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## Texas Looks to Grandfathered Facilities For Air Quality Improvements

*Fast approaching federal air quality deadlines are compelling Texas officials to develop more ambitious strategies for reducing air pollutants, especially in the four urban areas of the state that the federal Environmental Protection Agency (EPA) has designated as "nonattainment" for not meeting certain national air quality standards. Failure to comply with plans to reduce pollutants in such areas can cost the state both federal money and control of its air pollution programs, imposing additional permitting requirements on regulated industries. In an effort to stave off these penalties, Texas is considering a number of measures to reduce air pollution, including efforts to regulate "grandfathered" facilities, now exempt from most state air permitting requirements because they predate the 1971 Texas Clean Air Act and have not significantly changed since then. The permitting process can involve extensive analysis of air emissions and their health effects and require installing technologies to control and reduce emissions.*

*Critics say grandfathered facilities — whose ranks include utilities, refineries, industrial boilers, grain elevators, feedlots, shipyards, and auto body refinishers — should be forced to incorporate certain pollution control technologies and comply with current emissions standards in order to reduce very real risks to human health and the environment and help Texas comply with federal air quality standards. A number of public interest groups, including the League of Women Voters and the Sierra Club, have called for the state to require grandfathered facilities to obtain permits by the year 2001. Proponents of continuing the exemption, however, say no reliable data exist that demonstrate exactly how much pollution these grandfathered facilities emit. They maintain that the high cost of requiring older plants to be retrofitted to today's air standards would lead to wholesale shutdowns, jeopardizing the economic health of communities across Texas. Industry groups — such as the Texas Public Power Association, whose constituents include operators of 50 grandfathered gas-fired generating facilities, and the Texas Chemical Council — support a voluntary permitting program that would offer incentives to help offset expenses associated with permitting.*

*Amidst the growing controversy over grandfathered facilities, the 75th Legislature in 1997 enacted legislation directing the Texas Natural Resource Conservation Commission (TNRCC) to create a voluntary program by December 1998 to encourage grandfathered sources to voluntarily drop their exempt status and become permitted sources.*

### Contents

Grandfathered facilities	2
Chronology of developments	2
CARE recommendations	4
Air quality issues	5
Minority report	7
TNRCC draft plan	7
Debating voluntary compliance	8

The debate over grandfathered facilities is not new. What is new, however, is the role that grandfathered facilities may play in state proposals to develop regionwide plans for remedying air pollution in the state. Regional air quality control strategies proposed by the TNRCC in January could apply pollutant emissions limits to industries, including grandfathered facilities, outside certain nonattainment areas in order to control for pollutant "transport" across nonattainment boundaries.

In the meantime, the TNRCC is in the process of creating a voluntary Clean Air Responsibility Enterprise (CARE) program to encourage grandfathered facilities to come under air quality permitting requirements. Already, some 30 companies have volunteered to give up

their grandfathered status under existing rules at certain of their facilities, including units operated by some of the largest refining and utility companies in Texas. And for the first time since emissions records have been kept in Texas, the state will separately tally emissions for grandfathered facilities in the inventory scheduled for release in fall 1998, data that could energize the debate over whether and how these facilities should be regulated.

## Grandfathered facilities

The Texas Clean Air Act of 1971 "grandfathered" existing facilities by exempting them from its requirements that any proposed facility that will emit air contaminants or cause or contribute to air pollution obtain a pre-construction permit from the state. Certain facilities also may be eligible for a "standard exemption" from the permitting process or a "standard" or "flexible" permit that streamlines

the process. A pre-construction permit requires that a facility use the best available control technology (BACT) to minimize air emissions, as determined by the pollution control standards developed for that particular industry, the type of technology used in similar facilities, and the kinds of control technologies that are economically or technically feasible for the facility. Under pre-construction permits, an organization must comply with site-specific conditions for the facility, notify the public of its construction plans, analyze the facility's impact on public health, and provide results of the analysis to the TNRCC. Grandfathered facilities may continue to be exempt from these requirements so long as they do not undergo significant change.

All grandfathered facilities, however, must comply with TNRCC emission reporting requirements and pay fees for the pollutants they emit, currently set at \$26 per ton, with an annual cap of 4,000 tons. They also may be subject to TNRCC monitoring requirements. Those facilities emitting significant amounts of pollution, for example, are required to submit an inventory to the TNRCC detailing the quantity of their pollutants.

