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11th Grade*

EPA has proposed changes to existing PM test methods in order to more accurately measure PM<sub>2.5</sub>. EPA recognizes there are technical issues that need to be resolved. TIP states that rule comments reflect a strong desire for EPA to consider other PM<sub>2.5</sub> measurement approaches. There are concerns with sources being required to perform an emission test to demonstrate compliance with a PM<sub>2.5</sub> PSD permit emission limit when there are no federally approved methods, and significant technical issues remain associated with the test methods for measuring PM<sub>2.5</sub>. TCEQ should allow regulated entities to use test methods that are shown to be equivalent rather than limiting sources to only the method or methods promulgated by EPA. EPA issued additional PM<sub>2.5</sub> rules on October 20, 2010, establishing significant impact levels and de minimis monitoring levels for PM<sub>2.5</sub>. TIP is concerned that this proposal does not address the concepts established in that rulemaking.

The commission did not make any changes to the rule in response to these comments. EPA proposed rulemaking for repealing the Grandfathered Provisions, Implementation of the NSR Program for PM<sub>2.5</sub>; Notice of Proposed Rulemaking to repeal Grandfathering Provision and the end to the PM<sub>10</sub> Surrogate policy prior to the May 16, 2011 deadline, which has not been finalized. In efforts to ensure the TCEQ meets regulatory requirements of the FCAA, the commission is adopting amendments to add specific definitions related to PM<sub>2.5</sub> regulation and to address known requirements for implementation.

Subsequent to receipt of TIP's comments, EPA published the final rule on the Methods for Measurement of Filterable PM<sub>10</sub> and PM<sub>2.5</sub> and Measurement of Condensable PM Emissions (75 *Federal Register* 80118, December 21, 2010).

This adoption addresses known requirements to date in order to meet the May 16, 2011 deadline for implementation of the PM<sub>2.5</sub> requirements and the end of the PM<sub>10</sub> Surrogate policy. TCEQ will consider any future rulemaking as necessary to address future state or federal regulatory requirements.

#### Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's 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's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; and §382.0514, concerning Sampling, Monitoring, and Certification.

The adopted amendment implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 382.0513, and 382.0514.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 25, 2011.

TRD-201101536

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0779

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## 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 (TCEQ or commission) adopts the amendment to §117.2110.

Section 117.2110 is adopted *without changes* to the proposed text as published in the November 19, 2010, issue of the *Texas Register* (35 TexReg 10162) and the text will not be republished.

The amendment 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 Adopted Rule

On April 27, 2010, Ameresco of Texas (petitioner) submitted a petition for rulemaking (Project Number 2010-026-PET-NR) 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 adopted change will expand 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.

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 sil-

icon, 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 adopted 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 (FCAA), §110(l)*

The commission provides the following information to demonstrate why the adopted 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 adopted 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 was satisfied through a public hearing scheduled for December 14, 2010, and the public comment period, held November 19, 2010, to December 20, 2010. The purpose of the hearing was to accept written and oral comments on the proposed rulemaking. A written comment was submitted by the EPA. The EPA stated their agreement with the commission's §110(l) determination that the proposed rulemaking will not interfere with attainment or maintenance of the 1997 eight-hour ozone NAAQS in the DFW area.

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 adopted 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 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 petitioner may be forced to abandon the project. This outcome could actually result in a net NO<sub>x</sub> emissions increase that is more than the 0.02 tons per day 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> emissions could exceed that of the controlled emissions under the proposed emission limit, because flares are exempt from NO<sub>x</sub> emission limits under Chapter 117. Based on these factors, the commission has determined that the adopted rule change will not negatively impact the status of the state's attainment demonstration for 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 adopts the amendment to §117.2110(a)(1)(B)(ii)(I) to expand 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 adopted rule revision will 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 adopted rule revision, the commission adopts 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.

#### Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the adopted 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 adopted rulemaking does not constitute a major environmental rule, even if it did, a regula-

tory impact analysis would not be required because the adopted 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 adopted rulemaking implements requirements of the 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 adopted 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 adopted 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 adopted rule will expand the current §117.2110(a)(1)(B)(ii)(I) to include biogas other than landfill gas.

The adopted rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because: 1) the specific intent of the adopted 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) the adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor will the adopted 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 adopted rulemaking is not a major environmental rule, it is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225.

