

The Texas Natural Resource Conservation Commission (commission) adopts the amendments to §101.27, Emissions Fees, and §101.333, Allocation of Allowances. Section 101.27 is adopted with changes to the proposed text as published in the April 7, 2000 issue of the *Texas Register* (25 TexReg 2912). Section 101.333 is adopted without changes and will not be republished. These sections will be submitted to the United States Environmental Protection Agency as a revision to the state implementation plan (SIP).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASE FOR THE ADOPTED RULES

The 76th Legislature passed Senate Bill (SB) 766 in 1999. In general, SB 766 recategorized the new source review authorizations under the Texas Clean Air Act (TCAA) and created the new program for the voluntary permitting of grandfathered facilities. Prior to the revisions by SB 766, the TCAA authorized the commission to issue permits for the construction or modification of facilities that will emit air contaminants; standard permits adopted by rule; and exemptions from permitting, also adopted by rule. SB 766 modified this structure by authorizing the commission to issue standard permits using a process that does not require each standard permit to be in a rule. SB 766 provided a new name, permits by rule, for authorizations of certain types of facilities which would not make a significant contribution of air contaminants to the atmosphere. Finally, the commission was authorized to develop criteria for facilities that emit a de minimis amount of air contaminants that do not need preconstruction authorization. Within the category of permits, SB 766 created two new permitting options: the Voluntary Emission Reduction Permit (VERP) program for permitting of grandfathered facilities, and the multiple plant permit (MPP). SB 766 also amended TCAA, §382.0621(d) to require increasing emissions fees for the largest grandfathered facilities which do not have a permit application pending on

or after September 1, 2001.

The commission is implementing this legislation in two phases. The first phase of the implementation of SB 766 was adopted by the commission on December 16, 1999. Included in the first phase were the VERP program and the new standard permit issuance procedures.

This adoption implements elements of SB 766 relating to emissions fees, adds the ability for the commission to accept fee payments via electronic funds transfer, and makes administrative revisions. Other elements of SB 766, including MPPs, de minimis criteria, exemptions from permitting, and permits by rule are addressed in concurrent adoptions of new and amended sections in 30 TAC Chapter 106 and Chapter 116. The authority for emissions fees is in TCAA, §382.0621, concerning Operating Permit Fee.

#### SECTION BY SECTION DISCUSSION

The adopted amendments to §101.27 add a new §101.27(c)(2) to implement the emissions fees required by TCAA, §382.0621(d). For grandfathered facilities with emissions in excess of 4,000 tons per year (tpy) which do not have a permit application pending on or after September 1, 2001, all emissions from the facility, including those emissions in excess of 4,000 tpy would be used to calculate the emissions fees required by §101.27. Under the adopted amendment, for the first 4,000 tons, per pollutant, the emissions fee would be \$26 per ton. Emissions fees for emissions in excess of 4,000 tpy would be \$78 per ton of each pollutant for fiscal year (FY) 2002, and would triple each fiscal year thereafter. Thus, FY 2003, the fee for emissions in excess of 4,000 tpy per regulated air pollutant would be \$234 per

ton. The amended section also allows for fee payments to be made by electronic funds transfer, updates the emissions fee rate table to include FYs 1998 - 2000, reflects the recent reorganization of the commission's permitting offices, corrects a reference to 40 Code of Federal Regulations Part 70, and revises citations to reflect insertion of a new §101.27(c)(2).

Section 101.333 is amended to correct an inadvertent omission of the term "NO<sub>x</sub>."

#### FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking 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 amendments are intended to protect the environment and reduce risks to human health from environmental exposure. The amendment to §101.27 requires emissions fees for grandfathered facilities that do not have a permit application pending on or after September 1, 2001, on all emissions, including emissions in excess of 4,000 tons; and triple the amount of the fee imposed for emissions in excess of 4,000 tons each fiscal year. These increasing fees could adversely affect 14 facilities at seven sites in Texas which emit over 4,000 tons of emissions if those facilities do not have a permit application pending on or after September 1, 2001. A requirement that results in a financial impact does not, in and of itself, define a rule as being a major environmental rule. It is true that the

impacts of the statutorily mandated fees on the 14 potentially affected facilities could be adverse, for those few facilities. However, implementation of the statutorily mandated fees 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. The commission does not believe that the rules implementing the statutorily mandated fees will affect any of the 14 facilities at seven sites, because it is anticipated that they will all apply for a permit by September 1, 2001. Section 2001.0225(a) 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 does not meet any of these four applicability requirements of §2001.0225(a). Specifically, the adopted amendments do not exceed a standard set by state or federal law, but comply with provisions in SB 766 and the Texas Health and Safety Code, concerning Operating Permit Fees. The adopted amendment does not exceed a requirement of a delegation agreement and was not developed solely under the general powers of the agency, but was specifically developed to implement the provisions of the Texas Health and Safety Code as amended by SB 766.

