The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §101.306.

If adopted, the amendment to §101.306 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

**Background and Summary of the Factual Basis for the Proposed Rule**

The proposed rulemaking is intended to update some of the commission’s procedural rules and is not intended to impose any new procedural or substantive requirements.

In 1999, the 76th Texas Legislature enacted House Bill (HB) 801, which revised public participation in environmental permitting for certain permit applications declared administratively complete on or after September 1, 1999. The rulemaking to implement HB 801 (and other bills) consolidated the public participation rules across the agency which have subsequently been amended to implement legislation and policy decisions of the commission. The commission necessarily retained procedural rules applicable to certain permit applications declared administratively complete before September 1, 1999, and to other actions of the commission.

On June 12, 2019, the commission determined that the rules in 30 TAC Chapter 39, Subchapters A – E; Chapter 50, Subchapters A – C; Chapter 55, Subchapters A and B;
and Chapter 80, §§80.3, 80.5, and 80.251 are obsolete and no longer needed because no applications subject to these rules remain pending with the commission (June 28, 2019, issue of the Texas Register (44 TexReg 3304)). As a result, the commission is concurrently proposing to repeal obsolete rules in Chapters 39, 50, 55, and 80 (Rule Project Number 2019-119-039-LS) which necessitates updating other rules, primarily to remove obsolete text and update cross-references.

As part of this rulemaking, the commission is proposing amendments to Chapters 39, 55, and 116 to make necessary changes due to the proposed repeals for which revisions to the SIP are also necessary. Section 101.306 includes references to procedural mechanisms that are now obsolete, and this rulemaking will update cross-references to current applicable rules.

Concurrently with this rulemaking, the commission is proposing amendments to 30 TAC Chapters 33, 35, 39, 50, 55, 60, 70, 80, 90, 205, 285, 294, 305, 321, 330 - 332, 334, 335, and 350, and new sections in Chapter 39, to make necessary changes due to the proposed repeals (Rule Project Number 2019-121-033-LS). In addition, this rulemaking addresses public notice requirements for certain applications that are not subject to contested case hearing, but are currently subject to rules in Chapter 39, Subchapters A and B, without regard to the specified date of administrative completeness. The public notice requirements for those applications would be relocated to proposed new Chapter 39, Subchapter P.
The public's opportunity to participate in the permitting process will not change nor be affected in any way as a result of these rulemaking projects.

*Federal Clean Air Act, §110(l)*

All revisions to the SIP are subject to EPA's finding that the revision will not interfere with any applicable requirement concerning attainment and reasonable further progress of the national ambient air quality standards, or any other requirement of the Federal Clean Air Act (74 United States Code (USC), §7410(l)). This statute has been interpreted to be whether the revision will "make air quality worse" (*Kentucky Resources Council, Inc. v. EPA*, 467 F.3d 986 (6th Cir. 2006), cited with approval in *Galveston-Houston Association for Smog Prevention (GHASP) v. U.S. EPA*, 289 Fed. Appx. 745, 2008 WL 3471872 (5th Cir.)). Because procedural rules have no direct nexus with air quality, and because the current applicable public participation rules are approved as part of the Texas SIP, EPA should find that there is no backsliding from the current SIP and that this SIP revision complies with 42 USC, §7410(l).

**Section Discussion**

**Subchapter H: Emissions Banking and Trading**

**Division 1: Emission Credit Program**

§101.306, *Emission Credit Use*

The commission proposes to amend §101.306(c)(2) to update the cross-references to
Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule. This rulemaking will update cross-references in §101.306(c)(2) due to the repeal of rules in Chapter 50.

Public Benefits and Costs

Ms. Bearse also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from these changes will be to improve readability and minimize confusion with regard to applicable rules.

The proposed rule is not expected to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.
Rural Community Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rule does not adversely affect rural communities in a material way for the first five years that the proposed rule is in effect. The rule applies state-wide to all applicants for certain types of permit applications and the public and communities interested in those applications. These changes will improve readability and minimize confusion with regard to applicable rules.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this
proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rule does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does it increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

**Draft Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to §101.306 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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. Rather, this rulemaking updates cross-references to ensure there is no confusion regarding the applicable rules.

Texas Government Code, §2001.0225, 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 authority of the commission. The proposed amendment of §101.306 does not exceed an express requirement of state law or a requirement of a delegation agreement, and the rulemaking was not developed solely under the general powers of the agency but is authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking 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

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendment to §101.306 is procedural in nature and will not burden private real property. The proposed amendment does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The proposed amendment does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposed rule is identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (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 Advisory Committee and determined that the rulemaking is procedural in nature and will have
no substantive effect on commission actions subject to the CMP and is, therefore, 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**

Section 101.306 is an applicable requirement under 30 TAC Chapter 122 (Federal Operating Permits Program). However, the proposed amendment to update cross-references is procedural in nature and therefore no effect on sites subject to the Federal Operating Permits Program is expected if the commission amends this rule. The proposed amendment will not require any changes to outstanding federal operating permits.

**Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on December 10, 2019, at 10:00 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. 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 be permitted during the hearing; however, commission staff members will be available to discuss
the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

**Submittal of Comments**

Written comments may be submitted to Ms. Kris Hogan, 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: https://www6.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 2019-120-039-LS. The comment period closes on December 16, 2019. Copies of the proposed rulemaking can be obtained from the commission’s website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Amy Browning, Environmental Law Division, at (512) 239-0891.
SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 1: EMISSION CREDIT PROGRAM

§101.306

Statutory Authority
The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, §5.122, which authorizes the commission to delegate to the executive director the authority to act on an application. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which 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, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules
consistent with the policy and purposes of the Texas Clean Air Act. In addition, the amendment is also proposed under Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; and the Federal Clean Air Act, 42 United States Code, §§7401, et seq., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements TWC, §5.122; and THSC, §382.011 and §382.012.

§101.306. Emission Credit Use.

(a) Uses for emission credits. Unless precluded by a commission order or a condition or conditions within an authorization under the same commission account number, emission credits may be used as the following:

(1) offsets for a new source, as defined in §101.1 of this title (relating to Definitions), or major modification to an existing source;

(2) mitigation offsets for action by federal agencies under 40 Code of
Federal Regulations Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans;

(3) an alternative means of compliance with volatile organic compound and nitrogen oxides reduction requirements to the extent allowed in Chapters 115 and 117 of this title (relating to Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds);

(4) reductions certified as emission credits may be used in netting by the original applicant, if not used, sold, reserved for use, or otherwise relied upon, as provided by Chapter 116, Subchapter B of this title (relating to New Source Review Permits); or

(5) compliance with other requirements as allowed in any applicable local, state, and federal requirement.

(b) Credit use calculation.

(1) The number of emission credits needed by the user for offsets shall be determined as provided by Chapter 116, Subchapter B of this title.

(2) For emission credits used in compliance with Chapter 115 or 117 of
this title, the number of emission credits needed should be determined according to
the following equation plus an additional 10% to be retired as an environmental
contribution.

**Figure: 30 TAC §101.306(b)(2)** (No changes to the graphic as it currently exists in
TAC.)

\[
EC = A \times \left( ER_p - ER_r \right)
\]

Where:

- \( EC \) = The amount of emission credits needed.
- \( A \) = The maximum projected annual activity level during use period.
- \( ER_p \) = The projected emission rate per unit of activity during use period.
- \( ER_r \) = The emission rate per unit of activity required by Chapter 115 or 117 of this title
  (relating to Control of Air Pollution from Volatile Organic Compounds; and Control of
  Air Pollution from Nitrogen Compounds).

(3) For emission credits used to comply with §§117.123, 117.320,
117.323, 117.423, 117.1020, or 117.1220 of this title (relating to Source Cap; and
System Cap), the number of emission credits needed for increasing the 30-day rolling
average emission cap or maximum daily cap should be determined according to the
following equation plus an additional 10% to be retired as an environmental
contribution.

**Figure: 30 TAC §101.306(b)(3)** (No changes to the graphic as it currently exists in
ECs = \left[ \sum_{i=1}^{N} (H_n \times R_n) - \sum_{i=1}^{N} (H_i \times R_i) \right] \times \frac{365}{2000}

Where:

ECs = The amount of emission credits needed.

N = The total number of emission units in the source cap.

i = Each emission unit in the source cap.

H_n = The maximum daily heat input, in million British thermal units (MMBtu) per day, expected for an emission unit during the use period.

R_n = The maximum emission factor, in pounds per MMBtu (lb/MMBtu), expected for an emission unit during the use period.

H_i = The actual daily heat input, in MMBtu per day, as calculated according to §§117.123(b)(1) or (2), 117.320(c)(1) - (3), 117.323(b)(1) or (2), 117.423(b)(1) or (2), 117.1020(c)(1) or (2), or 117.1220(c)(1) or (2) of this title.

R_i = The facility’s emission factor, in lb/MMBtu, as defined in §§117.123(b)(1) or (2), 117.320(c)(1) - (3), 117.323(b)(1) or (2), 117.423(b)(1) or (2), 117.1020(c)(1) or (2), or 117.1220(c)(1) or (2) of this title.

(4) Emission credits used for compliance with any other applicable program should be determined in accordance with the requirements of that program and must contain at least 10% extra to be retired as an environmental contribution, unless otherwise specified by that program.

(c) Notice of intent to use emission credits.
(1) The executive director will not accept an application to use emission credits before the emission credit is available in the compliance account for the site where it will be used. If the emission credit will be used for offsets, the executive director will not accept the emission credit application before the applicable permit application is administratively complete.

(A) The user shall submit a completed application at least 90 days before the start of operation for an emission credit used as offsets in a permit in accordance with Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

(B) The user shall submit a completed application at least 90 days before the planned use of an emission credit for compliance with the requirements of Chapter 115 or 117 of this title or other programs.

(C) If the executive director approves the emission credit use, the date the application is submitted will be considered the date the emission credit is used.

(2) If the executive director denies the facility or mobile source’s use of emission credits, any affected person may file a motion for reconsideration within 60
days of the denial. Regardless of [Notwithstanding] the applicability provisions of §50.131(c)(5) [§50.31(c)(7)] of this title (relating to Purpose and Applicability), the requirements of §50.139 [§50.39] of this title (relating to Motion to Overturn Executive Director’s Decision [for Reconsideration]) shall apply. Only an affected person may file a motion for reconsideration.

(d) Inter-pollutant use of emission credits. With prior approval from the executive director and the United States Environmental Protection Agency, a nitrogen oxides or volatile organic compound emissions credit may be used to meet the offset requirements for the other ozone precursor if photochemical modeling demonstrates that the overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution.