

The Texas Commission on Environmental Quality (commission or agency) proposes amendments to §§101.350, 101.351, and 101.353.

The amended sections 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 RULES

The purpose of the proposed amendments to Subchapter H, Division 3, Mass Emissions Cap and Trade Program, is to maintain the integrity of the nitrogen oxides (NO<sub>x</sub>) cap in the Houston-Galveston-Brazoria (HGB) ozone nonattainment area and minimize increases in the NO<sub>x</sub> cap. The proposal would discontinue the acceptance of late ECT-3 forms, Level of Activity Certification, 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>, as defined in 30 TAC §117.10. Also, the proposed rulemaking would amend the definition of "Uncontrolled design capacity" to provide additional flexibility for certain stationary diesel engines and clarify both site and facility applicability.

The Mass Emissions Cap and Trade (MECT) program is a market-based component of the SIP that provides stationary sources of NO<sub>x</sub> compliance flexibility for the emission specifications under 30 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. The proposed rulemaking would not affect the

submittal of ECT-3 forms from minor sources of NO<sub>x</sub>.

In accordance with §101.360(a), to receive an allocation of allowances (one allowance equals one ton of NO<sub>x</sub>), sites were required to submit an ECT-3 form with the levels of activity from their applicable facilities by June 30, 2001. Applicable facilities with historical actual emission data were allocated allowances based on actual levels of activity while other applicable facilities without historical actual emission data were allocated allowances based on permitted allowable emissions. Representatives of facilities with allocations based on permitted emissions are required to submit a second ECT-3 form once a historical emissions baseline is established to convert their permit-based allocation to a historical level of activity based allocation in accordance with §101.360(b)(1). 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 late ECT-3 forms from sites defined on or before December 31, 2000, as major sources of NO<sub>x</sub> if submitted in accordance with §101.360(a) after March 30, 2010. These applicable facilities would have to obtain allowances from the market instead of receiving an allocation of allowances.

Informal comments from industry were received 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.

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 potentially become subject to the MECT program because 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 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 subsection (c) would clarify a site's duration in the MECT program.

## SECTION BY SECTION DISCUSSION

### *SUBCHAPTER H: EMISSIONS BANKING AND TRADING*

#### *DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM*

In addition to the proposed amendments to §§101.350, 101.351, and 101.353 discussed elsewhere in this preamble, the commission also proposes to make various stylistic non-substantive changes to update rule language to current *Texas Register* style and format requirements, as well as establish more consistency in the rules. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terms such as "must" and "shall." These changes are non-substantive and generally are not specifically discussed in this preamble.

#### *§101.350. Definitions.*

The proposed amendment to §101.350(14) would revise 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 (e.g., a selective catalytic reduction system), enforceable limitations (e.g., permit restrictions, such as a restriction on operating hours per year), or operational limitations (e.g., using a number lower than the maximum rated capacity). 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.

The proposed amendment to §101.350(14) would allow flexibility for calculating the uncontrolled design capacity to emit for stationary diesel engines that are modified, reconstructed, or relocated, operate less

than 100 hours per year (based on a rolling 12-month average) in non-emergency situations, and do not meet the applicable EPA Tier standards. In conjunction with proposed §101.351(c), proposed §101.350(14) would allow minor sources of NO<sub>x</sub> not subject to the MECT program the option to calculate the uncontrolled design capacity to emit for an applicable stationary diesel engine using the lower of 876 hours or a federally enforceable limitation on total hours of operation. From the proposed new language, an applicable site with an applicable stationary diesel engine could meet the emission specification listed in §117.2010 either by participating in the MECT program and obtaining allowances or not participating in the MECT program and obtaining emission credits or discrete emission credits, depending on the site's collective uncontrolled design capacity to emit.