#### TAKINGS IMPACT ANALYSIS

The commission has prepared a takings impact assessment for the adopted rules under Texas

Government Code, §2007.043. The following is a summary of that assessment. The adopted rules would increase emissions fees on emissions in excess of 4,000 tpy for grandfathered facilities that do not have a permit application pending on or after September 1, 2001. This action does not restrict or limit an owner's right to their property that would otherwise exist in the absence of governmental action and therefore does not constitute a takings. This action meets an exception to §2007.043, because it is implementing the specific requirement of TCAA, §382.0621(d).

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has determined that this rulemaking 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's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with 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 has reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council. The adopted rule is intended to provide incentive for the reduction of emissions at grandfathered facilities, and the commission has determined that the 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 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. This action does not authorize any new emissions. This action is consistent with Title 40 Code of Federal Regulations because it does not authorize an emission rate in excess of that specified by

federal requirements.

#### HEARING AND COMMENTERS

The commission held a public hearing on this proposal in Austin on May 4, 2000. The commission received comments from the following organizations and companies during the public comment period which closed on May 8, 2000: ExxonMobil Refining and Supply (ExxonMobil), the Texas Oil and Gas Association (TxOGA), Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP), and Brown McCarroll & Oaks Hartline, L.L.P. (BMOH). TxOGA and TIP supported the amendment. ExxonMobil and BMOH opposed it.

#### ANALYSIS OF TESTIMONY

ExxonMobil commented that it acknowledges that SB 766 required the trebling emission fee for grandfathered facilities which emit over 4,000 tons per year which have not submitted a permit application before September 1, 2001. However ExxonMobil believes that this retroactive change in the regulatory process runs counter to the established methodology for permitting programs which does not mandate changes to existing facilities which are not modified.

**The commission is required to implement the fee increases as directed by TCAA, §382.0621(d).**

**The fee increase is required regardless of whether a facility has been modified.**

TxOGA supports trebling emission fees each year, beginning in FY 2002, for facilities with emissions in excess of 4,000 tons per year per regulated pollutant - as drafted. TIP commented that the trebled

emission fees would apply to emissions in “excess” of 4,000 tons per year. TxOGA and TIP support the option to make emission fee payments by electronic funds transfer.

**The commission agrees with the commenters and has amended §101.27(c)(2) to clarify that the trebled emission fees apply on a per pollutant basis.**

BMOH commented that it is concerned with the commission’s declaration that the implementation of statutorily mandated fees 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. Based upon an extrapolation of the example provided in Draft Regulatory Impact Analysis, the commenter questioned whether or not the commission believes any rule could have an adverse impact if this one does not.

**Texas Government Code, §2001.0225, defines a “major environmental rule” as 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 commission does not believe that implementation of the statutorily mandated fees 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 increasing fees potentially adversely affect only 14 facilities at seven**

sites in Texas if those facilities do not have a permit application pending on or after September 1, 2001. A requirement that results in a financial impact does not, in and of itself, define a rule as being a major environmental rule. The commission does not believe that the rules implementing the statutorily mandated fees will affect any of the 14 facilities at seven sites, because it is anticipated that they will all apply for a permit by September 1, 2001. Therefore, the commission does not believe this rule is a major environmental rule. Even if the adopted amendments were a major environmental rule, §2001.0225(a) 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 does not meet any of these four applicability requirements of 2001.0225(a). Specifically, the adopted amendment does not exceed a standard set by state or federal law, but complies with provisions in SB 766 and the Texas Health and Safety Code, concerning Operating Permit Fees. The adopted amendment does not exceed a requirement of a delegation agreement and was not developed solely under the general powers of the agency, but was specifically developed to implement the provisions of the Texas Health and Safety Code as amended by SB 766.

#### STATUTORY AUTHORITY

The amendment is adopted under TCAA, §382.0621, which authorizes the commission to triple emissions fees for grandfathered facilities over 4,000 tpy which do not have a permit application pending on or after September 1, 2001. The amendment is also adopted under TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission with the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; and §382.0622, which defines Clean Air Act fees and their use.