Grandfathered facilities in nonattainment areas also must comply with federal air permitting requirements. Many grandfathered facilities have had to install some emission control equipment because of new federal hazardous air pollutant standards required under Title III of the 1990 federal Clean Air Act amendments. Others have installed control technology to avoid Title V requirements that certain plants consolidate all applicable rules and permit requirements into a single Title V operating permit. A Title V operating permit requires that a responsible party at the company sign a document certifying, under penalty of perjury, that the plant is in compliance with all applicable rules and regulations.

Facilities categorized as grandfathered are very diverse. They include feedlots, cotton gins, commercial bakeries, shipyards, catalytic cracking units in refineries, or an entire power plant. A large plant may have many "facilities," some grandfathered and others not. Because of the eclectic nature of grandfathered sources, say TNRCC officials, only one generalization can be made about them: the majority

occur in older industries, such as oil and gas producers, refineries, electric utilities, and pulp and paper manufacturers. Few, if any, grandfathered facilities occur in newer industries that have undergone significant changes in technology, such as computer and silicon chip plants.

Beyond this generalization, little is known about grandfathered facilities in Texas: how many exist, the amount of pollution they release into the air, the control technologies they may use to reduce emissions. Although each facility with significant emissions is required to make annual reports to the TNRCC's Texas Emissions Inventory, those records formerly did not separately tally emissions of grandfathered facilities from other non-permitted sources, such as those that have obtained standard permits and exemptions. The 1997 emissions inventory, scheduled for release in fall 1998, for the first time will present separate data on air pollutants emitted by grandfathered facilities.

## Chronology of developments

The 62nd Legislature in 1971 exempted existing facilities from the Texas Clean Air Act on the assumption

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*The term "facility" can be used to describe both small units that stand alone or those that are part of a much larger plant, and can range from a single tank, boiler, or paint booth to an entire plant. A large plant could have hundreds of facilities, all of which can be individually or collectively permitted.*

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### Additional air permitting options

- **Standard exemptions** are available for facilities that can demonstrate that they do not emit pollution above a certain predetermined level or that are making a change that will not significantly increase air emissions. Some 129 standard exemptions are available for sources as diverse as fireplaces, landfills and restaurants. The TNRCC has developed general guidelines and requirements for these facilities, including specific requirements for emission limits and procedures for each category.
- **Standard permits**, which set out certain design and operating requirements, provide a streamlined permitting process for larger sources. Such permits may be issued, for example, for certain voluntary emission reduction projects undertaken by a facility.
- **Flexible permits** allow facilities to determine how to reduce emissions, rather than requiring specific types of pollution control technologies. Plants with many different facilities may obtain single flexible permits with one comprehensive emissions cap instead of multiple permits with set limits on emissions from each facility.
- **SB 1126 exemptions**, based on a 1995 legislative initiative, allows qualified well controlled facilities, including grandfathered facilities, to make changes and trade emissions between facilities at the same plant without triggering the requirement for a preconstruction permit.
- **Emissions trading** is also available to companies in nonattainment areas that make certain reductions beyond what are required by law. These excess reductions can be sold to other companies or banked.

that these facilities in the normal course of business would make changes to their operations that would bring them under state permitting requirements. By 1985, it had become apparent that many grandfathered facilities were avoiding changes in order to remain outside the state permitting arena. That year, the Sunset Advisory Commission made several recommendations for legislative changes to the authority of the Texas Air Control Board (TACB), which was up for reauthorization. The commission recommended that air permits no longer be issued for periods of unlimited duration but instead be renewed after a designated time period, that renewals be required of previously permitted facilities, and that the exemption for grandfathered facilities built before 1971 expire by 1995.

The 69th Legislature in 1985 enacted a sunset bill eliminating air permits of unlimited duration. Although legislators did not implement the commission's other recommendations, they required as a foundation for further action that certain grandfathered facilities register with and provide an analysis of their emissions to the TACB. Facilities that did not constitute major sources or make significant contributions of air contaminants to the atmosphere were exempted from registration.