For example, on July 21, 2010, a municipal utility district (MUD) installs a stationary diesel engine for use as a backup generator to maintain water pressure during power outages. In this example, the MUD does not have any other applicable facilities subject to §117.2010 and is not subject to the MECT program prior to the installation of this engine. The diesel engine is rated at 150 horsepower, has an emission factor of 7.0 grams of NO<sub>x</sub> per horsepower-hour, and is permitted to operate at most 876 hours per year. The engine must comply with the emission specifications listed in §117.2010 since this engine does not meet the criteria necessary to be considered exempt under §117.2003. Therefore, the installation of the backup generator requires recalculation of the site's collective uncontrolled design capacity to emit to determine applicability in the MECT program. Proposed §101.350(14) would allow using 876 hours when calculating the uncontrolled design capacity to emit for the diesel engine, therefore equaling 1.01 tons of NO<sub>x</sub> per year. The MUD in this example could also use the conventional method for calculating the uncontrolled design capacity to emit using 8,760 hours, therefore equaling 10.14 tons per year. The MUD is subject to the MECT program if the collective uncontrolled design capacity to emit is ten tons or

more per year of NO<sub>x</sub>. Since the MUD has the option of having a collective uncontrolled design capacity to emit above or below ten tons per year, the MUD could either participate in the MECT program and obtain allowances to cover the actual emissions of NO<sub>x</sub> from the diesel engine or obtain emission credits or discrete emission credits for the diesel engine to meet the emission specifications listed in §117.2010. Under proposed §101.351(c), if this MUD participates in the MECT program, then this site would remain subject to the MECT program until permanently shut down.

*§101.351. Applicability.*

The proposed amendment to §101.351(a) would require a site first to determine its status as a minor or major source of NO<sub>x</sub> in Chapter 117. If the site is a major source of NO<sub>x</sub>, the facilities with emission specifications listed in §117.310 or §117.1210 are applicable to the MECT program. If the site is a minor source of NO<sub>x</sub>, the collective uncontrolled design capacity to emit is calculated from the facilities with emission specifications in §117.2010. If the collective uncontrolled design capacity to emit is ten tons or more per year of NO<sub>x</sub>, then the site is subject to the MECT program.

Proposed §101.351(c) states that once a site becomes subject to the MECT program, the site will remain subject to the MECT program until permanently shut down. Proposed subsection (c) would clarify that a site's collective uncontrolled design capacity to emit will not affect the site's applicability once subject to the MECT program. In addition, proposed subsection (c) would also clarify that once a minor source of NO<sub>x</sub> is subject to the MECT program, any of the facilities at the site subject to the emission specifications in §117.2010 are subject to the MECT program until the site is permanently shut down.

*§101.353. Allocation of Allowances.*

The proposed amendment to §101.353(b) would require sites defined on or before December 31, 2000, as major sources of NO<sub>x</sub> with facilities that meet the requirements to receive allowances in accordance with §101.360(a), but have not submitted an ECT-3 form by March 30, 2010, to obtain allowance for these facilities from the market. Under the existing rule, ECT-3 forms were considered late if submitted in accordance with §101.360(a) after June 30, 2001, however, the forms were accepted. Under the proposed amendment, if an ECT-3 form is submitted in accordance with §101.360(a) and is received after March 30, 2010, from a site defined on or before December 31, 2000, as a major source of NO<sub>x</sub>, then the ECT-3 form would not be accepted and the facilities listed on the ECT-3 form would be required to obtain allowances from the market instead of receiving an allocation of allowances based on historical actual emission data or an allocation of allowances based on permitted allowable emissions.

The existing rule language regarding the 90-day submittal deadline for an ECT-3 form from newly applicable sites or facilities would not be affected by the proposed rulemaking. Also, 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>.

#### 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 rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules clarify certain provisions of the MECT program.

The proposed rules amend Chapter 101 provisions pertaining to the MECT program. The proposed rules

will: eliminate the allocation of allowances to major sources of NO<sub>x</sub> in the HGB ozone nonattainment area that have not submitted proper certification regarding their level of activity by March 30, 2010; revise a definition for calculating "Uncontrolled design capacity" to allow minor sources of NO<sub>x</sub> not in the MECT program the option to use emission credits, discrete emission credits, or MECT allowances for modified, reconstructed, or relocated stationary diesel engines operating less than 100 hours per year in non-emergency situations and not meeting the emission standards for that EPA Tier; and clarify the policy that once a minor or major source of NO<sub>x</sub> participates in the MECT program, its participation is permanent until it is permanently shut down.