## CHAPTER 101 - GENERAL AIR QUALITY RULES

### SUBCHAPTER A : GENERAL RULES

#### §101.27

#### §101.27. Emissions Fees.

(a) Applicability. The owner or operator of each account to which this rule applies 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. 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. Each account will be assessed a separate emissions fee. Provisions of this section apply to all accounts, including accounts which have not been assigned specific commission account numbers. The owner or operator of an account subject to an emissions fee requirement is responsible for contacting the appropriate commission regional office to obtain an account number. 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 for which the fee is assessed, a full emissions fee is due. If the commission is notified in writing that the plant is not and will not be in operation during that fiscal year, a fee will not be due. All regulated air pollutants, as defined in subsection (c)(4) of this section, including, but not limited to, those emissions from point and fugitive sources during normal operations with the exception of (for applicability purposes only) hydrogen, oxygen, carbon dioxide, water, nitrogen, methane, and ethane, are used to determine applicability of

this section. In accordance with rules promulgated by EPA at 40 Code of Federal Regulations (CFR) 70, concerning the use of fugitive emissions in major source determinations, fugitive emissions shall be considered toward applicability of this section only for those source categories listed at 40 CFR 51.166(b)(1)(iii). For purposes of this section, an affected account shall have met one or more of the following conditions:

- (1) the account has the potential to emit, at maximum operational or design capacity, 100 tons per year (tpy) or more of any single air pollutant;
- (2) the account has the potential to emit, at maximum operational or design capacity, 50 tons per year or more of volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>) and is located in any serious ozone nonattainment area listed in §101.1 of this title (relating to Definitions);
- (3) the account has the potential to emit, at maximum operational or design capacity, 25 tons per year or more of VOC or NO<sub>x</sub> and is located in any severe ozone nonattainment area listed in §101.1 of this title;
- (4) the account emits ten tons per year or more of a hazardous air pollutant, as defined in the FCAA, §112;
- (5) the account emits an aggregate of 25 tons per year or more of hazardous air pollutants, as defined in the FCAA, §112;

(6) the account is subject to the National Emission Standards for Hazardous Air Pollutants (40 CFR 61) that apply to nontransitory sources;

(7) the account is subject to New Source Performance Standards (40 CFR 60);

(8) the account is subject to Prevention of Significant Deterioration (40 CFR 52) requirements; or

(9) the account is subject to Acid Deposition provisions in the FCAA Amendments of 1990, Title IV.

(b) Payment. Fees shall be remitted by check, electronic funds transfer, or money order made payable to the Texas Natural Resource Conservation Commission (TNRCC) and sent to the TNRCC address printed on the fee return form. A completed fee return form shall accompany fees remitted. The fee return form shall include, at least, the company name, mailing address, site name, air emissions inventory account number, Standard Industrial Classification (SIC) category, the allowable levels and/or actual 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.

(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. The fee applies to the tonnage of regulated pollutants at the account, including those emissions from point and fugitive sources during normal operations. 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)

Figure: 30 TAC §101.27(c)(1)

<b>Fiscal Year</b>	<b>Rate Per Ton</b>	<b>Minimum Fee</b>
1992	\$3	
1993	\$5	\$25
1994	\$25	\$25
1995	\$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) On and after September 1, 2001, a grandfathered facility, as defined in §116.10(6) of this title (relating to General Definitions) that does not have a permit application pending under Chapter 116 of this title (relating to Control of Air Pollution by Permits For New Construction or Modification) shall use all emissions, including emissions in excess of 4,000 tons per pollutant, for fee calculations. For the first 4,000 tons per pollutant, the rate in paragraph (1) of this subsection shall apply. For emissions in excess of 4,000 tons per pollutant, the rate will be \$78 per ton for fiscal year 2002 and will triple, each fiscal year, thereafter.

(3) The emissions tonnage for the account for fee calculation purposes will be the sum of those allowable levels and/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 or Commission Order, establishing allowable levels, actual emissions may be used only if a completed Emissions Inventory Questionnaire for the account is submitted with the fee payment. For stacks or vents, the inventory must include verifiable data based on continuous emission monitor measurements, other continuously monitored values, such as fuel usage and fuel analysis, or stack testing performed during normal operations using EPA approved methods and quality-assured by the executive director. All

measurements, monitored values, or testing must have been performed during the basis year as defined in subsection (c)(1) of this section or if not performed during the basis year, must be representative of the basis year as defined in subsection (c)(1) of this section. Actual emission rates may be based upon calculations for fugitive sources, flares, and storage tanks. Actual production, throughput, and measurement records must be submitted, along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and factors used in such calculations. If the actual emissions rate submitted for fee purposes is less than 60% of the allowable emission rate, an explanation of the discrepancy must be submitted. Where inadequate or incomplete documentation is submitted, the executive director may direct that the fee be based on allowable levels. Where a complete and verifiable inventory is not submitted, allowable levels shall be used.

(B) Where there is not an enforceable document, such as a permit or a Commission Order, establishing allowable levels actual emissions shall be used. 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 factors used in such calculations.

