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# TEXAS REGISTER

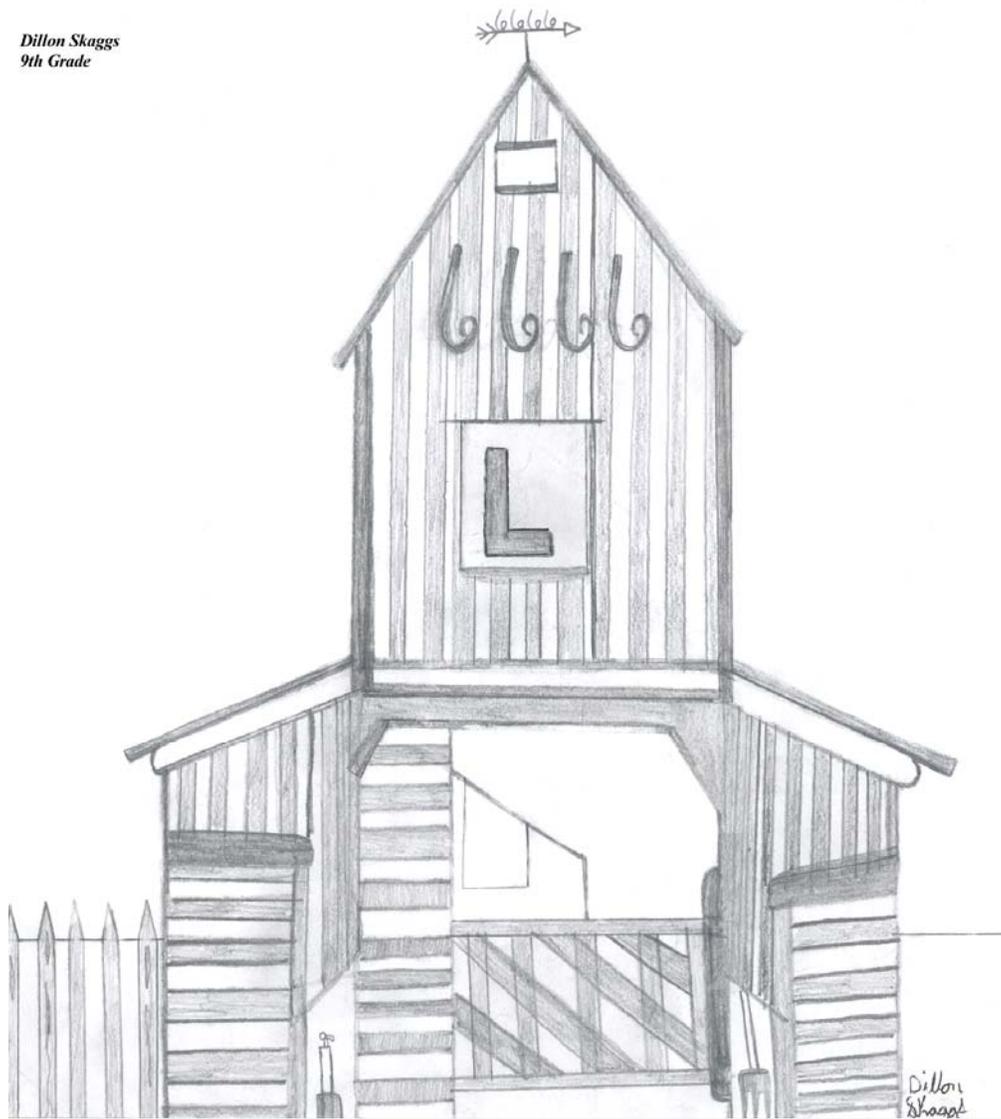
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9th Grade*



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Texas Commission on Environmental Quality  
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For further information, please call: (512) 239-6090



CHAPTER 117. CONTROL OF AIR  
POLLUTION FROM NITROGEN COMPOUNDS  
SUBCHAPTER D. COMBUSTION  
CONTROL AT MINOR SOURCES IN  
OZONE NONATTAINMENT AREAS  
DIVISION 2. DALLAS-FORT WORTH  
EIGHT-HOUR OZONE NONATTAINMENT  
AREA MINOR SOURCES

**30 TAC §117.2110**

The Texas Commission on Environmental Quality (commission) proposes an amendment to §117.2110.