In general, the proposed rules are not expected to have a significant fiscal impact on local governments in the HGB ozone nonattainment area. Local governments are not typically major sources of NO<sub>x</sub> emissions and eliminating the allocation of emission allowances after March 30, 2010, should not impact them. However, due to recent legislative changes, some water systems and wastewater systems in the HGB ozone nonattainment area may be affected. Those water and wastewater systems that install diesel engines to ensure emergency operations during extended power outages and are minor sources of NO<sub>x</sub> not in the MECT program would benefit from the additional flexibility for calculating the uncontrolled design capacity to emit for a stationary diesel engine that is not exempt from the provisions of §117.2003(a)(2)(I) because it does not meet the EPA Tier standard. If the proposed new calculation methodology is chosen and the site has a collective uncontrolled design capacity to emit less than 10 tons of NO<sub>x</sub> per year, the water or wastewater system would have the option to obtain emission credits or discrete emission credits to meet emission specifications. If the existing calculation methodology is chosen and the site has a collective uncontrolled design capacity to emit 10 tons or more of NO<sub>x</sub> per year, then the site must participate in the MECT program and obtain allowances. Market prices of MECT

allowances, emission credits, and discrete emission credits vary according to market conditions. Figure 1 of this preamble estimates the costs of the allowances and credits according to current market prices.

Figure 1: 30 TAC Chapter 101--Preamble

Estimated Cost of MECT allowances	\$500 - \$3,000 per allowance per year or \$75,000 - \$150,000 per allowance for perpetuity
Estimated Cost of Emission Reduction Credits	\$3,000 - \$100,000 per ton per year
Estimated Cost of Discrete Emission Reduction Credits	\$1,000 to \$10,000 per ton

Staff estimates that there may be as many as 3,000 public water systems and wastewater systems in the HGB ozone nonattainment area.

#### 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 rules will be a restriction on potential increases to the NO<sub>x</sub> cap in the HGB ozone nonattainment area and continued protection of public health and the environment in that area.

Staff estimates that there are 350 sites in the MECT program. If a major source of NO<sub>x</sub> does not submit the proper certification regarding their level of activity by March 30, 2010, they will be required to obtain MECT allowances. Minor sources of NO<sub>x</sub> not in the MECT program would benefit from the additional flexibility for calculating the uncontrolled design capacity to emit for a stationary diesel engine that is not exempt from the provisions of §117.2003(a)(2)(I) because it does not meet the EPA Tier standard. If the

proposed new calculation methodology is chosen and the site has a collective uncontrolled design capacity to emit less than 10 tons of NO<sub>x</sub> per year, the site would have the option to obtain emission credits or discrete emission credits to meet emission specifications. If the existing calculation methodology is chosen and the site has a collective uncontrolled design capacity to emit 10 tons or more of NO<sub>x</sub> per year, then the site must participate in the MECT program and obtain allowances. Market prices of MECT allowances, emission credits, and discrete emission credits vary according to market conditions. Figure 1 estimates the costs of the allowances and credits according to current market prices.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small businesses do not typically participate in activities that would qualify as a major source of NO<sub>x</sub>. Small businesses that might be classified as a minor source of NO<sub>x</sub> in the HGB ozone nonattainment area will see the same flexibility as other minor sources of NO<sub>x</sub> if they choose to install a stationary diesel engine that does not meet the EPA Tier standards.

#### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed the proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the emissions banking and trading program is a component of the state's plan to protect the environment and reduce risks to human health from environmental exposure to air pollutants, and the proposed rules do 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 the proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do 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 rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §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 amendments to Chapter 101 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants; although, the underlying emissions banking and trading program is intended to achieve these goals. The primary purpose of this rulemaking action is to maintain the integrity of the NO<sub>x</sub> cap in the HGB ozone nonattainment area by minimizing potential increases in the cap, to amend the definition of "Uncontrolled design capacity" to "Uncontrolled design capacity to emit" for additional clarity and to provide additional flexibility for certain diesel engines, and to clarify site and facility applicability.

None of these amendments place additional financial burdens on the regulated community. The first purpose of this proposed rulemaking is to maintain the integrity of the NO<sub>x</sub> cap and minimize cap increases, 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>.

