

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners

Date: March 6, 2009

Thru: Mark R. Vickery, P.G., Executive Director

Thru:  John Sadlier, Deputy Director
3/5 Office of Compliance and Enforcement

From:  Jennifer A. Sidnell, Division Director
3-5-09 Field Operations Support Division

Subject: Rulemaking Draft Concept and Initiation Memo
Chapter 101, New Subchapter C

Suggested short title: Supplemental Leak Detection

Introduction and reason(s) for the rulemaking:

House Bill (HB) 1526 of the 80th Legislature (2007) requires the commission to establish by rule a program that allows the owner or operator of a facility to voluntarily use as a supplemental detection method any leak detection method that has been incorporated and adopted by the United States Environmental Protection Agency (EPA) into a program for detecting leaks or emissions of air contaminants. HB 1526 was codified in Tex. Health & Safety Code, Chapter 382, new Subchapter I, which consists of new § 382.401, and in Tex. Water Code § 5.752(2). On December 22, 2008, EPA adopted its rule regarding Alternative Work Practice to Detect Leaks from Equipment (73 *Fed. Reg.* 78199).

These new rules will not be submitted as a revision to the SIP. This incentive program is not required by federal law or by the SIP. EPA's rule adopted December 22, 2008, is an alternative to the current leak detection and repair work practice, with the requirement to perform monitoring once per year using the current Method 21 leak detection instrument. While the federal law offers this alternative method, the state statute provides only for a supplemental method incentive program.

Scope of the proposed rule:

The proposed rule, in Chapter 101, new Subchapter C, would allow and encourage, through incentives, the voluntary, supplemental use of innovative technology, such as optical gas imaging technology, in the detection of leaks or emissions that may not be detected under the commission's current approved methods or technologies. The current commission regulation is based on EPA Method 21 Leak Detection and Repair (LDAR) which presents a defined set of components to be scanned for detection. Examples are process flanges, valves and transfer line components. The proposed rule would include a larger set of facility units and processes, such as storage tanks, flares, incinerators, process vessels, loading and unloading and transport vehicles. This broadens the scope of currently enforceable state and federal requirements regarding leak detection to large classes of facilities and units which were previously not

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under leak detection requirements but remain under other types of existing enforceable applicable requirements, such as federal and state rules and permits.

The proposed rule would address the recording and reporting of leaks detected by the alternative leak detection technology and those that are not repairable within a reasonable time; establish the reasonable period to repair leaks considering the size and complexity of the repair; and provide consideration of enforcement discretion for leaks repaired within a reasonable time. The statute provides for a mandatory incentive of exemption from enforcement for leaks that are reported and repaired within TCEQ's established reasonable period of time. However, federal law prohibits full exemption and therefore we propose to allow consideration of enforcement discretion on a case by case basis. In addition, the statute provides some flexibility on the exact nature of other incentives, specifying the incentives may include on-site technical assistance, inclusion of the use of alternative leak detection technology in the regulated entity's compliance history, considerations in scheduling and conducting inspections at the facilities, and credits or offsets to the facilities emission reduction requirements. The specific nature of these or other incentives, will be identified during development of the rules and during discussions with stakeholders.

Use of alternative leak detection technology in the program would be on a voluntary, supplemental basis, i.e. - would be in addition to any applicable leak detection requirements found in current state or federal rules or permits.

Potential controversial concerns and legislative interest:

The statute states that components that are repaired within the reasonable time frame established shall not be subject to reporting requirements. Reporting requirements such as unauthorized emissions and Title V deviations required by permits and state rules are in the Texas State Implementation Plan (SIP.) These are federal requirements and cannot be waived. The rule would not, however, place additional reporting requirements on components that are repaired within the reasonable time frame established.

Potential alternatives:

The program is mandated by HB 1526 and the finalization of EPA's Alternative Work Practice triggers the implementation of HB 1526. The commission must adopt rules to be compliant with state statute.

Effect on the:

Regulated community:

Regulated community representatives who choose to participate in the voluntary supplemental leak detection program at a facility will be able to employ the new leak detection technology site wide and be eligible to receive some or all of the incentives previously discussed. This will encourage the identification and repair of previously unidentified and unattended sources of air contaminants. Although this is a voluntary program, participating entities may incur cost in the purchase of the new leak detection technology.

Public:

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The public should benefit if the program under the proposed rule succeeds in the identification of new sources of contaminants and the timely, effective repair of leaking equipment.

Agency programs:

Within the Office of Compliance and Enforcement, Field Operations and Enforcement Divisions may not take enforcement action on an unauthorized emission that it would otherwise pursue if the emission is detected under this program and it would not have been detected under an existing agency leak detection program.

The Field Operations Division (FOD) may incorporate some sort of "credit" in its Risk Based Investigation Strategy for facilities that voluntarily use this new technology to detect and repair leaks. FOD may be required to develop a protocol for the use of alternative leak detection technology in the program.

Enforcement Division may incorporate use of the alternative leak detection technology in a company's compliance history and compliance summaries.

Small Business and Environmental Assessment may be required to provide consultation on the rule and assist regulated entities especially small businesses in understanding the Incentive Program under the proposed rule.

Proposed schedule and constraints:

Tentative proposal agenda: June 2009

Tentative adoption agenda: November 2009

Planned effective date of rule: We anticipate not later than December 31, 2009

Planned stakeholder involvement:

Two stakeholder meetings are planned for Austin and Houston in late March, early April 2009. These stakeholder meetings will be with interested parties including industry, environmental groups, and the general public. Specifically, input is needed to clarify key elements of regulatory incentive (e.g. on-site technical assistance, compliance history components, investigations scheduling, and offsets to the facility's emissions reduction requirements), and the establishment of a reasonable period allowed for repairs.

Statutory authority:

Texas Water Code, § 5.013, concerning General Jurisdiction of the commission, which establishes the commission's general authority to carry out its jurisdiction; § 5.102, concerning the commission's General Powers, including calling and holding hearings and issuing orders; § 5.103, concerning Rules, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; § 5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; Tex. Water Code, Chapter 5, Subchapter Q, concerning Performance-

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based Regulation, which authorizes the commission to establish and use compliance history information, including § 5.752(2), concerning Definitions, which includes programs established under Tex. Health & Safety Code § 382.401 as innovative programs; § 7.001, concerning Definitions; § 7.002, concerning Enforcement Authority, which authorizes the commission to initiate actions to enforce the relevant statutes; § 7.005, concerning Effect on Other Law, which provides that Chapter 7 does not exempt a person from complying with or being subject to other law; Tex. Health & Safety Code § 382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; § 382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; § 382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state air; § 382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air; § 382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring, monitoring and maintaining records of emissions of air contaminants; and § 382.401, concerning Alternative Leak Detection Technology, which establishes a voluntary program for use of supplemental leak detection technology; and 42 U.S. Code §§ 7401, *et seq.*

Direction and Guidance:

Project number:
2007-040-101-CE

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Attachments:

HB 1526 of the 80th Legislature (2007)
Alternative Work Practice to Detect Leaks from Equipment (73 Fed. Reg. 78199)

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TR will submit electronic notice to the following after ED Briefing:

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Kevin Patteson
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