While the adopted 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 adopted 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 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 regulatory impact analysis 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 regulatory impact analysis 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 adopted 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 adopted 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 adopted rulemaking is not a major environmental law because: 1) the specific intent of the adopted 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 adopted 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 adopted 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 adopted 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 adopted 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 invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

#### Takings Impact Assessment

The commission evaluated the adopted rule and performed an analysis of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The commission's 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, Article 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 adopted 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)(III) 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 adopted 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. To further the specific intent of providing fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area, the adopted rule will broaden the current §117.2110(a)(1)(B)(ii)(I) to biogas other than landfill gas.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. Because the adopted rule promulgates an exemption, the rule is less burdensome, restrictive, or limiting of rights to private real property than the existing rule. Furthermore, the adopted rule will benefit the public by providing fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area. The adopted 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 §117.2110(a)(1)(B)(ii)(I) 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 invited public comment regarding the consistency with the coastal management program (CMP) during the public comment period. No comments were received concerning the Texas CMP.

#### 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. Owners or operators subject to the federal operating permits program that elect to comply with the emission specification in §117.2110(a)(1)(B)(ii)(I) may need to revise their operating permit.

#### Public Comment

A public hearing was scheduled December 14, 2010, at 2:00 p.m., at the Texas Commission on Environmental Quality Region 4 office in Fort Worth, Texas. The hearing was not officially opened, because no one requested to present oral testimony. The comment period closed on December 20, 2010. A written comment was received from the EPA.

#### Response to Comments

The EPA stated its understanding that the proposed revision would expand the NO<sub>x</sub> emission specification for lean-burn engines fired on landfill gas to include lean-burn engines fired on biogas at minor sources in the DFW 1997 eight-hour ozone nonattainment area, and that the revision would allow a stationary diesel engine to be fired on biogas. The EPA also commented that although TCEQ has projected the potential for a small increase in NO<sub>x</sub> emissions from engines firing biogas resulting from the rule change, because a larger amount of NO<sub>x</sub> emissions could result from the likely alternative of sending the

gas to a flare, the rulemaking did not appear to conflict with FCAA, §110(I). The EPA also commented that it agreed with the commission's determination that the proposed rulemaking will not interfere with attainment or maintenance of the 1997 eight-hour ozone NAAQS in the DFW area and commented that the proposed change appeared to be an appropriate revision to the SIP given the small amount of emissions change and the beneficial use of the biogas. In addition, the EPA requested the commission confirm the EPA's understanding of the proposed amendment to §117.2110 and requested that emissions from engines fired on biogas be accounted for in future SIP revisions.

The commission appreciates the comment. The EPA's understanding of the amendment to §117.2110 is partially correct. The amendment to §117.2110 in this rulemaking only applies to lean-burn engines fired on landfill gas and lean-burn engines fired on other biogas at minor sources of NO<sub>x</sub> in the DFW 1997 eight-hour ozone nonattainment area; the amendment does not apply to stationary diesel engines. The EPA is correct in its understanding that the 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. The commission agrees that the use of biogas as fuel is beneficial and preferential to sending the biogas to a flare for destruction. Lastly, all emissions from lean-burn engines fired on biogas will be accounted for in future SIP revisions. No change has been made to the rule based on this comment.

#### STATUTORY AUTHORITY

The amendment is adopted under the authority of 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 adopted 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 adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standard will be achieved and maintained within each air quality control region of the state.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 25, 2011.

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Robert Martinez

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Texas Commission on Environmental Quality

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## CHAPTER 290. PUBLIC DRINKING WATER

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§290.38, 290.39, 290.41, 290.42, 290.46, 290.47, 290.111 - 290.115, 290.119, 290.121, 290.122, 290.271, and 290.272, and the repeal of §290.117. The commission simultaneously adopts new §290.117.

Sections 290.39, 290.41, 290.46, 290.112, 290.113, 290.115, 290.119, 290.271, and 290.272 are adopted *with changes* to the proposed text as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10815). Sections 290.38, 290.42, 290.47, 290.111, 290.114, 290.117, 290.121, and 290.122 are adopted *without changes* to the proposed text and will not be republished.