Although a major source of NO<sub>x</sub> that has not submitted its ECT-3 form by March 30, 2010, would have to purchase MECT allowances, the commission has not received any late ECT-3 forms since before 2003 from a major source of NO<sub>x</sub>; therefore, it is unlikely that anyone who needs to submit ECT-3 forms has not done so. The other purpose of this proposed rulemaking is to provide additional flexibility to sites that would enter the MECT program because of a backup generator, by proposing a new option for calculating the uncontrolled design capacity to emit from applicable diesel engines that operate less than 100 hours per year in non-emergency situations and do not meet the applicable EPA Tier standards. This proposed change would offer additional flexibility for potential applicability of the MECT program to a wider range of sources and would give potentially affected sources additional options, instead of requiring them to participate in the MECT program. Thus, the rulemaking action does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to the MECT program in this rulemaking action were developed to provide flexibility in meeting the ozone NAAQS set by the EPA under 42 United States Code (USC), §7409, and therefore meet a federal requirement. This rulemaking action does not exceed an express requirement of

state law or a requirement of a delegation agreement, was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Health and Safety Code (THSC), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments to the MECT program would provide additional flexibility for certain sites in meeting the ozone NAAQS set by the EPA under 42 USC, §7409, and also limit increases in the NO<sub>x</sub> cap. Promulgation and enforcement of the amendments will not burden private real property. The proposed amendments do 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. Additionally, the credits and allowances that would be affected by these proposed amendments are not property rights. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Although the proposed amendments do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within these rules were developed in order to meet the one-hour ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible to ensure attainment and maintenance of the NAAQS once the EPA has established them.

Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this proposed rulemaking action is to minimize increases in the NO<sub>x</sub> cap and to provide additional flexibility for certain sites to meet the ozone NAAQS set by the EPA under 42 USC, §7409. Consequently, the exemption that applies to these proposed amendments is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action 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 rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendments update a definition and maintain the integrity of the NO<sub>x</sub> cap. No new sources of air contaminants will be authorized and the revisions will maintain the same level of emissions control as

previous rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. 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

These amendments will not require any changes to outstanding federal operating permits.

#### ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal in conjunction with the HGB 1997 Eight-Hour Ozone Standard Attainment Demonstration and HGB 1997 Eight-Hour Ozone Reasonable Further Progress SIP revisions, Control Techniques Guidelines rulemaking, and the Highly Reactive Volatile Organic Compound Emissions Cap and Trade Program revisions in Houston on October 28, 2009, at 2:00 p.m. and 6:00 p.m. in Conference Room A at the Houston-Galveston Area Council, located at 3555 Timmons Lane, and in Austin on October 29, 2009, at 3:00 p.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 Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Jessica Rawlings, 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.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-019-101-EN. The comment period closes November 9, 2009.

Copies of the proposed rulemaking can be obtained from the commission's Web site at

[http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact

Brandon Greulich, Air Quality Planning Section, (512) 239-4904.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

**DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM**

**§§101.350, 101.351, 101.353**

**STATUTORY AUTHORITY**

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 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 USC, §§7401 *et seq.*, which requires states to submit SIP revisions that specify the manner 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.*

**§101.350. Definitions.**

The following words and terms, when used in this division (relating to Mass Emissions Cap and Trade Program), will [, shall] have the following meanings, unless the context clearly indicates otherwise.

(1) **Adjustment period**--A period of time, beginning on the first day of operation of a facility and ending no more than 180 consecutive days later, used to make corrections and adjustments to achieve normal technical operating characteristics of the facility.

(2) **Allowance**--The authorization to emit one ton of nitrogen oxides, expressed in tenths of a ton, during a control period.

(3) **Authorized account representative**--The responsible person who is authorized, in writing, to transfer and otherwise manage allowances.

(4) **Banked allowance**--An allowance that [which] is not used to reconcile emissions in the designated year of allocation, but that [which] is carried forward for up to one year and noted in the compliance or broker account as "banked."

(5) **Broker**--A person not required to participate in the requirements of this division (relating to Mass Emissions Cap and Trade Program) who opens an account under this division for the purpose of banking and trading allowances.

(6) **Broker account**--The account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division (relating to Mass Emissions Cap and Trade Program).

(7) **Compliance account**--The account where allowances held by a facility or multiple facilities at a single site are recorded for the purposes of meeting the requirements of this division (relating to Mass Emissions Cap and Trade Program).