If adopted, amended §117.2110 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 RULE**

On April 27, 2010, Ameresco of Texas (petitioner) submitted a petition for rulemaking requesting an amendment to Chapter 117, Subchapter D, Division 2, §117.2110 for the Dallas-Fort Worth (DFW) 1997 eight-hour ozone nonattainment area. The commission approved the petition for rulemaking on June 16, 2010, and issued an order on June 22, 2010, directing the executive director to examine the issues in the petition and to initiate rulemaking. Currently, §117.2110 limits nitrogen oxides (NO<sub>x</sub>) emissions from stationary gas-fired, lean-burn engines installed, modified, reconstructed, or relocated on or after June 1, 2007, to 0.60 grams per horsepower-hour (g/hp-hr) if fired on landfill gas and 0.50 g/hp-hr for all other lean-burn engines. The proposed change would expand the emission specification for lean-burn engines fired on landfill gas to include lean-burn engines fired on biogas at minor sources NO<sub>x</sub> in the DFW 1997 eight-hour ozone nonattainment area.

Landfill gas and other biogas are produced from anaerobic digestion or decomposition of organic matter and have similar fuel and combustion characteristics. Both landfill gas and other biogas can contain contaminants such as sulfur, chlorine, and silicon, which are present in other gaseous fuels. Consequently, engines fired on landfill gas and other biogas can have technological feasibility issues with regard to the installation of a NO<sub>x</sub> control catalyst because these contaminants can result in catalyst failure or deactivation in hours or days. The technological feasibility issues with regard to the installation of a NO<sub>x</sub> control catalyst is the basis for the 0.60 g/hp-hr emission standard in the current rule and the justification for the proposed expansion of the existing emission specification to include lean-burn engines fired on biogas at minor sources of NO<sub>x</sub> in the DFW 1997 eight-hour ozone nonattainment area.

*Demonstrating Noninterference under Federal Clean Air Act, Section 110(l)*

The commission provides the following information to demonstrate why the proposed change to expand the emission specification in §117.2110(a)(1)(B)(ii)(I) will not negatively impact the status of the state's attainment with the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS), will not interfere with control measures, and will not prevent reasonable further progress toward attainment of the ozone NAAQS. The commission acknowledges that the DFW area failed to attain the 1997 eight-hour ozone NAAQS by the June 15, 2010, attainment deadline based on monitoring data; however, the proposed rule change will not adversely affect the ability of the DFW area to attain the 1997 eight-hour ozone NAAQS for the reasons discussed in this preamble.

The requirement for reasonable notice and public hearing will be satisfied through a public hearing scheduled for December 14, 2010. The public comment period will begin November 19, 2010, and end December 20, 2010.

On May 23, 2007, as part of the DFW attainment demonstration, the commission adopted a new Chapter 117, Subchapter D, Division 2 with new emission control requirements for minor industrial, commercial, or institutional sources of NO<sub>x</sub> in the DFW 1997 eight-hour ozone nonattainment area. Subchapter D, Division 2 requires owners or operators of minor sources of NO<sub>x</sub> in the DFW 1997 eight-hour ozone nonattainment area to reduce NO<sub>x</sub> emissions from affected stationary internal combustion engines. A minor source of NO<sub>x</sub> in the DFW 1997 eight-hour ozone nonattainment area is any stationary source, or group of sources located within a contiguous area and under common control, that emits or has the potential to emit less than 50 tons per year of NO<sub>x</sub>.

One source category newly regulated under Chapter 117 during the 2007 rulemaking was lean-burn engines at minor sources. The current applicable NO<sub>x</sub> emission specification in §117.2110(a)(1)(B)(ii)(II) for gas-fired lean-burn engines using gaseous fuels other than landfill gas that are installed, modified, reconstructed, or relocated on or after June 1, 2007, is 0.50 g/hp-hr. During the 2007 rulemaking, no landfill gas-fired engines were identified in the emissions inventory in the counties impacted by the proposed rule; however, the emission specification of 0.60 g/hp-hr for gas-fired engines fired on landfill gas established by §117.2110(a)(1)(B)(ii)(I) is consistent with the emission specification for this category of engines in the Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment area.

In the 2007 Chapter 117 rulemaking for the DFW 1997 eight-hour ozone attainment demonstration, no gas-fired engines fired on biogas or other non-landfill gaseous fuels were relied upon for creditable reductions for the SIP. Therefore, if the petitioner's proposed change is adopted, allowing the slightly higher emission specification of 0.60 g/hp-hr on gas-fired engines fired on other biogas fuels would not result in a loss of any SIP creditable reductions for the DFW 1997 eight-hour ozone nonattainment area.

