

The commission adopts new §114.420 (Definitions), §114.421 (Emission Specifications), §114.422 (Control Requirements), §114.427 (Exemptions), and §114.429 (Affected Counties and Compliance Schedules). The commission adopts these revisions in new Division 3 (Non-Road Large Spark-Ignition Engines), Subchapter I (Non-Road Engines), Chapter 114 (Control of Air Pollution from Motor Vehicles), and to the State Implementation Plan (SIP). These amendments are adopted with changes to the proposed text as published in the December 31, 1999 issue of the *Texas Register* (24 TexReg 11950).

These new sections are adopted in order to control ground-level ozone in the Dallas/Fort Worth (DFW) ozone nonattainment area by requiring model year 2004 and subsequent non-road, large spark-ignition (LSI) engines 25 horsepower (hp) and larger to be certified under Title 13, California Code of Regulations, Chapter 9, concerning Off-Road Vehicles and Engines Pollution Control Devices (13 CCR 9), as adopted by the California Air Resources Board (CARB) on October 19, 1999 and effective November 18, 1999. The commission is incorporating the California rules by reference due to the need for the Texas program to remain identical to the program in California. For state programs that differ from the federal standards, the Federal Clean Air Act (FCAA), §209(e)(2)(B) (42 United States Code (USC), §7543(e)(2)(B)), requires that the state programs be identical to the California program. The rules are effective in the DFW ozone nonattainment area, which includes Collin, Dallas, Denton, and Tarrant Counties; as well as the five other counties in the DFW area, which include Ellis, Johnson, Kaufman, Parker, and Rockwall Counties.

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

The DFW ozone nonattainment area, an area defined by Collin, Dallas, Denton, and Tarrant Counties, was originally designated “moderate” under the FCAA Amendments of 1990 (42 USC) and thus was required to attain the one-hour national ambient air quality standard (NAAQS) for ozone by November 15, 1996. As required by the FCAA, the state submitted an attainment demonstration plan in 1994 which projected attainment of the ozone NAAQS by 1996. This plan was based on a volatile organic compound (VOC) reduction strategy. DFW did not attain the ozone NAAQS in 1996. The United States Environmental Protection Agency (EPA) is authorized to redesignate an area to the next higher classification (“bump up”) if the area fails to attain by the required date. In March 1998, in accordance with 42 USC, §7511(b)(2), the EPA reclassified the DFW area from moderate to serious, based on monitored exceedances of the ozone NAAQS between 1994 and 1996. The reclassification required the state to submit a revised SIP that demonstrates that the ozone NAAQS will be met in DFW by November 15, 1999. Because the DFW area continued to exceed the ozone NAAQS in 1999, the EPA may bump up the area to the severe classification. Regardless, the EPA and 42 USC, §7410 and §7502(a)(2), require the state to submit a revised SIP which demonstrates that the area will attain the ozone NAAQS as expeditiously as practicable. The rules adopted for DFW in this notice are one element of the ozone attainment demonstration SIP for DFW being adopted concurrently in this issue of the *Texas Register*. The commission plans to submit this SIP to the EPA in April, 2000.

In 1996, the commission began to develop new modeling for the DFW area and now is using newer air quality models with improved meteorological and emission inputs. The newer modeling since 1996 shows that reductions of oxides of nitrogen (NO<sub>x</sub>) in the DFW area and regionally will be necessary to

attain the ozone NAAQS. The current modeling also shows that achieving the ozone NAAQS in the DFW area will require strenuous effort because the area's rapid growth has resulted in increasing amounts of emissions due to increased levels of activity in the area. The emissions from increased activity are offsetting the emission reductions being achieved from new emission standards applicable to the on-road and non-road engine source categories which dominate the emissions inventory in the DFW area.

The emission reduction requirements adopted as part of this SIP package are the outcome of a development process which involved the EPA, the commission, local elected officials, citizens, industrial stakeholders, air quality researchers, and hired consultants. Local officials from the DFW area have formally submitted a resolution to the commission requesting the inclusion of many specific emission reduction strategies, including the one contained in these rules.

The NO<sub>x</sub> reductions required for the area to attain the ozone NAAQS have been estimated by extensive use of sophisticated air quality grid modeling which, because of its scientific and statutory grounding, is the chief policy tool for designing emission reductions. Title 42 USC, §7511a(c)(2), requires the use of photochemical grid modeling for ozone nonattainment areas designated serious, severe, or extreme.