The emissions analyses were presented in 1986 to a Clean Air Study Committee gauging the value of a permitting program for grandfathered facilities. The analyses showed that registered grandfathered facilities were responsible for approximately 1.6 million tons per year of emissions and that major facilities emitting 100 tons per year or more of at least one air contaminant accounted for 86 percent of the total air contaminant emissions from registered grandfathered facilities.

In 1991, the 72nd Legislature consolidated the TACB with the Texas Water Commission and certain elements of the Texas Department of Health into the single umbrella environmental authority of the TNRCC. Legislative action consolidating the agencies deleted the registration requirement for grandfathered facilities. A legislative proposal to end the grandfathered exemption for facilities located in nonattainment areas also failed at this time.

A 1994 TNRCC workgroup developed the concept of offering additional regulatory flexibility in return for overall reductions in emissions, an idea now embodied in the agency's flexible permitting program. The following year, the 74th Legislature amended the definition of "modification" in the Texas Clean Air Act to provide

that certain "well controlled" facilities, including some grandfathered facilities, could trade emissions reductions at a single plant site. TNRCC officials say this provision was included to provide an incentive for grandfathered facilities to reduce their emissions. In 1996, a workgroup created by the TNRCC failed to arrive at a consensus on how to develop a plan for voluntary permitting of grandfathered facilities.

In 1997, the 75th Legislature enacted HB 3019 by Allen specifically authorizing the TNRCC to continue granting standard exemptions from air permitting requirements to all facilities, not just permitted ones. A 1991 statutory change had created confusion over whether the TNRCC had legal authority to grant standard exemptions to non-permitted facilities.

HB 3019 also required the TNRCC to develop a voluntary emissions reduction plan for permitting existing significant sources of air contaminants no later than December 1, 1998. In September 1997, the TNRCC created the Clean Air Responsibility Enterprise (CARE) Advisory Committee to help develop the voluntary plan. The committee was composed of 11 members, including representatives of the utility and oil and gas industries, business groups, public interest groups, local jurisdictions, and academia. The CARE committee held five meetings over a four-month period. Although various members of the CARE committee had widely divergent

opinions on how a voluntary program should be structured, the committee did reach a consensus on some issues and issued a report in December 1997 with a number of recommendations for a voluntary program to permit grandfathered facilities.

## CARE recommendations

The CARE committee agreed on certain fundamental goals for a voluntary program to permit grandfathered facilities. Chief among them was achievement of meaningful, quantifiable reductions and permitting as many facilities as possible.

The committee also recommended numerous incentives to encourage companies to participate in the program, including allowing an abbreviated health review when appropriate, using site-wide emission limits for facilities, allowing trading between plant sites, and restructuring permit and emission fees. Under the committee's recommendation, companies participating in the voluntary program would be required to give public notice of a permit application in a newspaper in an "abbreviated notice format as appropriate," and hearings on such permits would follow a notice and comment process similar to that used for federal operating permits

— continued on page 7

### The first volunteers

On November 18, 1997, Gov. George W. Bush announced that 10 companies with grandfathered facilities were voluntarily relinquishing exempt status under existing permit requirements for certain of their facilities. The companies, six of them in Houston, estimated that their actions together will reduce total air pollution by 10,000 tons per year, with the bulk of the reductions achieved by Valero Energy Corp., Houston Lighting and Power (HL&P), Koch Refining, and Crown Central Petroleum. The facilities include Valero's Houston and Texas City refineries; three HL&P electric generation units in Chambers, Harris and Fort Bend counties; Koch's two Corpus Christi refineries; a Crown Central refinery in Pasadena; Marathon Oil Co.'s Texas City refinery; Lockheed Martin's aircraft painting operation in Fort Worth; Merichem-Sasol's Houston chemical facility; Witco Corp.'s Houston chemical facility; and two Phelps Dodge facilities in El Paso.