(8) **Control period**--The 12-month period beginning January 1 and ending December 31 of each year. The initial control period begins January 1, 2002.

(9) **Existing Facility**--A new or modified facility that either has submitted an application for a permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) that [which] the executive director has determined to be administratively complete before January 2, 2001, or has qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and commenced construction before January 2, 2001.

(10) **Houston-Galveston-Brazoria (HGB) ozone nonattainment area**--As defined in §101.1 of this title (relating to Definitions).

(11) **Level of activity**--The amount of activity at a facility measured in terms of production, fuel use, raw materials input, or other similar units.

(12) **Person**--For the purpose of issuance of allowances under this division (relating to Mass Emissions Cap and Trade Program), a person includes an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, or a corporation.

(13) **Site**--As defined in §122.10 of this title (relating to General Definitions).

(14) **Uncontrolled design capacity to emit**--The maximum capacity of a facility to emit nitrogen oxides without consideration for post-combustion pollution control equipment, enforceable limitations, or operational limitations. The owner or operator of a stationary diesel engine may use the lower of 876 hours or a federally enforceable limitation on total hours of operation to calculate uncontrolled design capacity to emit if the engine would otherwise be exempt from Chapter 117, Subchapter D, Division 1 of this title (relating to Houston-Galveston-Brazoria Ozone Nonattainment Area Minor Sources) under §117.2003(a)(2)(I) of this title (relating to Exemptions) except that the engine does not meet the emission standard requirements of §117.2003(a)(2)(I)(ii) of this title.

[(14) **Uncontrolled design capacity**--The maximum capacity of a facility to emit a pollutant without regard to any enforceable or physical operational limitations including air pollution control equipment.]

**§101.351. Applicability.**

(a) This division applies to sites [all facilities which emit nitrogen oxides (NO<sub>x</sub>)] in the Houston-Galveston-Brazoria ozone nonattainment area that: [, as defined in §101.1 of this title (relating to Definitions) which are subject to the emission specifications under §§117.310, 117.1210, or 117.2010 of this title (relating to Emission Specifications for Attainment Demonstration and Emission Specifications) and which are:]

(1) meet [located at a site which meets] the definition of a major source of nitrogen oxides (NO<sub>x</sub>), as defined in §117.10 of this title (relating to Definitions), with facilities subject to §117.310 or §117.1210 of this title (relating to Emission Specifications for Attainment Demonstration); or

(2) do not meet the definition of a major source of NO<sub>x</sub>, as defined in §117.10 of this title, and have facilities subject to §117.2010 of this title (relating to Emission Specifications) with a collective uncontrolled design capacity to emit from these facilities of [located at a site where they collectively have an uncontrolled design capacity to emit] ten tons or more per year of NO<sub>x</sub>.

(b) A site that [which] met the definition of major source as of December 31, 2000, must [shall] always be classified as a major source for purposes of this chapter. A site that [which] did not meet the definition of major source (i.e., was a minor source, or did not yet exist) on December 31, 2000, but that [which] at any time after December 31, 2000, becomes a major source, must [shall] from that time forward always be classified as a major source for purposes of this chapter.

(c) Once a site becomes subject to the requirements of this division, the site will remain subject to this division until the site has been permanently shut down.

**§101.353. Allocation of Allowances.**

(a) Allowances will be deposited into compliance accounts according to the following equation except as provided in subsection (b) or (h) of this section.

Figure: 30 TAC §101.353(a) (No change.)

$$A = [B] - X \left[ B - \left( \frac{LA_{HA} * EF_{FINAL}}{2000} \right) \right]$$

Where:

- (1) A= number of allowances rounded to tenths of tons;
- (2) B = the facility's baseline emission rate and is calculated as follows:
  - (A) For facilities in operation prior to January 1, 1997:

$$B = \frac{(LA_{97} * EF_{97}) + (LA_{98} * EF_{98}) + (LA_{99} * EF_{99})}{3(2000)}$$

- Where:
- LA<sub>97</sub> = the facility's level of activity, as certified by the executive director for 1997;
  - LA<sub>98</sub> = the facility's level of activity, as certified by the executive director for 1998;
  - LA<sub>99</sub> = the facility's level of activity, as certified by the executive director for 1999;

$EF_{97}$  = the facility's emission factor for 1997 or the emission specifications under §§117.310, 117.1210, and 117.2010 of this title (relating to Emission Specifications for Attainment Demonstration; and Emission Specifications) (ESAD) whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director;

$EF_{98}$  = the facility's emission factor for 1998 or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director;

$EF_{99}$  = the facility's emission factor for 1999 or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director.