The proposed change is limited to a narrow category of stationary gas-fired engines with NO<sub>x</sub> controls that were not relied upon in the DFW 1997 eight-hour ozone attainment demonstration adopted in 2007, and the resulting change in future NO<sub>x</sub> emissions is negligible. Furthermore, if the proposed rulemaking is not adopted and the petitioner is not able to comply with the 0.50 g/hp-hr emission limit or purchase credits to offset the surplus emissions, the company may be forced to abandon the project. This outcome could actually result in a net NO<sub>x</sub> emissions in-

crease that is more than the 0.02 tons per day (tpd) increase anticipated if the rule is adopted. If the company is forced to send the emission stream to a flare for destruction rather than use the stream as a fuel source in the engines, the total uncontrolled NO<sub>x</sub> emission could exceed that of the controlled emissions under the proposed emission limit, as flares are exempt from NO<sub>x</sub> emission limits under Chapter 117. Based on these factors, the commission has determined that the proposed rule change will not negatively impact the status of the state's attainment with the 1997 eight-hour ozone NAAQS, will not interfere with control measures, and will not prevent reasonable further progress toward attainment of the ozone NAAQS.

## SECTION DISCUSSION

### *Section 117.2110, Emission Specifications for Eight-Hour Attainment Demonstration*

The commission proposes to amend §117.2110(a)(1)(B)(ii)(I) by expanding the emission specification for lean-burn engines fired on landfill gas to include lean-burn engines fired on biogas at minor sources of NO<sub>x</sub> in the DFW 1997 eight-hour ozone nonattainment area. The proposed rule revision would require owners or operators of stationary gas-fired lean-burn internal combustion engines fired on biogas fuels other than landfill gas that are installed, modified, reconstructed, or relocated on or after June 1, 2007, to comply with a NO<sub>x</sub> emission limit of 0.60 g/hp-hr.

In addition to the proposed rule revisions, the commission proposes non-substantive formatting changes to conform with current Texas Register format requirements. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

The commission is only accepting comments regarding the specific changes proposed by the petitioner and directed by the commissioners at the June 16, 2010, agenda when the commission considered and granted the petition for rulemaking. Comments received related to other portions of the section proposed for amendment will not be considered and no changes will be made in response to such comments.

### 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 rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed rule is not expected to have fiscal implications for other units of state or local government.

The proposed rule would amend Chapter 117 regarding minor sources of NO<sub>x</sub> emissions in the DFW 1997 eight-hour ozone nonattainment area. The current rule specifies that lean-burn engines fired on landfill gas at minor NO<sub>x</sub> sources in DFW have an emission standard of 0.60 g/hp-hr. Gas-fired lean-burn engines, using gaseous fuels other than landfill gas, have a 0.50 g/hp-hr emission standard. Biogas and landfill gas are produced from the anaerobic digestion or decomposition of organic matter. The agency has received a petition from a privately owned wastewater treatment facility in the DFW area to use biogas in lean-burn internal combustion engines. The biogas is a by-product of plant operations and would be used to produce electricity and thermal energy to fuel wastewater treatment functions at the plant.

Under the current rule, gas-fired lean-burn engines using biogas are limited to the 0.50 g/hp-hr standard even though biogas

has many of the characteristics and saturation of contaminants (such as sulfur, chlorine, and silicon) as landfill gas. The high contaminant content of landfill and other biogas can lead to high incidents of failure in catalyst controls and engine operations if engines using this type of fuel are not allowed to operate with an emission standard of 0.60 g/hp-hr. The proposed rule will allow lean-burn engines at minor NO<sub>x</sub> sources in the DFW 1997 eight-hour ozone nonattainment area to operate at 0.60 g/hp-hr if they use biogas. Making the emission standards for these engines equal to standards for landfill gas engines will allow the company to use biogas that would otherwise be considered to be a source of volatile organic compounds or NO<sub>x</sub> emissions to produce power for its own plant operations or for sale to the power grid.

The expansion of the 0.60 g/hp-hr emission standard is not expected to impact the SIP for the DFW 1997 eight-hour ozone nonattainment area since no engines fired on biogas or other non-landfill gaseous fuels were relied upon to provide SIP emission reductions.