The modeling has been conducted with input from a technical advisory committee. Hundreds of emission control strategies were considered in developing the modeling. Varying degrees of reductions from point sources and mobile sources were analyzed in at least forty modeling iterations, to test the effectiveness of different NO<sub>x</sub> reductions. The attainment demonstration modeling submitted for public hearing and comment concurrently with these rules shows that, in order for DFW to achieve the ozone

NAAQS by 2007, almost all of the practicably achievable NO<sub>x</sub> reductions are necessary from each emission source category, including reductions from counties surrounding the DFW nonattainment area. Therefore, each strategy, including the reductions required by this rulemaking, is crucial to meet federal requirements for the DFW nonattainment area.

The North Texas Clean Air Steering Committee (steering committee) representing the DFW ozone nonattainment area counties requested an ozone pollution control strategy establishing emission requirements for non-road, LSI engines to reduce NO<sub>x</sub> emissions necessary for the counties included in the DFW ozone nonattainment area to be able to demonstrate attainment with the NAAQS for ozone.

At the request of the steering committee, the commission developed a non-road LSI engine strategy in the DFW area which establishes emission requirements for non-road, LSI engines 25 hp and larger for model year 2004 and subsequent engines, and all equipment and vehicles that use such engines, by requiring LSI engines to be certified under 13 CCR 9. The rules are necessary for the counties included in the DFW area to be able to demonstrate attainment with the ozone NAAQS. In its effort to ensure that the SIP strategies impose no more burden than necessary to protect health and welfare, the commission has decided not to include the counties of Hunt, Hood, and Henderson as affected counties of this rule due to their limited impact on the air quality within the DFW nonattainment area. Due to the relatively low population, percentage of commuters, and growth rate of these counties the commission has reevaluated the need for implementing this rule in these three counties. The reevaluation included new photochemical modeling runs which applied this rule in the nine remaining counties only. The results of these runs indicated a minor impact of including Hunt, Hood, and

Henderson counties in this rule but also showed that the area could demonstrate attainment of the NAAQS without those reductions in emissions. However, other control measures which were proposed for these counties do have measurable benefits for attainment of the NAAQS.

The EPA has been regulating highway (on-road) cars and trucks since the early 1970s and continues to set increasingly stringent emissions standards for such vehicles. After considerable progress has been made in controlling the emissions from on-road vehicles, EPA has turned its attention to non-road (also called off-road) engines, which also contribute significantly to air pollution. Although emissions from non-road, LSI engines have not yet been regulated by EPA, the CARB has adopted exhaust emission standards for these engines. Non-road, LSI engines are primarily used to power industrial equipment such as forklifts, generators, pumps, compressors, aerial lifts, sweepers, and large lawn tractors. The engines are similar to automotive engines and can use similar automotive technology, such as closed-loop engine control and three-way catalysts, to reduce emissions.

The CARB has determined these standards to be a technologically feasible and cost effective strategy, at \$.25 per pound (\$500 per ton) of NO<sub>x</sub> and hydrocarbons (HC) reduced, towards reducing NO<sub>x</sub> and HC from these engines. HC, also called VOC, and NO<sub>x</sub> are precursor chemicals that contribute to the production of ground-level ozone. Adopting the California standards for non-road, LSI engines in the nine-county DFW area will reduce the amount of VOC and NO<sub>x</sub> emissions from these sources, and therefore, help control ground-level ozone in the DFW nonattainment area. Emission reductions of NO<sub>x</sub> from these affected engines are projected by the commission to be 2.2 tons per day. The program

is estimated to cost about \$500 per ton of NO<sub>x</sub> reduced, which compares very favorably with the cost per ton of other emission control strategies.

The commission solicited comments regarding the applicability and possible extension of the program to attainment and other nonattainment areas of the state. The commission also solicited comments regarding the implementation of these proposed rules in phases. One individual and the Industrial Truck Association (ITA) commented regarding the extension of these rules to attainment and other nonattainment areas of the state. The ITA and the City of Cleburne commented on the implementation of the rules in phases. These comments are addressed in the ANALYSIS OF TESTIMONY section of this preamble.