On March 31, Gov. Bush announced additional companies intending to relinquish exempt status at certain of their facilities. The companies included Bayer Corp., Bell Helicopter Textron, Celanese, Central and South West Corp., CITGO Refining and Chemicals Co., Clark Refining and Marketing, Coastal Refining and Marketing, Dow Chemical Co., DuPont, Exxon Chemicals Americas, Exxon Co. U.S.A., Fina Oil and Chemical Co., Goodyear Tire and Rubber Co., Lyondell-CITGO Refining Co., Occidental Chemical Corp., Phillips Petroleum Co., Shell Chemical Co., Shell Refinery, Solutia, Southwest Research Institute, Spirit Energy 76, Sterling Chemicals, Texas Petrochemicals Corp., Texas Utilities Co., Union Pacific Railroad, and Witco Corp.'s Marshall facility. The companies also agreed to reduce air emissions by 15,000 tons per year.

## Air Quality Issues

### Pollutant standards

The federal Environmental Protection Agency (EPA) establishes limits for the presence of designated air pollutants over a specified period of time. Localities that do not meet those limits are designated as "nonattainment" for EPA's National Ambient Air Quality Standards (NAAQS). Nonattainment areas are classified according to the degree that air standards are exceeded for various pollutants. For ground-level ozone, classifications are marginal, moderate, serious, severe, or extreme. States must develop plans for bringing their nonattainment areas into compliance or risk losing federal funds and control over their environmental regulatory programs. Grandfathered facilities in nonattainment areas must comply with federal air standards.

Ground-level ozone — a component of smog that can irritate lungs and induce or exacerbate respiratory ailments — is one of the "criteria" pollutants under NAAQS. It has been identified by federal and state regulators as a major factor in Texas air pollution. According to the TNRCC, most ground-level ozone is formed when nitrogen oxides (NO<sub>x</sub>), produced by combustion, and volatile organic compounds (VOCs), produced by the evaporation or burning of hydrocarbons, chemically mix together in sunlight. NO<sub>x</sub> and VOCs are called "precursors" of ozone.

Four urban areas in Texas are currently designated as nonattainment areas for ground-level ozone: Houston/Galveston-Brazoria, Dallas/Fort Worth, Beaumont/Port Arthur-Orange, and El Paso. El Paso also is classified as nonattainment for particulate matter and carbon monoxide. Four other areas in the state are considered by the TNRCC to be approaching nonattainment status for ground-level ozone: Austin, Corpus Christi, San Antonio, and Tyler-Longview.

In February 1997, EPA downgraded the Dallas/Fort Worth area from moderate to serious nonattainment, triggering more stringent air pollution reduction requirements for the area. According to the TNRCC, as much as 80 percent of NO<sub>x</sub> emissions in that region are from non-permitted sources, including grandfathered facilities.

The current NAAQS standard for ground-level ozone allows a maximum concentration of 0.12 parts per million (ppm) measured over an hour at any one monitoring site.

If this standard is exceeded four or more times within a three-year period, an area is considered noncompliant. In July 1997, EPA promulgated new clean air standards. The new standard for ground-level ozone sets maximum allowable concentrations at 0.08 ppm measured over eight hours. Although EPA will not designate nonattainment areas for the new ozone standards until the year 2000, the TNRCC has estimated that the four near-nonattainment areas of Texas may be classified as nonattainment.

The new standards also will regulate, for the first time, emissions of fine particulates, composed of tiny airborne particles of soot, smoke, dust, and other pollutants. Federal air standards previously were limited to particle matter of 10 microns or more in diameter. Under the new regulations, maximum allowable concentrations of particles smaller than 2.5 microns in diameter will be limited to an annual average of 15 micrograms per cubic meter, with a 24-hour limit of 65 micrograms per cubic meter. EPA will designate nonattainment areas for fine particulates sometime between 2003 and 2005.

More immediately, Texas nonattainment areas are now faced with the prospect of complying with federal NO<sub>x</sub> requirements. In 1994, all sources of air pollution, including grandfathered facilities, in Texas' nonattainment areas were temporarily exempted by the EPA from federal requirements to reduce NO<sub>x</sub> emissions through reasonably available control technology (RACT). In general, RACT is less stringent than the best available control technology (BACT) usually required for new sources seeking permits, but does set specific requirements for each individual class of facility.

The federal NO<sub>x</sub> exemption ended in December 1997 for the Houston/Galveston and Beaumont/Port Arthur ozone nonattainment areas. (El Paso, which falls under a special section of the Clean Air Act Amendments due to its proximity to an international border, will retain the exemption.) Both permitted and non-permitted sources of pollution, including grandfathered facilities, in the affected areas must now comply with the NO<sub>x</sub> requirements. Because the status of Dallas/Fort Worth was downgraded, facilities there also could lose their NO<sub>x</sub> exemption.

