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rulemaking is in effect, no significant fiscal implications are anticipated for the commission. Units of state or local government that own or operate EGFs are not expected to experience fiscal impacts as a result of the rulemaking. The proposed rulemaking would repeal the existing Chapter 101 SCT program rules, which have been minimally used.

The proposed rulemaking would repeal the SCT program rules specified in Chapter 101. Amendments are also proposed to Chapter 117, to remove references to the SCT program as a part of the same rule package, and fiscal impacts of the revisions to Chapter 117 will be addressed in a separate fiscal note.

The SCT program was created to provide additional compliance flexibility to owners or operators of EGFs subject to system cap emission limits specified in Chapter 117. Under this program, only owners of electric power generating systems in the same nonattainment area or within the East and Central Texas counties are allowed to trade surplus emissions allowables. The SCT program has seen minimal participation, and owners and operators of EGFs in the affected areas have complied with the system cap emissions limits using other available compliance options. Records indicate that there have been no trades under the SCT program from Fiscal Year 2008 - Fiscal Year 2010.

No SCT trades are expected for Fiscal Year 2011, and the commission has withdrawn the Chapter 101 SCT program rules from the EPA's consideration as a SIP revision. The proposed rulemaking will remove the SCT program as a compliance option in the BPA area, the HGB area, and the 31 counties of East and Central Texas.

There may be as many as 18 sites with EGFs in the 31 counties of East and Central Texas that are owned or operated by state or local government. In the BPA area and the HGB area, records indicate there are no EGFs owned or operated by state agencies or local government. The repeal of the Chapter 101 SCT program rules is not expected to have any fiscal impact on EGFs in the East and Central Texas counties owned or operated by local government since no reports have been received that indicate the SCT program is being utilized as a compliance option. In addition, the proposed rulemaking does not change current emissions limits with which EGFs have been in compliance for a few years. In any case, government-owned or operated EGFs in these counties will still have alternative compliance options available to them. For example, in the BPA and HGB areas, affected sources will still have ERCs or DERCs available to them as compliance options.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed

rulemaking will be the repeal of rules for a minimally used compliance option. Repeal of the Chapter 101 SCT program rules is expected to increase rule clarity and efficiency regarding compliance options for EGFs.

The proposed rulemaking will not have a fiscal impact on individuals because EGFs are typically owned or operated by large businesses.

The proposed rulemaking is not expected to have a fiscal impact on large businesses that own or operate the estimated 119 sites with EGFs in the BPA area, the HGB area, and the 31 counties of East and Central Texas. The proposed rulemaking eliminates the SCT program as a compliance option for EGFs in meeting system cap emissions limits.

Records indicate that this program has not been used in the 2008 - 2010 Fiscal Year time frame. EGFs in the affected areas have submitted reports that indicate they are using other available options to meet system cap emissions limits. Businesses have been in compliance with current system cap emissions limits for a few years, and the proposed rulemaking will not change those limits.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. The proposed rulemaking applies to EGFs, and small businesses do not typically own or operate EGFs.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed repeal of the SCT program rules from Chapter 101 in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed repeal does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

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. Instead, the specific intent of the proposed repeal is to remove rules related to the SCT program from Chapter 101. The SCT program was established to provide additional compliance flexibility to sources subject to the system cap emission limits specified in Chapter 117; however, it has only seen minimal participation by affected sources. The SCT program rules in Chapter 101 have been withdrawn from consideration by the EPA as a revision to the SIP and are not federally enforceable, while the Chapter 117 rules specifying the system cap emission limits have been approved by the EPA as a SIP revision and are therefore federally enforceable. The proposed repeal of the SCT rules in Chapter 101 will avoid potential regulatory confusion among owners or operators of sources subject to the system cap emission limits in Chapter 117 by removing a compliance flexibility option that is not federally enforceable. As discussed in the Fiscal Note portion of this preamble, the proposed repeal is not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards on 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.

Additionally, the proposed repeal does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only 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.

The proposed repeal will avoid potential regulatory confusion among owners or operators of EGFs subject to the system cap emission limits in Chapter 117 by removing a compliance flexibility option that is not federally enforceable. The proposed repeal does not exceed a requirement of a delegation agreement or a contract between state and federal government if this rulemaking is adopted. The proposed repeal was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this rulemaking.

Therefore, this proposed repeal is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed repeal under Texas Government Code, §2007.043. The purpose of the proposed rulemaking is to

repeal rules related to the SCT program from Chapter 101. The proposed repeal will not create any additional burden on private real property. The proposed repeal will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed repeal will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rulemaking in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRA) (31 TAC §501.12(l)). The CMP policy applicable to the proposed

rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas so as to protect CNRAs and promote the public health, safety, and welfare (31 TAC §501.32). The proposed rulemaking would not increase emissions of air pollutants and is therefore consistent with the CMP goal in 31 TAC §501.12(1) and the CMP policy in 31 TAC §501.32.