- (B) For existing facilities not in operation prior to January 1, 1997 and that have been in operation less than five complete consecutive calendar years beginning after the end of the adjustment period and have not established two years of baseline data:

$$B = \frac{LA_{ALLOWABLE} * EF_{ALLOWABLE}}{2000}$$

Where:  $LA_{Allowable}$  = The level of activity authorized by the executive director until such time two consecutive calendar years of actual level of activity data is available;

$EF_{Allowable}$  = The emission factor or the emission specifications under ESAD, whichever is higher, authorized by the executive director until such time two consecutive calendar years of actual emission data is available.

- (C) For existing facilities not in operation prior to January 1, 1997, and that have established two consecutive calendar years of baseline data out of the first five years of operation following the end of the adjustment period:

$$B = \frac{(LA_{YEAR-1} * EF_{YEAR-1}) + (LA_{YEAR-2} * EF_{YEAR-2})}{2(2000)}$$

- Where:
- $LA_{Year-1}$  = the facility's level of activity, as certified by the executive director, for the first of any two consecutive years within the first five years of operation;
  - $LA_{Year-2}$  = the facility's level of activity, as certified by the executive director, for the second of any two consecutive years within the first five years of operation;
  - $EF_{Year-1}$  = the facility's emission factor or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director, for the first of any two consecutive years within the first five years of operation;
  - $EF_{Year-2}$  = the facility's emission factor or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director, for the second of any two consecutive years within the first five years of operation.

(3) X = reduction factor, where:

- (A) For all boilers, auxiliary steam boilers, and stationary gas turbines (including duct burners used in turbine exhaust ducts) within an electric power generating system, as defined in §117.10(14)(A) of this title (relating to Definitions), located in the Houston-Galveston-Brazoria nonattainment area:
  - (i) for January 1, 2002 through March 31, 2003, X = 0.00;
  - (ii) for April 1, 2003 through March 31, 2004, X = 0.50;
  - (iii) on or after April 1, 2004, X = 1.00;
- (B) For facilities subject to the emission specifications under §117.310(a)(1)(A) and (B), (2)(A), (5), (8)(A)(i), (8)(B), (9)(A)(ii), (10), or (11) of this title:
  - (i) for January 1, 2002 through March 31, 2004, X = 0.00;
  - (ii) for April 1, 2004 through March 31, 2005, X = 0.47;
  - (iii) for April 1, 2005 through March 31, 2006, X = 0.80;
  - (iv) for April 1, 2006 through March 31, 2007, X = 0.93;
  - (v) on and after April 1, 2007, X = 1.00;
- (C) For all other facilities:

(i) for January 1, 2002 through March 31, 2004,  $X = 0.00$ ;

(ii) for April 1, 2004 through March 31, 2005,  $X = 0.389$ ;

(iii) for April 1, 2005 through March 31, 2006,  $X = 0.667$ ;

(iv) for April 1, 2006 through March 31, 2007,  $X = 0.778$ ;

(v) on and after April 1, 2007,  $X = 1.00$ ;

(D) Alternatively, facilities subject to the reduction factors under subparagraph B of this paragraph may elect to comply with the following:

(i) for January 1, 2002 through March 31, 2005,  $X=0.00$ ;

(ii) on and after April 1, 2005,  $X=1.00$ .

(E) Election to comply with the alternative reduction schedule under subparagraph (D) of this paragraph shall be made by letter to the executive director no later than April 1, 2003.

(F) For calendar years which include two different reduction factors, the reduction factor shall be adjusted using the appropriate ratio to reflect the number of months covered by each reduction factor.