### Regional approaches

Scientists have recognized for some time that air pollution caused by ground-level ozone and its precursors (VOCs

and NO<sub>x</sub>) move across regions with prevailing winds. This drifting or "transport" of pollutants makes pollution control difficult in certain areas, especially if the pollution is coming from outside the area's border. For this reason, El Paso and areas like it are given special treatment under the federal Clean Air Act: border cities simply cannot control the amount of pollution drifting across international boundaries.

Past regulation of ground-level ozone and its precursors in Texas has focused exclusively on sources within the nonattainment areas. For several years, however, the TNRCC has been studying the problem of ozone and ozone precursor transport and the effect this transport has on ozone nonattainment problems in the state. In 1997, under a contract with Baylor University, the agency used a specially equipped airplane to measure ozone formation, trace its source, and monitor its movements. It is using the data gathered from this and other scientific analyses of ozone transport to formulate control strategies. According to the agency, reducing the background level of ozone for entire regions of the state would facilitate the ability of nonattainment areas in each region to meet federal air quality standards. This ability is critical, since Texas will be hard-pressed to meet federal air quality deadlines for ozone in nonattainment areas in the time allotted by the federal Clean Air Act, even without the new EPA standards for ground-level ozone and particulates.

In January 1998, the agency announced a new set of options for consideration as means of controlling ground-level ozone in the eastern half of Texas. TNRCC officials say the new regional strategies would be aimed at controlling ground-level ozone in eastern and central portions of the state in order to help nonattainment areas reduce air pollution generated outside as well as inside their borders and keep the state's marginal air quality areas from becoming nonattainment.

Central to the options being proposed by the agency are regional controls on businesses and industrial sources of pollution in much of central and east Texas. Under the plan, existing VOC controls on larger businesses and major industries could be extended up to 62 miles from the boundaries of the Houston/Galveston and Dallas/Fort Worth nonattainment areas and new NO<sub>x</sub> requirements applied 124 miles out. In addition, control technology used to trap ozone-producing vapors released when gasoline tankers transfer gas to station storage tanks would be required within a 60-mile radius of the Houston/Galveston, Beaumont/Port Arthur, and Dallas/Fort Worth metropolitan areas.

The plan also proposes mandatory use of a cleaner burning gasoline, such as reformulated gasoline, for all eastern and central Texas. In addition, Texas has pledged support for the national low-emission vehicle program (NLEV), advocated by a number of Northeastern states. The program is designed to encourage automakers to adopt NLEV as the national vehicle standard; automakers recently agreed to make NLEV automobiles available in the Texas market starting with the 2001 model year.

Requirements to extend VOC and NO<sub>x</sub> emission controls outside of nonattainment areas could have sizeable impacts on certain facilities, both grandfathered and permitted, known to have significant NO<sub>x</sub> emissions, such as TU's Big Brown and Monticello power plants in Freestone and Titus counties, the Champion paper plant in Lufkin, Alcoa's Milam County plant, and Central and Southwest facilities in Corpus Christi and Longview.

The TNRCC says it already has authority to regulate sources outside of nonattainment areas that contribute to pollution in nonattainment areas. They also maintain that the federal Clean Air Act allows the use of cleaner burning fuels outside of nonattainment areas, but some industry lawyers disagree with this assertion. The federal Clean Air Act mandates the use of cleaner burning fuels in serious, severe and extreme nonattainment areas and allows marginal and moderate areas to choose whether to opt into a cleaner burning fuel program. The TNRCC has said it intends to hold discussions with oil producers and refineries to gather input concerning the availability and cost effectiveness of clean fuel requirements.

A number of industries outside nonattainment areas that would be affected by requirements to extend VOC and NO<sub>x</sub> emission controls are voicing concerns about the prospect of having to install expensive control technology. They claim that no solid scientific evidence supports the hypothesis that extending industrial pollution controls outside nonattainment areas would provide measurable benefits or emission reductions of criteria pollutants inside those areas.