### Background and Summary of the Factual Basis for the Adopted Rules

The primary purpose of the adopted rulemaking is to implement federal regulations pertaining to the safety of drinking water from groundwater and surface water sources. Federal rules controlling levels of the metals lead and copper in drinking water have been in place since 1991. Lead and copper can leach into drinking water from pipes or solder under corrosive conditions. The federal rules require public water systems to monitor for lead and copper; monitor for water quality parameters related to corrosivity; perform corrosion control studies; install optimum corrosion control treatment; meet lead and copper action levels; and, when action levels are exceeded, educate the public. The United States Environmental Protection Agency (EPA) adopted the National Primary Drinking Water Regulations for Lead and Copper: Short-Term Regulatory Revisions and Clarifications (LCSTR) on October 10, 2007. Under 40 Code of Federal Regulations (40 CFR) §142.10, the commission must adopt rules at least as stringent as the federal rules to maintain primary enforcement authority (primacy) over public water systems in Texas. This rulemaking adopts the federal rules for lead and copper and makes minor changes for consistency with the adopted federal rules to retain primacy for the Safe Drinking Water Act and its amendments (SDWA). In addition, the commission adopts the rule language for lead and copper to reorganize the state rules to match the organizational structure for other chemicals in drinking water. The intent of this reorganization is to assist the regulated community by making the rules easier to use. No part of the adopted rule-

making differs from the federal requirements or existing Texas requirements in stringency.

This rulemaking also adopts minor changes to Chapter 290 for consistency with the federal Long Term 2 Enhanced Surface Water Treatment Rule (LT2), Stage 2 Disinfectants and Disinfection Byproducts Rule (DBP2), and Ground Water Rule (GWR). Rule Project Number 2006-045-290-PR incorporated the major requirements of the federal LT2, DBP2, and GWR on December 19, 2007. In the time since that adoption, as part of the EPA's primacy review, the EPA identified some rule elements inadvertently omitted from that rulemaking. These omissions have been corrected in this adopted rulemaking. These changes, though important in order to meet primacy, are relatively minor in terms of extent and scope.

### Section by Section Discussion

In addition to implementation of the federal laws discussed previously, the commission adopts administrative changes throughout the adopted rulemaking to reflect the agency's current practices and to conform with *Texas Register* and agency guidelines. These changes include updating cross-references and correcting typographical, spelling, and grammatical errors.

#### *Subchapter D: Rules and Regulations for Public Water Systems*

The commission adopts the amendment to §290.38, Definitions. The commission amends §290.38(4) and (11) to correct references to "certified" laboratories. On July 1, 2005, the commission published rules under 30 TAC §25.4(f) changing the requirements for environmental laboratories, a classification that includes laboratories that perform sample analyses required under the SDWA. The rulemaking eliminated the historical certification program, and replaced it with an accreditation program consistent with the environmental laboratory testing program known as the National Environmental Laboratory Accreditation Conference standards. Specifically, the rule stated that after the third anniversary of the publishing in the *Texas Register*, an environmental testing laboratory that provides analytical data used for a commission decision relating to the SDWA would no longer be certified, but must be accredited. The third anniversary of publishing was June 30, 2008. Therefore, after June 30, 2008, laboratories ceased to be "certified" by the agency, and are now "accredited" according to 30 TAC §25.4(f). The commission amends §290.38(6) to update the reference to the American Society for Testing and Materials standards. The commission amends §290.38(40) to ensure consistency with normal syntax standards by adding a closing parenthesis.

The commission adopts §290.39, General Provisions. The commission amends §290.39(b) to remove the word "a" in order to ensure consistency with normal English usage standards. The commission amends §290.39(j) to incorporate requirements contained in the federal LCSTR. Specifically, the commission amends §290.39(j) to contain requirements of the federal rules under 40 CFR §§141.82(h), 141.83(b)(6), and 141.86(d)(4)(vii) and (g)(4)(iii) that systems seek approval from the TCEQ for any change in treatment that may affect the corrosivity of the water. The commission amends §290.39(j)(1)(E) and (F) to move the word "and," together with its semicolon, to the correct location in the sequential list of requirements. The commission adopts §290.39(j)(1)(G) to include the requirements of the new federal LCSTR under 40 CFR §141.90(a)(3) giving examples of changes that the TCEQ must approve before use, consistent with requirements of repealed §290.117(g)(2)(E). The commission had proposed the addition of language in §290.39(j)(1)(G)