

# Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

**To:** Commissioners **Date:** September 4, 2009  
**Thru:** LaDonna Castañuela, Chief Clerk  
Mark R. Vickery, P.G., Executive Director  
**From:** Susana M. Hildebrand, P.E., Chief Engineer  
**Docket No.:** 2009-0867-RUL  
**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 101, General Air Quality Rules  
Mass Emissions Cap and Trade (MECT) Program Cap Integrity for the Houston-  
Galveston-Brazoria (HGB) Eight-Hour Ozone Nonattainment Area  
Rule Project No. 2009-019-101-EN

## Reasons for the rule package:

The MECT program is a market-based component of the state implementation plan (SIP) that provides stationary sources of nitrogen oxides (NO<sub>x</sub>) compliance flexibility for the emission specifications under 30 Texas Administrative Code (TAC) Chapter 117, while establishing a mandatory cap for total NO<sub>x</sub> emissions from affected source categories in the HGB ozone nonattainment area. The MECT program was adopted as a primary control measure of the HGB attainment demonstration for the one-hour ozone National Ambient Air Quality Standard (NAAQS). The MECT program NO<sub>x</sub> cap is a product of the emission specifications of Chapter 117 and the submitted levels of activity from applicable facilities.

In accordance with §101.360(a), sites were required to submit an ECT-3 form, Level of Activity Certification, with the levels of activity from their applicable facilities by June 30, 2001, in order to receive an allocation of allowances (one allowance equals one ton of NO<sub>x</sub>). However, the current rule doesn't address late submittals of ECT-3 forms. Therefore, a site that has never complied with the MECT program could submit a late ECT-3 form in accordance with §101.360(a) and receive an allocation of allowances, thus, potentially increasing the NO<sub>x</sub> cap. To maintain the integrity and minimize increases in the NO<sub>x</sub> cap, the proposed rulemaking would discontinue the acceptance of ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NO<sub>x</sub>. These applicable facilities would thus have to obtain allowances from the market instead of receiving an allocation of allowances. The proposed rulemaking would not affect ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from minor sources of NO<sub>x</sub>.

In addition, the Texas Commission on Environmental Quality (TCEQ) staff received informal comments from industry regarding clarification on "air pollution control equipment" in the definition of "Uncontrolled design capacity." Therefore, the proposed rulemaking would clarify the definition of "Uncontrolled design capacity" by amending this definition to "Uncontrolled design capacity to emit" as the maximum capacity of a facility to emit NO<sub>x</sub> without consideration for post-combustion control equipment, enforceable limitations, or operational limitations. The addition of "post-combustion control equipment" to the proposed definition would account for any equipment that can be removed without preventing the facility from operating. NO<sub>x</sub> control equipment that is not considered post-combustion control equipment, such as low-NO<sub>x</sub> burners, would be considered when calculating the uncontrolled design capacity to emit.

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In 2008, Hurricane Ike increased awareness of the need for backup generators during extended power outages for activities such as maintaining water pressure at water treatment plants. To provide additional flexibility to sites that would become subject to the MECT program because of the installation of a backup generator, the new sentence to §101.350(14) proposes a new option for calculating the uncontrolled design capacity to emit from applicable diesel engines operating less than 100 hours per year in non-emergency situations and not meeting the applicable United States Environmental Protection Agency (EPA) Tier standards. Under this proposed rulemaking, a minor source of NO<sub>x</sub> with an applicable diesel engine would, depending on the site's collective uncontrolled design capacity to emit, meet the emission specification listed in §117.2010 either by participating in the MECT program and acquiring allowances or not participating in the MECT program and acquiring emission reduction credits or discrete emission reduction credits.

To clarify site and facility applicability, the proposed rulemaking would restructure §101.351 to explain that sites must determine their status as a minor or major source of NO<sub>x</sub> in Chapter 117 before determining applicability of their facilities in the MECT program. Along with the restructuring of §101.351, proposed new subsection (c) would clarify a site's duration in the MECT program. Therefore, new §101.351(c) would explain that once a site is subject to the MECT program, that site will remain subject to the MECT program until the site is permanently shut down.

**Under what authority are we proposing these changes?**

The amendments 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 amendments 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; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §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 amendments are also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit SIP revisions that specify the manner in which the NAAQS will be achieved and maintained within each air quality control region of the state.

The amended sections implement THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017, and FCAA, 42 USC, §§7401 *et seq.*

**Is this rulemaking required by federal rule or state statute? Which ones?**

This rulemaking is not required by federal rule or state statute.

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**Are there any legal deadlines by which these rules must be proposed, adopted, or effective?** No.

**What issue(s) or problem(s) are we trying to solve?**

The proposed rulemaking would maintain the integrity of the MECT program NO<sub>x</sub> cap and minimize increases in the cap. This rulemaking would also amend the definition of uncontrolled design capacity, provide an option for determining the uncontrolled design capacity to emit for certain stationary diesel engines, and clarify site and facility applicability in the MECT program.

**Why is it important that we do this rule package?**

The importance of this rule package is to protect the HGB attainment demonstration for the ozone NAAQS and provide additional Chapter 117 compliance flexibility for certain backup generators that supply power during emergency situations.

