

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the repeal of §§115.620 - 115.622, 115.626, 115.627, and 115.629. The repeals are adopted *without changes* as published in the September 11, 2009, issue of the *Texas Register* (34 Tex Reg 6279).

The repealed sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).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 RULES

The EPA adopted a federal portable fuel container (PFC) rule (72 *Federal Register* 8432, February 26, 2007) that set a national standard for gasoline, diesel, and kerosene PFCs. All PFCs manufactured on or after January 1, 2009, are required to comply with the federal standards. The federal regulations are very similar to the revised PFC regulations adopted by the California Air Resources Board (CARB) on September 15, 2005. The current Texas PFC regulations are inconsistent with the federal standards, because the state regulations were based on the previous PFC testing methods adopted by the CARB in 2001.

The design criteria requirements for PFCs and PFC spouts specified under §§115.620 - 115.622, 115.626, 115.627, and 115.629 were adopted on October 27, 2004. These PFC rules established design criteria for "no-spill" PFCs based primarily on the 2001 CARB standards. The Texas PFC regulations differ from the 2001 CARB standards, because the Texas PFC rules do not require the control of permeation rates through the walls of the PFC. The control of permeation rates was not included in the Texas PFC regulations, because the cost of compliance was expected to be large and the reduction in emissions small.

The Texas PFC rules became effective on December 31, 2005, and on January 11, 2006, the Executive Director received a petition for rulemaking under 30 TAC §20.15 from Mr. Jon Lips of L&W Innovations, LLC. L&W Innovations manufactures a one-time use emergency fuel carrier known as the "Gas-O-Haul." The "Gas-O-Haul" emergency fuel carrier is prohibited by regulation from sale in Texas, because it does not comply with the performance standards and testing requirements of §115.622 and the labeling requirements of §115.626. In addition, the "Gas-O-Haul" emergency fuel carrier did not qualify for the exemption provided in §115.627 for one-time use containers filled by the manufacturer but are not intended for reuse, because the "Gas-O-Haul" is not a pre-filled container. On March 8, 2006, Docket Number 2006-0055-RUL, the commission approved the petition for rulemaking and instructed the executive director to initiate the rulemaking process that would allow one-time use, unfilled, emergency fuel containers to be exempt and be eligible for sale in the State of Texas. On May 1, 2006, the petitioner was granted an interim enforcement discretion waiver that is effective until the PFC rules are appropriately revised.

In December 2006, a concept memo was drafted to initiate proposed revisions to the PFC rules rulemaking. However, the rulemaking packet was put on hold while the EPA adopted the federal PFC rule. The federal rule defines a "portable fuel container" in 40 Code of Federal Regulations (CFR) §59.680 as "any reusable container." Thus, the "Gas-O-Haul" emergency fuel carrier is exempt under the federal rule, because it can only be used once.

Since all PFCs manufactured on or after January 1, 2009, are required to comply with the federal standards, this action will provide a clear regulatory structure by repealing §§115.620 - 115.622, 115.626,

115.627, and 115.629.

SECTION BY SECTION DISCUSSION

The adopted repeal of §§115.620 - 115.622, 115.626, 115.627, and 115.629 will remove regulations that have become unnecessary with the EPA's implementation of the federal PFC rule (*72 Federal Register* 8432, February 26, 2007), which established a national standard for gasoline, diesel, and kerosene PFCs and are intended to eliminate duplication and provide a clear regulatory structure.

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 rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, a "major environmental rule" means a rule with 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. The adopted rule repeal is intended to more effectively focus commission resources and to update administrative and technical requirements. While the rules being repealed were originally intended to protect the environment or reduce risks to human health from environmental exposure, they are no longer necessary because the EPA has promulgated federal rules that set a national standard for gasoline, diesel, and kerosene PFCs. All PFCs manufactured on or after January 1, 2009, are required to comply with the federal standards. The adopted repeals will remove requirements for PFC manufacturers in Texas, so that they can comply with the federal standard, which will prevent companies from having to determine compliance with duplicative standards. Because this rulemaking will not

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, the rulemaking does not fit the Texas Government Code, §2001.0225 definition of "major environmental rule".

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because this adoption does not constitute a major environmental rule, a regulatory impact analysis is not required.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period, and no comments were received.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), "taking" means 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 a governmental action that 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 is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The commission has determined that the promulgation and enforcement of the adopted repeal will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adopted repeal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. The adopted repeal is administrative and does not impose any new regulatory requirements. The changes to §§115.620 - 115.622, 115.626, 115.627, and 115.629 would remove regulations that have become unnecessary by the EPA's implementation of federal PFC standards and are therefore intended to eliminate duplication and provide a clear regulatory structure. The adopted repeal is reasonably taken to fulfill requirements of state law. Therefore, the adopted repeal will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined this rulemaking related to an action or actions is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (*Texas Natural Resources Code*, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the repeal is consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal

natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. The repeal complies with 40 CFR Part 50, National Primary and Secondary Air Quality Standards, and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. This rulemaking action is consistent with CMP goals and policies, in compliance with 31 TAC §505.22(e).

The commission invited public comment regarding the consistency with the CMP during the public comment period and no comments were received.

PUBLIC COMMENT

A public hearing was scheduled on October 6, 2009. The commission did not receive oral or written comments on the PFC rule repeal. The comment period closed on October 12, 2009.

SUBCHAPTER G: CONSUMER-RELATED SOURCES

[DIVISION 2: PORTABLE FUEL CONTAINERS]

[§§115.620 - 115.622, 115.626, 115.627, 115.629]

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code (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 repeal is also adopted under THSC, §382.002, concerning 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; §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; and §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.

The adopted repeals implement THSC, §§382.002, 382.011, 382.012, and 382.051.

§115.620. Definitions.

§115.621. Applicability.

§115.622. Performance Standards and Testing Requirements.

§115.626. Labeling.

§115.627. Exemptions.

§115.629. Affected Counties and Compliance Schedules.