The proposed rule is not expected to have fiscal impacts on any facilities owned or operated by state agencies and local government in the DFW 1997 eight-hour ozone nonattainment area since no government owned facilities that are classified as minor sources of NO<sub>x</sub> are known to operate lean-burn engines using landfill gas or other biogas.

### PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the change seen in the proposed rule will be increased flexibility to use renewable fuels to produce electricity and thermal energy without affecting the capability to reduce NO<sub>x</sub> emissions in the DFW 1997 eight-hour ozone nonattainment area.

The proposed rule is not expected to affect individuals.

The proposed rule is expected to allow biogas fueled lean-burn engines to operate with the same emission standard of 0.60 g/hp-hr as a landfill gas fueled lean-burn engine. The proposed rule will allow a wastewater treatment plant to use waste generated by its own operations and eliminate the need to purchase additional emission credits equivalent to 0.02 tpd or add controls, which would be expensive and increase downtime at the treatment facility. The wastewater treatment facility will operate three biogas-fired lean-burn engines. Emission credits can range from \$800 to \$25,000 per ton. Cost savings could range from \$3,360 to \$105,000 per year if the business is not required to operate these engines at the current 0.50 g/hp-hr.

### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. There are no known small businesses that are minor sources in the DFW 1997 eight-hour ozone nonattainment area that are expected to use lean-burn engines fueled by landfill gas or other biogas.

### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rule does not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that 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." Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule which, "(1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds 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 (4) adopts a rule solely under the general powers of the agency instead of under a specific state law."

The proposed rulemaking implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, a SIP must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIP provides for implementation, attainment, maintenance, and enforcement of the NAAQS within the state.

The specific intent of the proposed rulemaking is to provide fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area. The current applicable NO<sub>x</sub> emission specification in §117.2110(a)(1)(B)(ii)(I) for gas-fired lean-burn engines using gaseous fuels other than

landfill gas that are installed, modified, reconstructed, or relocated on or after June 1, 2007, is 0.50 g/hp-hr. The current applicable NO<sub>x</sub> emission specification in §117.2110(a)(1)(B)(ii)(I) for gas-fired engines fired on landfill gas is 0.60 g/hp-hr. Landfill gas and other biogas are produced from anaerobic digestion or decomposition of organic matter and have similar fuel and combustion characteristics. Both landfill gas and other biogas can contain contaminants such as sulfur, chlorine, and silicon. Consequently, engines fired on landfill gas and other biogas can have technological feasibility issues with regard to the installation of a NO<sub>x</sub> control catalyst because these contaminants can result in catalyst failure or deactivation in hours or days. The technological feasibility issues with regard to the installation of a NO<sub>x</sub> control catalyst is the basis for the 0.60 g/hp-hr emission standard in the current §117.2110(a)(1)(B)(ii)(I) and the justification for the proposed expansion of the existing emission specification to include lean-burn engines fired on biogas at minor sources NO<sub>x</sub> in the DFW 1997 eight-hour ozone nonattainment area. To further the specific intent of providing fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area, the proposed rule will expand the current §117.2110(a)(1)(B)(ii)(I) to include biogas other than landfill gas.

The proposed rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because: 1) the specific intent of the proposed rule is not to protect the environment or reduce risks to human health from environmental exposure, but rather to provide fair and consistent application of SIP rules in the DFW eight-hour ozone nonattainment area by providing a specific expansion of §117.2110(a)(1)(B)(ii)(I) to apply to biogas other than landfill gas; and 2) as discussed in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE, FISCAL NOTE, PUBLIC BENEFITS AND COSTS, SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS, and the LOCAL EMPLOYMENT IMPACT STATEMENT sections of this preamble, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor will the proposed rule adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Because the proposed rulemaking is not a major environmental rule, it is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225.

While the proposed rulemaking does not constitute a major environmental rule, even if it did it would not be subject to a regulatory impact assessment under Texas Government Code, §2001.0225. The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not

large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full Regulatory Impact Analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that, "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with *per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

Regardless of whether the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this rule is part of the commission's SIP for making progress toward the attainment and maintenance of the eight-hour ozone NAAQS in the DFW nonattainment area.

Therefore, the proposed rule does not exceed a standard set by federal law or exceed an express requirement of state law, since the rule is part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law - the NAAQS. The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Env'tl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). In addition, no contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the agency but is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, and 382.017.

This rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), for the following reasons. The proposed rulemaking is not a major environmental law because: 1) the specific intent of the proposed rule is not to protect the environment or reduce risks to human health from environmental exposure, but rather to provide fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area; and 2) the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor will it adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Furthermore, even if the proposed rulemaking was a major environmental rule, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the DFW SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) no contract or delegation agreement covers the topic that is the subject of this rulemaking; and 3) the proposed rulemaking is authorized by specific sections of THSC, Chapter 382, and the TWC, which are cited in the STATUTORY AUTHORITY section of this preamble.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an analysis of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply because this rulemaking provides for fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area by expanding the current §117.2110(a)(1)(B)(ii)(I) NO<sub>x</sub> emission specification to include biogas other than landfill gas.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Ar-

ticle I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

The specific purpose of the proposed rulemaking is to provide fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area. The current applicable NO<sub>x</sub> emission specification in §117.2110(a)(1)(B)(ii)(II) for gas-fired lean-burn engines using gaseous fuels other than landfill gas that are installed, modified, reconstructed, or relocated on or after June 1, 2007, is 0.50 g/hp-hr. The current applicable NO<sub>x</sub> emission specification in §117.2110(a)(1)(B)(ii)(I) for gas-fired engines fired on landfill gas is 0.60 g/hp-hr. Landfill gas and other biogas are produced from anaerobic digestion or decomposition of organic matter and have similar fuel and combustion characteristics. Both landfill gas and other biogas can contain contaminants such as sulfur, chlorine, and silicon. Consequently, engines fired on landfill gas and other biogas can have technological feasibility issues with regard to the installation of a NO<sub>x</sub> control catalyst because these contaminants can result in catalyst failure or deactivation in hours or days. The technological feasibility issues with regard to the installation of a NO<sub>x</sub> control catalyst is the basis for the 0.60 g/hp-hr emission standard in the current §117.2110(a)(1)(B)(ii)(I) and the justification for the proposed expansion of the existing emission specification to include lean-burn engines fired on biogas at minor sources NO<sub>x</sub> in the DFW 1997 eight-hour ozone nonattainment area. To further the specific intent of providing fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area, the proposed rule will broaden the current §117.2110(a)(1)(B)(ii)(I) to biogas other than landfill gas.

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Because the proposed rule promulgates an exemption, the rule is less burdensome, restrictive, or limiting of rights to private real property than the existing rule. Furthermore, the proposed rule will benefit the public by providing fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area. The proposed rule does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rule simply expands the existing exemption in §117.403 to include sources that have technological feasibility issues similar to those of the sources covered by the current exemption. Therefore, the rule will not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be

considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking will not affect any coastal natural resource areas because the rule only affects counties outside the CMP area and is, therefore, 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

Chapter 117 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed amendment to Chapter 117 is adopted, owners or operators subject to the federal operating permits program that elect to comply with the amended emission specification must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 117 requirements.

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Fort Worth on December 14, 2010, at 2:00 p.m. at the Texas Commission on Environmental Quality, Region 4 Office, DFW Public Meeting Room, 2309 Gravel Road. 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

Written comments may be submitted to Natalia Henriksen, 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 2010-048-117-EN. The comment period closes December 20, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.state.tx.us/nav/rules/propose\\_adapt.html](http://www.tceq.state.tx.us/nav/rules/propose_adapt.html). For further information, please contact Ray Schubert, Air Quality Division, at (512) 239-6615.

#### STATUTORY AUTHORITY

The amendment is proposed under the authority of the following: Texas Government Code, §2001.021, Petition for the Adoption of Rules, which authorizes an interested person to petition a state agency for the adoption of a rule; Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, and §5.105, General Policy (these provisions authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC); Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the

TCAA; THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, TCAA, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The amendment is also proposed under THSC, §382.016, Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; THSC, §382.021, Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures; and THSC, §382.051, Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, et seq., which requires states to submit SIP revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements TWC, §5.103 and §5.105 and THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.051, and FCAA, 42 USC, §§7401 et seq.

*§117.2110. Emission Specifications for Eight-Hour Attainment Demonstration.*

(a) The owner or operator of any source subject to this division (relating to Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Minor Sources) shall not allow the discharge into the atmosphere emissions of nitrogen oxides (NO<sub>x</sub>) in excess of the following emission specifications.

