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Environmental Concerns

Only time will tell if ordinances on air quality will be beneficial

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In early 2007, the City of Houston broadened the groundwork for a program of independent air emissions source registration and enforcement through revisions to city ordinances.



Pels

The city also has proposed a program to further regulate benzene emissions of major sources that extends beyond traditional permitting programs required by regulatory agencies. Both the enacted registration ordinance and the proposed benzene ordinance represent an ambitious attempt by a local authority to address air emissions.

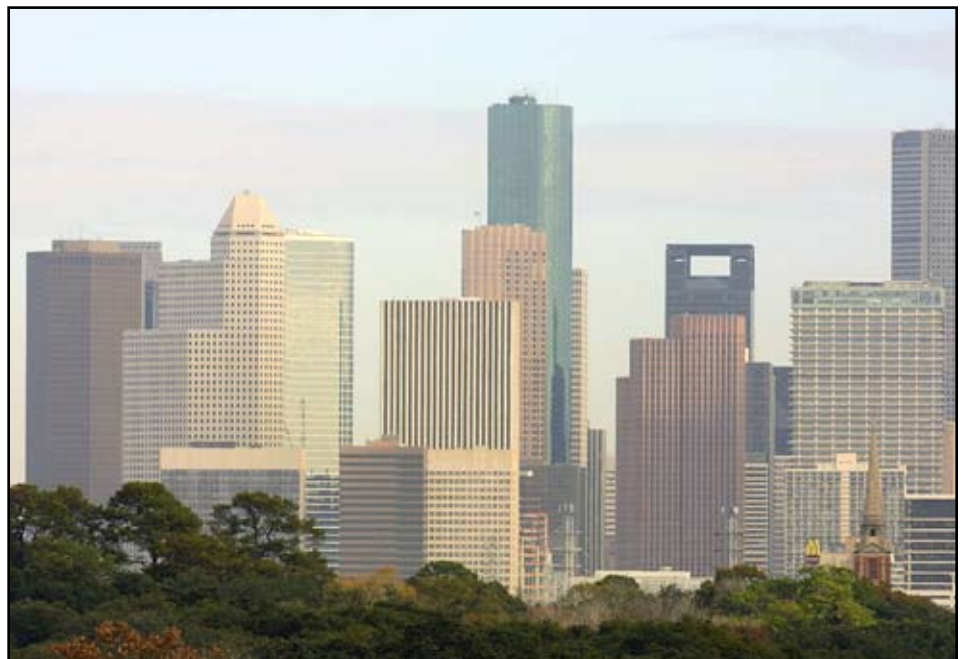


Higdon

The language of the two ordinances is sufficiently broad that compliance could prove challenging to the regulated community. Only time and actual hands-on experience will determine whether this attempt to co-regulate air emissions will be a breath of fresh air or merely another layer of regulation.

REGISTRATION

In January, the city adopted material changes to Chapter 21 of its Code of



Ordinances. The changes will require a significant number of air emission sources to register with the city and pay registration fees. The amount of the registration

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fee varies depending upon the nature of the facility.

The maximum registration fee is \$3,000. The new ordinance makes it unlawful to operate an unregistered facility within the city. The ordinance defines "facility" broadly to include both specific facilities like dry cleaners, automotive body

repair shops, gasoline dispensers, sewage treatment plants and used car lots and, also more generally, any source emitting one ton or more per year of contaminants.

This definition of facility, which is tied to a one ton emission requirement, will unquestionably require many sources to inventory emissions that were previously covered by permits by rule and similar authorizations. Thus, small businesses such as restaurants and machine shops will likely require registration, as will already-permitted facilities.

In another change, the ordinance incorporates by reference the Texas Commission on Environmental Quality's air pollu-

tion control rules, thereby leading to dual enforcement of those programs by state and local officials. Penalties for violation of the new ordinance can be as much as \$1,000 per day per violation for a first-time offense and as much as \$2,000 per day where there was a prior offense.

The registration provisions' effective date is July 1, although the city's enforcement of TCEQ rules already is effective. The net effect of this ordinance may well be increased scrutiny of air emission sources within the city, coupled with the potential for disparate enforcement depending upon whether the focus of state authorities is consistent with that of City of Houston inspectors.

NUISANCE ORDINANCE

On another front, the city recently proposed revisions to its general nuisance ordinance.

Under the city's approach, a nuisance includes the emission of 10 listed chemicals that causes or contributes to the presence of any of those chemicals in the air at levels greater than what is protective against one additional cancer case per 1 million people.

In an initial phase-in period from Jan. 1, 2007, through Dec. 31, 2011, the ordinance sets the relevant air standards at a less stringent level of that which protects against one additional cancer case per 100,000 people. The city could impose fines ranging from \$500 to \$2,000 for each violation per day.

On its face, the ordinance applies to 10 different chemicals. A report prepared

by the Mayor's Office of Environmental Programming clarifies, however, that the city's focus centers on benzene. The city prioritizes benzene because of its reported status as a carcinogen and because of measured benzene concentrations in Houston air that exceed the above-referenced cancer protection goals. Yet the ordinance also provides two types of parties with an affirmative defense to liability under the ordinance.

The first type of protected party is anyone who owns or operates a facility contributing to air concentrations above the proscribed levels, but which emits less than 10 tons per year of any one of the 10 listed chemicals and less than 25 tons per year in the aggregate of all of the listed chemicals. Thus, if a facility is not a "major" source, it is irrelevant under the proposed ordinance that it contributes to benzene levels above the regulated standards.

Even major sources can assert an affirmative defense to liability under the ordinance, but only if they have entered into and are in compliance with an agreement with the city to reduce their emissions of regulated chemicals over a five-year period.

Thus, contractually enforceable benzene emission reductions by Houston's major sources represents the core purpose behind the new ordinance. The city has identified seven specific facilities in Harris and Galveston counties that it intends to target under the new ordinance and for which it wants enforceable emission reduction agreements.

The city has even proposed site-specific reduction control plans for each facility from which negotiation can start. The city desires each plan to contain at least the following elements:

- More rigorous air monitoring around each site.
- Operational changes to identify and reduce benzene emissions.
- Equipment upgrades.
- Analyses of air contaminant trends over time.

Aside from an affirmative defense to prosecution under the new nuisance ordinance, parties entering into and complying with emission reduction agreements would receive certain public accolades, consideration in the development of the city's inspection priorities and "support" during permitting and enforcement matters.

The City of Houston is stepping onto new ground in relation to the control of air emission sources. The exercise of such local control is unusual for Texas where most facilities have become accustomed to dealing only with federal and state requirements.

While the workability and enforceability of Houston's approach remains in question, it is clear that Houston air pollution sources will have to adapt in the way they operate and face an extra level of review.

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