(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) Due date. Fee payments shall be made annually and must be received by the TNRCC or postmarked no later than November 1 of the fiscal year in which the fee is assessed. If an account commences or resumes operation after November 1 of the fiscal year in which the fee is assessed, the full emissions fee will be due prior to commencement or resumption of operations.

(e) Nonpayment of fees. Each emissions fee payment must be received by the due date specified in subsection (d) of this section. Failure to remit the full emissions fee by the due date shall result in enforcement action under the Texas Clean Air Act, Texas Health and Safety Code, §382.082 or §382.088. In addition, the Texas Clean Air Act, Texas Health and Safety Code, §382.091(a)(2), makes it a criminal offense to intentionally or knowingly fail to pay a required fee. The provisions of this section, as first adopted and amended thereafter, are and shall remain in effect for purposes of any unpaid fee assessments, and the fees assessed pursuant to such provisions as adopted or as amended remain a continuing obligation.

(f) Late payment penalties. The owner or operator of an account failing to make payment of emissions fees when due shall be assessed late payment penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

**SUBCHAPTER H : EMISSIONS BANKING AND TRADING**

**DIVISION 2 : EMISSIONS BANKING AND TRADING OF ALLOWANCES**

**§101.333**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Utilities Code (TUC), §39.264, which authorizes the commission to require the permitting of grandfather electric generating facilities and issue allowances to meet those permit emission restrictions; TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission with the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; and §382.0622, which defines Clean Air Act fees and their use.

**§101.333. Allocation of Allowances.**

Allowances will be allocated according to the requirements of this section.

(1) Except as provided in paragraphs (2) and (3) of this section, allowances will be calculated for grandfathered electric generating facilities (EGF) using the following equation:

Figure: 30 TAC §101.333(1)

Figure: 30 TAC §101.333(1)

$$A = \frac{ER * HI}{2000 \text{ lb / allowance}}$$

Where:

A = Number of allowances

HI = Total heat input (million British thermal units (MMBtu)) as listed in the 1997 Emissions Scorecard from EPA's Acid Rain Program, or if not listed in the 1997 Emissions Scorecard, by a method approved by the executive director, consistent with the emission reduction requirements of this division.

ER = Emission rate, as defined in subparagraphs (A) and (B) of this paragraph;

(A) In the East Texas Region:

(i) 0.14 pound nitrogen oxides (NO<sub>x</sub>) per MMBtu;

(ii) 1.38 pounds sulfur dioxide (SO<sub>2</sub>) per MMBtu only for coal-fired

grandfathered EGFs.

(B) In the West Texas and El Paso Regions, 0.195 pounds NO<sub>x</sub> per MMBtu.

(2) For electing EGFs, the amount of allowances is equal to emissions as listed in the 1997 Emissions Scorecard from EPA's Acid Rain Program, or if not listed in the 1997 Emissions Scorecard, by a method approved by the executive director, consistent with the emission reduction requirements of this division; and in both cases, shall not exceed any of the following:

(A) any annual emission limitation authorized under Chapter 116, Subchapter B of this title (relating to New Source Review Permits);

(B) an applicable state or federal requirement.

(3) The commission may invalidate any allowances allocated to an electing EGF that authorize emissions in excess of applicable state or federal requirements.

(4) If emissions of NO<sub>x</sub> or, if applicable, SO<sub>2</sub>, exceed the amount of allowances for a given control period, allowances for the next control period will be reduced in an amount equal to the emissions exceeding the allowances in the compliance account.

(5) Allowances will be allocated:

(A) initially, by:

(i) January 1, 2000, for grandfathered EGFs;

(ii) January 1, 2001, for electing EGFs; and municipal corporations, electric cooperatives, and river authorities that choose to obtain a permit under Chapter 116, Subchapter I of this title (relating to Electric Generating Facility Permits) for any grandfathered or electing EGFs previously exempted under §116.910(d) of this title (relating to Applicability);

(B) subsequently, by May 1 of each year, beginning in 2004.

(C) allowances will be allocated:

(i) initially by commission order for all grandfathered and electing EGFs;

(ii) notwithstanding clause (iii) of this subparagraph, at the beginning of each control period, the commission will deposit the same amount of allowances into each grandfathered or electing EGF's compliance account;

(iii) for electing EGFs, the annual deposit for any control period may be adjusted to reflect new state or federal requirements.

(6) Allowances may be deducted from compliance accounts following the review of

trading reports required under §101.336(b) of this title (relating to Emission Monitoring, Compliance, Demonstration, and Reporting.)

(7) The commission shall maintain a registry of the allowances in each compliance account. For each transfer, the registry shall include the price paid per allowance. The registry shall not contain proprietary information.