Affected industries are warning the TNRCC that if these new strategies are mandated, many grandfathered industries will not voluntarily drop their exempt status and join the CARE program until they know the extent and cost of the new rules. They also say such regulations may trigger statutory requirements that the TNRCC conduct a cost-benefit analysis of any new environmental proposals that would exceed standards set by federal or state laws.

continued from page 4 —

rather than the more lengthy contested case hearing provided under the state permitting process.

Grandfathered facilities that might have inadvertently modified their facilities in the past would be granted an enforcement amnesty for a period of two years from the time of program adoption. Amnesty would not be granted to facilities that had willfully violated state regulations by knowingly making modifications that significantly increased emissions without surrendering their exempt status. The committee also suggested that facilities seeking permits under the program be allowed extended time for implementing required measures.

## Minority report

The three public interest groups represented on the committee — the Environmental Defense Fund, Sierra Club, and North Bay Citizens Advisory Panel — criticized the CARE recommendations as overly general, saying they provided only minimal guidance to the TNRCC. According to the minority report issued by these groups:

The committee was not balanced, with six members representing industrial or business interests and only three members representing the citizens of the state of Texas. This imbalance prohibited open in-depth discussion of critical issues of concern to the general public. Important matters, such as the testimony from the public hearing, disincentives for entities who choose to retain their grandfathered status, health impacts, and a firm deadline for entering the voluntary program, were never seriously considered by the committee.

The minority report said the CARE process had failed, in large part because of a "wide gulf between the environmental and industry representatives as to the actual contribution of grandfathered facilities to the local and regional air pollution problems in Texas." Maintaining that grandfathered plants are a major source of air pollution in Texas, the minority report proposed requiring grandfathered facilities to be permitted by 2001.

It also listed a number of separate issues that the groups felt should be considered by the TNRCC. These included establishing a team of TNRCC inspectors to identify facilities falsely claiming grandfathered status,

distinguishing between major and minor grandfathered sources, addressing the issue of cumulative impacts in areas of concentrated industrial activity, and allowing citizens to participate fully in the permitting process.

CARE committee representatives from the Texas Oil and Gas Association, Texas Utilities, and the Texas Association of Business and Chambers of Commerce responded to the minority report by noting that no reliable data exist on the amount of emissions produced by grandfathered facilities. And while "we agree that in the best of all possible worlds, more time, more study, more research would be an advantage when designing a complex program like the one contemplated here," the representatives said, the December deadline prohibited such leisure. "We believe that all task force members have done their best to meet that deadline in a manner that would encourage maximum participation and maximum emission reductions from grandfathered facilities."

## TNRCC draft plan

Initial plans drafted by TNRCC staff for permitting grandfathered facilities incorporate elements from the CARE report. The draft, unveiled at the March 5 commissioners' work session, proposes a voluntary emissions reduction and permitting plan that would require unpermitted sources to apply for permits by 2001. Applications would follow a streamlined version of the process now used for reviewing new sources. The process would include a review of control technology, an abbreviated analysis of health effects, and an opportunity for public participation.

Emissions reductions would be achieved by using best available retrofit technology (BART) rather than the more stringent and expensive best available control technology (BACT). BART considers cost, the technology available or already in use, the remaining life of the source, and the potential amount of reductions in configuring the best system of continuous emission reductions for each pollutant emitted by a stationary facility. BART could not be less stringent than applicable federal statutes or rules.

Several incentives would be used to encourage grandfathered facilities to quickly join the program. Facilities that had been "inadvertently" modified without applying for a permit would be offered a two-year limited amnesty. For a limited time, the TNRCC would accept a brief initial application identifying only the fa-

cility and the minimum volume, type and timing of reductions that could be expected with additional emission control technologies. Facilities submitting early initial applications also would be given additional time to implement emission reduction measures. However, participation in the program would not delay obligations to comply with other federal or state requirements.

Other incentives proposed in the draft include assessing minimal or no permit application fees and allowing emission credit trading among plants and between multiple sites of a single concern. The draft also proposes a system of discrete emission reduction credits of finite amount and duration that could be used to reward both early reductions and participation in the program, so long as emissions trading actually resulted in emissions reductions and had no adverse effect on nonattainment areas. Other possibilities include authorizing certain taxing authorities in nonattainment or near-nonattainment areas to offer tax abatements for reductions in certain air pollutants.