#### SECTION-BY-SECTION DISCUSSION

Subchapter I is a new subchapter which is being adopted as part of a concurrent rulemaking (Rule Log Number 1999-055E-114-AI) in this issue of the *Texas Register*.

The intent of these adopted rules is to adopt non-road, LSI standards in Texas that are identical to those in California.

The new §114.420 incorporates by reference the 42 definitions found in 13 CCR 9, §2431 (Definitions). Section 114.420 also includes two new definitions for “non-road, large spark-ignition engine” and “new non-road, large spark-ignition engine.”

The new §114.421 incorporates by reference the exhaust emissions standards for new non-road, LSI engines found in subsections (a) and (b) of 13 CCR 9, §2433 (Exhaust Emission Standards and Test Procedures -- Off-Road Large Spark-Ignition Engines).

The new §114.422 incorporates by reference the California off-road, LSI engine certification requirements found in 13 CCR 9, Article 4.5 (Off-Road Large Spark-Ignition Engines); the California emission certification label requirements found in 13 CCR 9, §2434 (Emission Control Labels -- 2001 and Later Off-Road Large Spark-Ignition Engines); the California warranty requirements found in 13 CCR 9, §2435 and §2436 (Defects Warranty Requirements for 2001 and Later Off-Road Large Spark-Ignition Engines, and Emission Control System Warranty Statement); and the California corrective measures for engine recalls found in 13 CCR 9, §2439 (Procedures for In-Use Engine Recalls for Large Off-Road Spark-Ignition Engines with an Engine Displacement Greater than 1.0 Liter).

The new §114.427 exempts construction and farm equipment engines below 175 hp, which is consistent with the preemption of state authority provisions in 42 USC, §7543(e)(1)(A). The new section also exempts marine propulsion engines, engines used in devices that operate on rails or tracks, recreational vehicles, snowmobiles, and gas turbines, which is consistent with the equipment specifically excluded in 13 CCR 9, §2431.

The new §114.429 specifies the counties that are subject to the new requirements, which includes nine counties in the DFW area. Section 114.429 also specifies the compliance schedule for engine manufacturers.

## FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking does not meet the definition of a “major environmental rule” as defined in that statute. “Major environmental rule” means 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. The amendments to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone, but are not anticipated to 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 amendments require units of state and local government, businesses, and individuals in the nine-county DFW area that own or operate model year 2004 and subsequent non-road, LSI engines of 25 hp and larger, and all equipment and vehicles that use such engines, to use LSI engines certified under 13 CCR 9. The increased cost of \$100 to \$500 per engine would not cause material impact given the high total cost of this type of equipment. This air pollution control program is part of the strategy to reduce emissions of NO<sub>x</sub> necessary for the counties included in the DFW nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The steering committee representing the DFW ozone nonattainment area counties requested an air pollution control program, including the use of CARB-certified LSI engine standards, be established to reduce NO<sub>x</sub> emissions necessary for the counties included in the DFW nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The amendments are part of the commission response to the request and one element of the proposed

DFW Attainment Demonstration SIP. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1. exceed a standard set by federal law, unless the rule is specifically required by state law; 2. exceed an express requirement of state law, unless the rule is specifically required by federal law; 3. exceed 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. adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements. Specifically, the use of CARB-certified, LSI engine standards within this adoption were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once EPA has established those standards. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. This adoption is not an express requirement of state law, but was developed specifically in order to meet the air quality standards established under federal law as NAAQS. This adoption is intended to help bring ozone nonattainment areas into compliance and to help keep attainment and near nonattainment areas from going into nonattainment. The amendments do not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by federal law, nor exceed a requirement of a delegation agreement. The amendments were not developed solely under the general powers of the agency but were specifically developed to meet the air quality standards established under federal law as NAAQS, as authorized under the Texas Clean Air Act (TCAA), §§382.012, 382.017, 382.019, and 382.039. One

commenter, the ITA, submitted comments on the draft regulatory impact analysis during the comment period. Those comments are addressed in the ANALYSIS OF TESTIMONY section of this preamble.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to establish emission requirements on model year 2004 and subsequent non-road, LSI engines 25 hp and larger and all equipment and vehicles that use such engines by requiring these engines to be certified under 13 CCR 9 in the nine-county DFW area. This rulemaking will act as an air pollution control strategy to reduce NO<sub>x</sub> emissions necessary for the four counties included in the DFW ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The affected area consists of nine counties in the DFW area. Promulgation and enforcement of the proposed rules will not burden private, real property. Although the rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emissions limitations and delays within this adoption were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS, once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rules is to implement a cleaner-burning, non-road, LSI engine program necessary for the DFW nonattainment area to meet the air quality standards established under

federal law as NAAQS. Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these revisions will not constitute a takings under the Texas Government Code, Chapter 2007.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et. seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), 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 has reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). No new sources of air contaminants will be authorized by the rule amendments. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies. No comments on the consistency of the proposed rules with the CMP were received during the public comment period.