(4)  $LA_{HA}$  = historical average level of activity, where:

(A) For facilities in operation on or before January 1, 1997, the average level of activity, as certified by the executive director, for 1997, 1998, and 1999; or

(B) For existing facilities which began operation after January 1, 1997,  $LA_{HA}$  is:

(i) the level of activity authorized by the executive director until such time two consecutive calendar years of actual level of activity data is available, beginning after the end of the adjustment period; or

(ii) when two complete consecutive calendar years of actual level of activity data is available, beginning after the end of the adjustment period, the level of activity becomes the average of the facility's actual level of activity over those two consecutive calendar years of actual level of activity data.

(5)  $EF_{final}$  = emission factor, as listed in §§117.310, 117.1210, or 117.2010 of this title.

(6) For facilities using alternative emission specifications as allowed in §117.310(a)(17) or §117.2010(c)(6) of this title, the level of activity for any formula will be the lowest of the level of activity as calculated in variables (2)(A), (2)(B), or the level of activity limited by an enforceable limit or commitment necessary to qualify for an alternative emission specification in §117.310(a)(17) or §117.2010(c)(6) of this title.

(b) The owner or operator of the following facilities shall acquire allowances for each control period or the annual allocation rights from facilities already participating under this division in accordance with §101.356 of this title (relating to Allowance Banking and Trading):

(1) new and/or modified facilities that have submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), an application that the executive director has not determined to be administratively complete before January 2, 2001;

(2) new and/or modified facilities that qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and have not commenced construction before January 2, 2001;

(3) facilities in operation prior to January 1, 1997, located at a site defined on or before December 31, 2000, as a major source of nitrogen oxides (NO<sub>x</sub>), as defined in §117.10 of this title (relating to Definitions), that have not submitted a ECT-3 Form, Level of Activity Certification, in accordance to §101.360(a)(1) of this title (relating to Level of Activity Certification) by March 30, 2010;

(4) new and/or modified facilities located at a site defined on or before December 31, 2000, as a major source of NO<sub>x</sub>, as defined in §117.10 of this title, that submitted a permit application that was determined administratively complete before January 2, 2001, but have not submitted an ECT-3 Form in accordance to §101.360(a)(2) of this title by March 30, 2010; and

(5) new and/or modified facilities located at a site defined on or before December 31, 2000, as a major source of NO<sub>x</sub>, as defined in §117.10 of this title, that qualified for a permit by rule and commenced construction before January 2, 2001, but have not submitted an ECT-3 Form in accordance to §101.360(a)(2) of this title by March 30, 2010.

[(b) For a new and/or modified facility that has submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permit for New Construction of Modification), an application which the executive director has not determined to be administratively complete before January 2, 2001, or has qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and has not commenced construction before January 2, 2001, allowances for each control period or the annual allocation rights shall be acquired from facilities already participating under this division, or in accordance with §101.356(g) of this title (relating to Allowance Banking and Trading).]

(c) If actual emissions of NO<sub>x</sub> [nitrogen oxides] during a control period exceed the amount of allowances held in a compliance account on March 1 following the control period, allowances for the next control period will be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus an additional 10%. This does not preclude additional enforcement action by the executive director.

(d) Allowances will be allocated by the executive director, who will deposit allowances into each compliance account:

(1) initially, by January 1, 2002; and

(2) subsequently, by January 1 of each following year.

(e) The annual deposit for any control period may be adjusted by the executive director to reflect new or existing state implementation plan requirements.

(f) Allowances may be added or deducted by the executive director from compliance accounts following the review of reports required under §101.359 of this title (relating to Reporting).

(g) The owner or operator of a facility may, due to extenuating circumstances, request a baseline period more representative of normal operation as determined by the executive director. Applications for extenuating circumstances must be submitted by the owner or operator of the facility to the executive director:

(1) no later than June 30, 2001, to request an alternative three consecutive calendar year period for facilities in operation prior to January 1, 1997;

(2) no later than 90 days after completion of the baseline period to request up to two additional calendar years to establish a baseline period for facilities whose baseline as described by variable (2)(C) listed in the figure contained in subsection (a) of this section is not complete by June 30, 2001; or

(3) at any time as authorized by the executive director.

(h) Allowances calculated under subsection (a) of this section will continue to be based on historical activity levels, despite subsequent reductions in activity levels. If allowances are being allocated based on allowables and the facility does not achieve two complete consecutive calendar years of actual level of activity data, then allowances will not continue to be allocated if the facility ceases operation or is not built.