The TNRCC announced five public hearings would be held in April in Beaumont, Corpus Christi, Lubbock, Houston and Dallas to gather public input about the proposal. TNRCC commissioners have said they plan to adopt a final plan for permitting grandfathered facilities by July.

## Debating voluntary compliance

The debate over voluntary compliance with air pollution standards by grandfathered facilities pits those who believe that state permitting requirements should apply to all facilities and that a program of voluntary reductions will not bring in those facilities that are emitting the lion's share of unpermitted emissions against those who argue that the quantity of grandfathered emissions has been exaggerated and that no program is needed, or that a voluntary program would succeed better than any state mandate.

**Critics of the permitting exemption say** that Texas should require all grandfathered plants to meet BACT standards by 2001. Almost 30 years have elapsed since enactment of the Texas Clean Air Act, yet emissions from old, outmoded plants are still unnecessarily endangering public health and the environment. The exemption was never intended to continue this long, and the severity of present conditions requires that it be eliminated now.

In 1997, TNRCC documents showed that grandfathered facilities and other unpermitted facilities were responsible for over half the industrial air pollution in the state. The state could significantly reduce air pollution by bringing into the regulatory framework all grandfathered units at refineries and utilities, the facilities that most endanger public health in terms of quantity and toxicity of emissions.

Many grandfathered facilities and units are essentially uncontrolled and operating at their 1971 emission levels, and sizeable numbers of them are located in or near nonattainment areas. Because of their grandfathered status, they are not specifically controlled by EPA-required state implementation plans for reducing pollution. This is unfair to other sources of pollution in the area that must take up the slack. Many permitted facilities in nonattainment areas say they have done everything possible to reduce their emissions, including installing costly technology, yet are still called upon to do even more because of worsening air quality that is beyond their control. Grandfathered facilities need to shoulder their part of the burden.

According to a recent report by the Sustainable Energy and Economic Development Coalition (SEED), a group advocating sustainable energy strategies for Texas, electric utilities account for more grandfathered emissions than any other industry sector in Texas, even discounting emissions produced by grandfathered facilities that also have standard exemptions. Grandfathered power plants alone emit as much smog-causing pollution as 6.5 million cars annually, the SEED coalition has reported. According to SEED, plants operated by Texas Utilities (TU) emit more than twice as much pollution as any other utility, yet the grandfathered coal-burning units at TU's Big Brown and Monticello plants have never been evaluated for their effect on public health.

Air pollution poses an unacceptable risk to public health and is especially damaging to children, the elderly, and those who suffer from asthma. Yet many grandfathered facilities have never had to review the public health effects of their emissions. This omission is especially telling when industrial facilities are clustered in one area, increasing the impact of their collective pollution on their residential neighbors. The cumulative effect on public health can be deadly, and any facilities concentrated in such area should not be allowed to retain a grandfathered status.



It is encouraging that several companies have volunteered to come under the TNRCC permitting program, but the quantifiable emissions reductions from these actions are negligible. Indeed, some companies have come forward to gain credit for actions that they already are required to take under new federal requirements. Meaningful reductions can only happen if all large facilities, not just a willing few, meet current emission standards.

Facilities brought into the permitting program should not be credited for past reductions mandated to clean up dirty air in urban areas. The state should not provide such incentives to polluting plants; indeed, a far more effective approach to dismantling the grandfather exemption would be to substantially increase emission fees levied on those facilities that choose to remain outside the permitting program. Similarly, facilities that have illegally retained their grandfathered status should not be granted a special amnesty, since this would penalize companies that had acted in good faith in the past by reporting major modifications and other changes and thus lost their exempt status. Texas law should not favor one group of business interests over another, but rather should ensure a fair and level playing field.

**Supporters of grandfathered facilities say** Texas should not unfairly single out long established operations for new and unnecessary regulation when the data are unclear about the amount of pollution actually produced by these facilities. TNRCC documents indicating that unpermitted facilities were responsible for over half the industrial air pollution in the state did

not distinguish between grandfathered facilities and other unpermitted facilities. Most of the pollution could have come from those facilities with standard exemptions, rather than from grandfathered sources. Increasing regulation of stationary sources when pollution controls on mobile sources, primarily automobiles, are not similarly strengthened is unfair, especially in nonattainment areas like Dallas/Fort Worth, where mobile sources account for most of the ozone problem.