## HEARING AND COMMENTERS

The commission held public hearings on this proposal on January 24, 2000 in El Paso; January 25, 2000 in Austin; January 26, 2000 in Longview and Irving; January 27, 2000 in Dallas and Lewisville; January 28, 2000 in Fort Worth; January 31, 2000 in Beaumont and Houston; and February 9, 2000 in Denton. The comment period was originally scheduled to close on February 1, 2000, but was extended until 5:00 p.m. on February 14, 2000. (See the January 21, 2000 issue of the *Texas Register* (25 TexReg 461)). There were no persons who provided oral testimony regarding this rule package at the hearings and 21 persons submitted written testimony. There were 188 persons who provided oral and written testimony supporting the "Citizen's Implementation Plan" submitted by the Dallas Sierra Club, Downwinders at Risk, Fort Worth Sierra Club, Sustainable Economic and Environmental Development (SEED), Texas Campaign for the Environment, Texas Clean Water Action, and Texas Public Citizen. The City of Cleburne and nine individuals generally supported this proposal. There were no commenters who generally opposed this proposal. The following persons suggested changes to the proposal as stated in the ANALYSIS OF TESTIMONY section of this preamble: the United States Environmental Protection Agency (EPA), Dallas Sierra Club, Downwinders At Risk, Fort Worth Sierra Club, the ITA, SEED, Texas Campaign for the Environment, Texas Chemical Council (TCC), Texas Clean Water Action, Texas Public Citizen, and one individual.

## ANALYSIS OF TESTIMONY

Many individuals commented supporting the adoption of California emission requirements for non-road, large spark-ignition (LSI) engines. One individual stated, "...I support SIP provisions promoting California emission standards, cleaner fuels, and cleaner engines." Another individual responded with

“The California standards for non-road, heavy duty industrial equipment should be adopted.” “We certainly should adopt the California type of pollution controls,” and “Also we need California standards for engines and diesel equipment for non-road industrial equipment and old equipment,” were comments received from two other individuals. Four individuals responded with “100% support” and one other individual commented “Great.”

The City of Cleburne also supported the adoption of California pollution control standards for non-road LSI engines and stated, “By allowing phasing out of higher polluting engines by routine replacement there will be no substantial anticipated increases in costs to small municipalities or other private owners/operators.”

One citizen commented that the rules should also be implemented in the Houston-Galveston non-attainment area.

**The commission appreciates the support for these proposed rules in the DFW area, and is currently considering the California standards for non-road, LSI engines in the Houston/Galveston ozone nonattainment area counties. The California non-road, LSI standard is included in Table 7-1, “List of Potential Control Measures to Meet Shortfall of NO<sub>x</sub> Reductions Needed for Attainment,” of the Houston/Galveston Attainment Demonstration SIP, proposed by the commission on December 16, 1999.**

The “Citizens’ Implementation Plan for Cleaner Air in DFW” submitted by the Dallas Sierra Club, Downwinders at Risk, Fort Worth Sierra Club, SEED, Texas Campaign for the Environment, Texas Clean Water Action, and Texas Public Citizen, stated that there should be no exemptions for recreational equipment, stationary engines, marine vessels, and locomotives or other equipment running on tracks. The American Lung Association Dallas Regional Office, Citizens for a Safe Environment, League of Women Voters of Dallas, Sierra Club Lone Star Chapter, and 184 individuals endorsed the “Citizens’ Implementation Plan for Cleaner Air in DFW.”