**Other important background or historical information.** N/A

**Scope of the rulemaking:**

The proposed rulemaking would maintain the integrity of the NO<sub>x</sub> cap in the HGB ozone nonattainment area and minimize increases in the cap by discontinuing the acceptance of late ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NO<sub>x</sub>. The proposed rulemaking would amend the definition of "Uncontrolled design capacity" to "Uncontrolled design capacity to emit" for additional clarity and to provide additional flexibility for certain stationary diesel engines. The proposed rulemaking would also clarify both site and facility applicability in the MECT program.

**Changes required by federal rule:** N/A

**Changes required by state statute:** N/A

**Staff recommendations that are not expressly required by federal rule or state statute:**

- Amend the definition of "Uncontrolled design capacity" to "Uncontrolled design capacity to emit" as the maximum capacity of a facility to emit NO<sub>x</sub> without consideration for post-combustion control equipment, enforceable limitations, or operational limitations.
- Allow minor sources of NO<sub>x</sub> the option to use the lower of 876 hours or a federally enforceable limitation on total hours of operation when calculating the uncontrolled design capacity to emit for stationary diesel engines that are not exempt under §117.2003(a)(2)(I) because the diesel engines do not meet the applicable EPA Tier standards.
- Specify that once a site is subject to the MECT program, the site will remain subject to the MECT program until the site is permanently shut down.
- Discontinue the acceptance of late ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NO<sub>x</sub>.

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**Impact on the regulated community:**

**Who will be affected?**

The regulated community affected by the proposed rulemaking are sites defined on or before December 31, 2000, as major sources of NO<sub>x</sub> that have not submitted an ECT-3 form in accordance with §101.360(a) by March 30, 2010. In addition, minor sources of NO<sub>x</sub> that are not subject to the MECT program but install stationary diesel engines that are not exempt under §117.2003(a)(2)(I) because the diesel engines do not meet the applicable EPA Tier standards will be affected by the proposed rulemaking.

**Does it create a group of affected persons who were not affected previously? How?** No.

**Will there be a fiscal impact? If so, estimate.**

Although a major source of NO<sub>x</sub> that has not submitted an ECT-3 form in accordance with §101.360(a) by March 30, 2010, would have to purchase MECT allowances, TCEQ staff have not received any late ECT-3 forms since before 2003 from a major source of NO<sub>x</sub>. Therefore, no significant fiscal implications are anticipated.

**Impact on the public:**

**Who will be affected?**

The public would benefit from the availability of energy during emergencies due to the additional Chapter 117 compliance flexibility for sites with applicable diesel engines not meeting an exemption under Chapter 117 that supply power during emergency situations.

**Does it create a group of affected persons who were not affected previously? How?** No.

**Will there be a fiscal impact? If so, estimate.** No.

**Impact on agency programs:** None.

**Stakeholder meetings:**

**Have any stakeholder meetings been held?** No.

**With whom?** N/A

**What were the general sentiments?** N/A

**Were any changes made in response to stakeholder concerns?** N/A

**Policy issues:**

**What policy issues are affected?**

- All late ECT-3 forms are currently accepted, but the proposed rule discontinues the acceptance of late ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NO<sub>x</sub>.

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- Current policy requires stationary diesel engines that are not exempt under §117.2003(a)(2)(I) that do not meet the applicable EPA Tier standards to use 8,760 hours when determining uncontrolled design capacity potentially making an emergency engine subject to obtaining sufficient allowances to operate on a continuous basis. The proposed rule would allow minor sources of NO<sub>x</sub> the option to use the lower of 876 hours or a federally enforceable limitation on total hours of operation when calculating the uncontrolled design capacity to emit for these stationary diesel engines.
- Current rule language does not define air pollution control equipment. The proposed definition "Uncontrolled design capacity to emit" explains that any NO<sub>x</sub> post-combustion control equipment that can be removed without preventing the facility from operating would not be used when calculating the uncontrolled design capacity to emit. NO<sub>x</sub> control equipment that is not considered post-combustion control equipment, such as low-NO<sub>x</sub> burners, would be used when calculating the uncontrolled design capacity to emit.

**Are any policies that are not currently based on rule being made into a rule?**

A current policy that is being made into a rule is proposed under new §101.351(c) stating that once a site is subject to the MECT program, the site will remain subject to the MECT program until the site is permanently shut down.

**What are the consequences if this rulemaking is not approved to go forward?**

The consequences of not approving the proposed rulemaking are potential increases to the NO<sub>x</sub> cap, affecting the HGB attainment demonstration for the one-hour and eight-hour NAAQS for ozone. Also, not approving the proposed rulemaking limits the options for sites with certain backup generators not meeting an exemption under Chapter 117 that supply power during emergency situations when trying to comply with the Chapter 117 emission specifications.

**Are there alternatives?**

The commission could choose not to make the proposed rule changes.

**Potentially controversial matters:** None.

**Key points in proposed rulemaking schedule:**

**Anticipated proposal date:** September 23, 2009  
**Anticipated *Texas Register* publication date:** October 9, 2009  
**Public hearing date (if any):** October 28, 2009, Houston; October 29, 2009, Austin  
**Public comment period:** October 9, 2009 - November 9, 2009  
**Anticipated adoption date:** March 2010

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