Despite its unjustified reputation, grandfathered status does not mean uncontrolled emissions nor the absence of regulation: over the past decade, grandfathered facilities have worked to decrease emissions by about 20 percent. Companies have voluntarily installed control technologies for a number of reasons: prevent unexpected emission releases, avoid Title V certification requirements, conserve raw materials, or conform to state implementation plan mandates for reducing ozone.

Grandfathered facilities, like any other source, must meet federal requirements for reducing ozone that often mirror the BACT requirements mandated by the state for new facilities. Grandfathered facilities also must comply with requirements posed by other federal air quality programs and state regulations regarding emissions fees and emissions inventory reporting. Existing regulatory applications already provide ample opportunities to bring most grandfathered facilities into permitted status. Pollution controls required under the federal Clean Air Act will become even stricter in the next decade, and grandfathered sources in nonattainment areas will have

### The dereg factor

The prospect of electric utility deregulation in Texas has heightened debate over grandfathered facilities owned and operated by utilities. Environmentalists have voiced concern that deregulation could encourage utilities to rely heavily on their grandfathered coal-burning plants, which generally pollute more than other kinds of generating units but which may be more cost-effective to operate. Exemption from permitting requirements, they say, would give grandfathered plants a competitive advantage over newer plants, which must install BACT when they renew their permits.

Utility industry representatives, however, note that most coal-fired utility facilities are already running at almost maximum capacity so deregulation would have little effect on how much pollution they emit. They also point out that emissions from these facilities do not exceed any state health standards. Furthermore, industry representatives argue, these facilities could be rendered noncompetitive if forced to spend millions of dollars for pollution control equipment just when the market opens up to competition. Although expenditures for such equipment might qualify as stranded costs and could be recouped if passed on to customers, the uncertainty enveloping the future of electric utility deregulation provides no assurance of recovering these expenses.



to meet those new requirements. Requiring that they drop their exempt status at the same time would force these facilities to conform to two different regulatory schemes with potentially conflicting requirements.

Stripping older facilities of their grandfathered status would not necessarily result in lower air emissions nor improvements to public health or the environment. The benefits are unclear; the disadvantages, on the other hand, are patently obvious. A natural gas-fired steam generating facility, for example, represents no critical threat to human health or the environment but could be required to devote substantial resources to meet permitting requirements.

Most older utility plants would be unable to absorb the considerable expense of complying with BACT requirements. While some could survive by passing the costs on to consumers, others would be forced to shut down. Either way, Texas communities would lose with skyrocketing bills or service interruptions. In 1997, the Energy Reliability Council of Texas expressed concerns about Texas' generating capacity to meet projected load demands, even with the support of grandfathered facilities. Dick White, TU's vice president of environmental services, has pointed out that TU facilities provide 36 percent of the state's electricity and that their emissions per kilowatt hour are some of the lowest in the nation, even though their total emissions may be higher because of the great amount of power they produce. In fact, TU plants are among the cleanest in the nation: its coal-fired plants, located in rural areas, have no impact on

air quality in nonattainment areas and comply with all of the regulations set by the state and federal governments.

State regulators must remember the imperative of maintaining a balance between economic and environmental health. In some small towns, a company forced to close due to stringent permitting regulations might be the largest employer in the area.

Texas does not need a heavy-handed mandatory program to do away with the grandfathered exemption. It is clear that a voluntary program will work better than state mandates; already, more than 30 facilities have agreed to give up their grandfathered status at the urging of the governor and state officials, and others are following suit. Many grandfathered facilities already have reduced emissions, at substantial cost. The voluntary program should be given time to work before any kind of mandate is considered.

Companies should be encouraged to voluntarily participate in the CARE program with incentives, rather than punishment, to offset the cost of permitting. These could include crediting grandfathered facilities that have voluntarily implemented pollution control measures at their plants with past reductions. Other incentives could include a streamlined permitting process that allows for a notice and comment hearing, rather than a contested case hearing, and reduced permit application fees.

— by *Ann Walther*

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