**The commission disagrees that there should be no exemptions for this equipment. Federal regulations for adoption of California standards by other states, listed in 40 CFR §85.1606, require that the Texas adopted standards for the non-road vehicles and engines be identical to the California standards for the period of concern. Recreational equipment, stationary engines, marine vessels, and locomotives or other equipment running on tracks are specifically excluded from the definition of “Off-Road Large Spark-Ignition Engines” in 13 CCR 9, §2431, and are not required to meet the emission specifications of 13 CCR 9, §2433(b). Requiring recreational equipment, stationary engines, marine vessels, locomotives or other equipment running on tracks to meet the same standards as 13 CCR 9, §2433(b), would be adopting Texas standards different than the California standards for these non-road engines and equipment. Therefore, the commission has made no changes in response to this comment. The commission may reevaluate this suggestion in the future if additional reductions are needed for attainment of the ozone NAAQS in the covered nonattainment counties.**

The “Citizens’ Implementation Plan for Cleaner Air in DFW” suggested that incentives be given to accelerate the replacement of older, dirtier equipment.

**The commission agrees that incentives would likely accelerate the replacement of older, dirtier equipment; however, none have been identified in time for inclusion in this rule. The commission will continue to work with stakeholders to identify incentives which may be implemented through future rulemaking or other means.**

Dunaway & Cross, General Counsel to the ITA, noted that the California standards phase the implementation of certified engines from 25% of California engine sales in 2001, 50% in 2002, 75% in 2003, and 100% in 2004 and thereafter. The proposed rules do not contain a phase-in schedule and would apply to all new non-road, LSI engines that are produced on or after May 1, 2002. Federal law requires that, “Any State other than California . . . may adopt and enforce . . . standards relating to the control of emissions from non-road vehicles or engines if . . . such standards and implementation and enforcement are identical, for the period concerned, to the California standards authorized by the (EPA) Administrator . . .” 42 USC, §7543(e)(2). The ITA stated that the California regulation requires 100% compliance as of January 1, 2004, and the proposed Texas rules require 100% compliance as of May 1, 2002, which is 19 months earlier.

**The ITA is correct in its interpretation of the federal requirements for adoption of California standards by other states. The implementation of the emission standards must be identical to the California standards for the period concerned; therefore, changes to the proposed implementation**

**schedule in the rules are needed to bring the rules into conformance with the California standards. The phase-in schedule for the California standards begins in 2001, which, for this rulemaking, is less than the two-year period required by 40 CFR §85.1606(d), which specifies that commencement of state emission standards must take effect more than two years after the state adopts the standards. A direct incorporation of California's 2001 phase-in schedule cannot be made and the implementation schedule in the proposed rule does not conform with the California implementation schedule; therefore, the applicability language of the rules has been changed from "engines produced on or after May 1, 2002" to "model year 2004 and subsequent engines," and the implementation date has been changed from May 1, 2002, to January 1, 2004. These changes align the implementation schedule of the standards with the California standard for model year 2004 engines and will conform with 40 CFR, §85.1606(d). Changes to §114.420 and §114.429 have been made to correct these issues.**

The ITA noted that the EPA is considering an LSI regulation and plans to require 100% compliance with the California emission limits, for the useful life of the engines, beginning January 1, 2004. ITA also noted that the EPA intends to issue an official Notice of Proposed Rulemaking in September 2000, with a final regulation published in September 2001. ITA stated that the proposed Texas rules would add no additional emission reductions in the affected counties because they would require the same level of LSI emissions reductions as the EPA rule. ITA suggested that the commission take no action on regulating LSI engines until after the EPA issues a final regulation, and to take action only if additional emission reductions are necessary.

**The commission is aware that the EPA is planning to issue final regulations in September 2001. However, there are currently no federal emission controls on non-road, LSI engines, and the emission reductions from federal programs that have not been proposed or adopted cannot be used in a current SIP to demonstrate attainment. California adopted rules for these engines in October 1998, and 40 CFR §85.1606 allows states to adopt California standards. With no current federal emission controls on non-road, LSI engines, the commission will proceed with adopting the California standards. However, if the EPA establishes federal emission standards on these engines which provide equal or more stringent controls than the California standards, then the commission will consider repealing this rule.**

The ITA commented that it is difficult to adequately comment on the proposed rules due to changes anticipated in response to comments regarding the implementation schedule, inaccuracy of the fiscal note, and important issues which have been left open during the comment period. Due to these issues, the ITA recommended that the rules be re-proposed.