(1) Emission specifications for stationary, gas-fired, reciprocating internal combustion engines are as follows:

(A) rich-burn engines:

(i) fired on landfill gas, 0.60 grams per horsepower-hour (g/hp-hr); and

(ii) all other rich-burn engines, 0.50 g/hp-hr; and

(B) lean-burn engines:

(i) placed into service before June 1, 2007, that have not been modified, reconstructed, or relocated on or after June 1, 2007, 0.70 g/hp-hr; and

(ii) placed into service, modified, reconstructed, or relocated on or after June 1, 2007:

(I) fired on landfill gas or other biogas, 0.60 g/hp-hr; and

(II) all other lean-burn engines, 0.50 g/hp-hr.

(2) The emission specification for stationary, dual-fuel, reciprocating internal combustion engines is 5.83 g/hp-hr.

(3) Emission specifications for stationary, diesel, reciprocating internal combustion engines are as follows:

(A) placed into service before March 1, 2009, that have not been modified, reconstructed, or relocated on or after March 1, 2009, the lower of 11.0 g/hp-hr or the emission rate established by

testing, monitoring, manufacturer's guarantee, or manufacturer's other data; and

(B) for engines not subject to subparagraph (A) of this paragraph:

(i) with a horsepower (hp) rating of 50 hp or greater, but less than 100 hp, that are installed, modified, reconstructed, or relocated on or after March 1, 2009, 3.3 g/hp-hr;

(ii) with a horsepower rating of 100 hp or greater, but less than or equal to 750 hp, that are installed, modified, reconstructed, or relocated on or after March 1, 2009, 2.8 g/hp-hr; and

(iii) with a horsepower rating of 750 hp or greater that are installed, modified, reconstructed, or relocated on or after March 1, 2009, 4.5 g/hp-hr.

(4) As an alternative to the emission specifications in paragraphs (1) - (3) of this subsection for units with an annual capacity factor of 0.0383 or less, 0.060 pound per million British thermal units (lb/MMBtu) [~~lb/MMBtu~~] heat input. For units placed into service on or before December 31, 2000, the annual capacity factor as of December 31, 2000, must be used to determine eligibility for the alternative emission specification of this paragraph. For units placed into service after December 31, 2000, a 12-month rolling average must be used to determine the annual capacity factor.

(5) For the purposes of this subsection, the terms "modification" and "reconstruction" have the meanings defined in §116.10 of this title (relating to General Definitions) and 40 Code of Federal Regulations §60.15 (December 16, 1975), respectively, and the term "relocated" means to newly install at an account, as defined in §101.1 of this title (relating to Definitions), a used engine from anywhere outside that account.

(b) The averaging time for the NO<sub>x</sub> emission specifications of subsection (a) of this section is as follows:

(1) if the unit is operated with a NO<sub>x</sub> continuous emissions monitoring system (CEMS) or predictive emissions monitoring system (PEMS) under §117.2135(c) of this title (relating to Monitoring, Notification, and Testing Requirements), either as:

(A) a rolling 30-day average period, in the units of the applicable standard;

(B) a block one-hour average, in the units of the applicable standard, or alternatively;

(C) a block one-hour average, in pounds per hour, for boilers, calculated as the product of the boiler's maximum rated capacity and its applicable limit in lb/MMBtu; or

(2) if the unit is not operated with a NO<sub>x</sub> CEMS or PEMS under §117.2135(c) of this title, a block one-hour average, in the units of the applicable standard.

(c) The maximum rated capacity used to determine the applicability of the emission specifications in subsection (a) of this section must be the greater of the following:

(1) the maximum rated capacity as of December 31, 2000; or

(2) the maximum rated capacity after December 31, 2000.

(d) A unit's classification is determined by the most specific classification applicable to the unit as of December 31, 2000. For example, a unit that is classified as a stationary gas-fired engine as of December 31, 2000, but subsequently is authorized to operate as a

dual-fuel engine, must be classified as a stationary gas-fired engine for the purposes of this chapter.

(e) Changes after December 31, 2000, to a unit subject to an emission specification in subsection (a) of this section (ESAD unit) that result in increased NO<sub>x</sub> emissions from a unit not subject to an emission specification in subsection (a) of this section (non-ESAD unit), such as redirecting one or more fuel or waste streams containing chemical-bound nitrogen to an incinerator or a flare, is only allowed if:

(1) the increase in NO<sub>x</sub> emissions at the non-ESAD unit is determined using a CEMS or PEMS that meets the requirements of §117.2135(c) of this title, or through stack testing that meets the requirements of §117.2135(f) of this title; and

(2) emission credits equal to the increase in NO<sub>x</sub> emissions at the non-ESAD unit are obtained and used in accordance with §117.9800 of this title (relating to Use of Emission Credits for Compliance).

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

(g) The availability under subsection (a)(4) of this section of an emission specification for units with an annual capacity factor of 0.0383 or less is based on the unit's status on December 31, 2000. Reduced operation after December 31, 2000, cannot be used to qualify for a more lenient emission specification under subsection (a)(4) of this section than would otherwise apply to the unit.

(h) No person shall allow the discharge into the atmosphere from any unit subject to NO<sub>x</sub> emission specifications in subsection (a) of this section, emissions in excess of the following, except as provided in §117.2125 of this title (relating to Alternative Case Specific Specifications):

(1) carbon monoxide (CO), 400 ppmv at 3.0% oxygen (O<sub>2</sub>) [O<sub>2</sub>], dry basis (or alternatively, 3.0 g/hp-hr for stationary internal combustion engines):

(A) on a rolling 24-hour averaging period, for units equipped with CEMS or PEMS for CO; and

(B) on a one-hour average, for units not equipped with CEMS or PEMS for CO; and

(2) for units that inject urea or ammonia into the exhaust stream for NO<sub>x</sub> control, ammonia emissions of 10 ppmv at 15% O<sub>2</sub>, dry, for gas-fired lean-burn engines; and 3.0% O<sub>2</sub>, dry, for all other units, based on:

(A) a block one-hour averaging period for units not equipped with a CEMS or PEMS for ammonia; or

(B) a rolling 24-hour averaging period for units equipped with CEMS or PEMS for ammonia.

(i) An owner or operator may use emission reduction credits as specified in §117.9800 of this title to comply with the NO<sub>x</sub> emission specifications of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006377

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: December 19, 2010

For further information, please call: (512) 239-0177



## CHAPTER 298. ENVIRONMENTAL FLOW STANDARDS FOR SURFACE WATER

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §§298.1, 298.5, 298.10, 298.15, 298.20, 298.25, 298.200, 298.205, 298.210, 298.215, 298.220, 298.225, 298.230, 298.240, 298.250, 298.255, 298.260, 298.265, 298.270, 298.275, 298.280, 298.285, and 298.290.

### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

In 2007, the 80th Legislature, passed House Bill 3 (HB 3), relating to the management of the water resources of the state, including the protection of instream flows and freshwater inflows; and, Senate Bill 3 (SB 3), relating to the development, management, and preservation of the water resources of the state. Both of these bills amended Texas Water Code (TWC), §11.1471, which requires the commission to adopt rules related to environmental flow standards and set-asides. The commission is proposing to create a new Chapter 298, Environmental Flow Standards for Surface Water, to implement the environmental flow provisions of HB 3, Article 1, and SB 3, Article 1, and propose environmental flow standards for the Trinity and San Jacinto Rivers, their associated tributaries, and Galveston Bay; and the Sabine and Neches Rivers, their associated tributaries, and Sabine Lake Bay.

Prior to HB 3/SB 3, the commission had authority to protect environmental interests as it permitted state surface water. The commission had authority to maintain: existing instream uses under TWC, §11.147(d); water quality under TWC, §11.147(d) and §11.150; fish and wildlife habitat under TWC, §11.147(e) and §11.152; and freshwater inflows to bay and estuary systems under TWC, §11.147(a) - (c). TWC, §11.147(b) - (e) and §11.152 required that these environmental considerations be included only to the extent practicable or reasonable and required that environmental considerations be considered along with other factors of public welfare. HB 3/SB 3 did not make major changes to this commission authority.

The commission also retains its ability, granted prior to HB 3/SB 3, to place special conditions in water right permits to protect environmental interests. Before HB 3/SB 3, TWC, §11.134(b)(3)(D), required consideration of environmental interests for new appropriations of water, including amendments that granted an increase in the amount of water that could be diverted and TWC, §11.085, required consideration for interbasin transfers. Permits for water projects that call for the re-diversion of wastewater or return flows to a watercourse, so called "indirect reuse" projects, were also subject to special conditions to protect environmental uses under TWC, §11.042 and §11.046. Amendments that were not new appropriations were required to be authorized if, among other criteria, the