Promulgation and enforcement of this rulemaking will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rulemaking is consistent with these CMP goals and policies and does not create or have a direct or significant adverse effect on any coastal natural resource areas. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 101 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the repeals of §§101.380, 101.382, 101.383, and 101.385 are

adopted, owners or operators with facilities subject to the federal operating permit program must revise their operating permit to remove all references to the SCT program rules. The owners or operators of these facilities would have the option of initiating a permit action or waiting for the next permit action, such as a renewal, to remove these references.

Announcement of Hearings

The commission will hold public hearings on this proposal in Houston on November 15, 2011, at 1:30 p.m. and 6:00 p.m. in Conference Room C at the Houston-Galveston Area Council located at 3555 Timmons Lane; and in Austin on November 17, 2011, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearings are 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 be permitted during a hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to a hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-018-101-EN. The comment period closes November 21, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Shantha Daniel, Air Quality Planning Section, (512) 239-3930.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING
[DIVISION 5: SYSTEM CAP TRADING]
[[§101.380, 101.382, 101.383, 101.385]

Statutory Authority

The repeals are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; 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 Texas Clean Air Act. The repeals are also proposed 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; and 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.

The proposed repeals implement TWC, §§5.102, 5.103, and 5.105; and THSC, §§382.002, 382.011, 382.012, and 382.017.

[\$101.380. Definitions]

[The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise: Surplus emission allowables--The amount, greater than zero, that a source owner or operator's allowable emissions in a system cap emission limit specified in Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) is greater than the actual emissions in that system, in:]

[(1) pounds per day for a:]

[(A) single day; or]

[(B) rolling 30-day average period; or]

[(2) tons per year for a calendar year period for a source subject to Chapter 117, Subchapter B, Division 2 of this title (relating to Utility Electric Generation in East and Central Texas).]

[\$101.382. Applicability]

[Trades of emission allowables are limited to sources located within a single nonattainment area or within another single area with unique emission limits identified in Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds).]

[\$101.383. General Provisions]

[(a) System cap limits may be exceeded with surplus emission allowables obtained for that day from another source owner or operator participating in a system cap. The owner or operator may exceed the:]

[(1) maximum daily cap with one-day surplus emission allowables generated on the same day; and]

[(2) rolling 30-day average daily system cap emission limitation with surplus emission allowables generated over the same period.]

[(b) System cap limits for units within an electric power generating system as regulated under §117.3020 of this title (relating to System Cap) may be exceeded with

surplus emission allowables obtained for that calendar year from another source owner or operator participating in a system cap.]

[(c) The cap requirements of Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) continue to apply, except as modified in subsections (a) and (b) of this section.]

[\$101.385. Recordkeeping and Reporting]

[(a) The owner or operator of a source in an ozone nonattainment area participating with this division shall submit to the executive director a quarterly report.]

[(1) Each quarterly report will be based on a three-calendar month period beginning on January 1 of each year.]

[(2) The report shall be submitted within 30 days following the end of the quarterly period.]

[(3) The report shall detail the following:]

[(A) the daily nitrogen oxides (NO_x) emissions from each source along with supporting calculations for the maximum daily cap and the rolling 30-day average system cap emission limitation;]

[(B) all emission trades conducted under this division during the reported time period including the trade date or period, quantity traded, and trading participants.]

[(b) The owner or operator of a source participating in a system cap limit for sources subject to §117.3020 of this title (relating to System Cap) shall submit to the executive director an annual report.]

[(1) Each annual report will be based on a 12-month calendar period beginning on January 1 of each year.]

[(2) The report shall be submitted within 30 days following the end of the annual period.]

[(3) The report shall detail the following:]

[(A) the annual NO_x emissions from each source along with supporting calculations; and]

[(B) all emissions trades conducted under this division during the reported time period including trade date, quantity traded, and trade participants.]

[(c) The owner or operator of any system participating in this division shall report within 48 hours to the executive director any time that the system exceeded its daily or rolling 30-day average system cap emission limitation, or within 30 days any time that the system exceeded its annual system cap, and did not obtain surplus emission allowables for that time period. This report shall include:]

[(1) cause of the exceedence with supporting data;]

[(2) date or period of exceedence;]

[(3) amount of exceedence with data to demonstrate the amount of emissions in excess of the applicable limit; and]

[(4) number of surplus emission allowables traded on the date of or during the period of the exceedence.]