**The commission disagrees that the rules must be re-proposed. The commission believes that adequate notice has been given regarding this rule package and that all of the changes made upon adoption are clearly within the scope of this rulemaking. As the commenter mentioned there are some changes that the commission is making upon adoption of the rules, including a change to the compliance date. These changes arose because of early comments received from this commenter. Prior to the end of the comment period, the commission staff indicated to the commenter that the compliance date issue would most likely be resolved by pushing the date back to 2004. The**

commission indicated at that time that this would not be done through a re-proposal, but upon adoption. It is for this purpose that rules go through public comment. Only when the changes would result in a completely different rule than the one proposed, or include a different class of affected persons, is an agency required to re-propose the rule. In this case the preamble to the proposed rules clearly stated that it was the commission's intent to adopt standards identical to those in California. Therefore, changes which are needed to ensure the standards are identical, are clearly within the scope of this rulemaking, and allowable without re-proposal.

The commission disagrees that the fiscal note information was inaccurate. The commenter noted inaccuracies in the fiscal note regarding a phase-in schedule between 2002 and 2004, although the commenter did not provide information regarding the accuracy of the costs other than the assumption of the phase-in schedule. The costs associated with the adopted version of the rules may be estimated by looking at the costs identified for 2004 and beyond, therefore, the fiscal note actually overestimates the costs by including the two extra years. This information was useful to anyone who wished to comment on a phase-in schedule as requested in the preamble. The commission believes that sufficient cost information was provided to give notice of the potential costs for several versions of these rules, including the version which is being adopted.

Additionally, the commenter was concerned about issues which were left open such as expansion of the rules to cover other areas of the state. It is true that the commission solicited comments on this issue, however, it was clear in the proposed rules that the only area covered by the proposal is the nine-county DFW area. The commission solicited comments on this issue for potential future

**rulemakings, and the rules will have to be re-proposed to cover additional areas of the state. If anything, requesting comment on the potential future expansion provided additional notice to the public.**

**The commission has reconsidered the 12-county DFW area affected by the proposed rules and has determined that implementing the rules in Henderson, Hood, and Hunt counties will not be necessary for attainment. Therefore, Henderson, Hood, and Hunt counties have been removed from §114.429(a).**

**For these reasons the commission does not believe that it is necessary to re-propose these rules prior to adoption.**

The TCC proposed that owners/operators be granted waivers from the requirements if non-road, LSI engines that meet the emission standards are unavailable from the manufacturer. TCC proposed that owners/operators submit a waiver request to the executive director with specific reasons why the engines or equipment is not available by the compliance date. TCC also proposed that the waiver be granted unless the executive director responds adversely within three weeks.

**The commission does not agree that a waiver will be needed because of the unavailability of compliant engines. The California standards were adopted in October 1998 and the implementation of certified engines is phased from 25% of California engine sales in 2001, 50% in 2002, 75% in 2003, and 100% in 2004 and thereafter. As previously noted, the implementation**

**date of the rules has been changed to January 1, 2004, in response to comments submitted by the EPA and ITA. From October 1998 to January 2004, manufacturers have over five years to design and make available non-road, LSI engines that meet the California standards. The commission believes that five years is a sufficient amount of time for manufacturers to develop engines and equipment that meet the standards and supply the DFW nonattainment area with those engines and equipment. Therefore, the waiver clause proposed by TCC will not be incorporated at this time.**

The EPA commented that if the proposed rules were adopted by May 1, 2000, the two-year delay prior to effective date required by 40 CFR §85.1606(d) and two years of California implementation prior to effective date in 40 CFR §85.1606(e) will be met. EPA also commented that if adoption of the rules is delayed past May 1, 2000, the implementation date of the rules would need to be changed to ensure a two-year period from adoption of the standards.

**The commission agrees and notes that the implementation date will be changed from May 1, 2000, to January 1, 2004, in response to comments submitted by the ITA. The new implementation date provides over three years from the date of adoption to implementation of the standards; therefore, the two-year period required by 40 CFR §85.1606(d) and two years of California implementation prior to effective date in 40 CFR §85.1606(e) will be met.**

The EPA questioned the commission authority to incorporate “all future revisions” to 13 CCR 9 in the proposed rules. The TCC also commented that the incorporation of “all future revisions” constitutes an

unconstitutional delegation of legislative authority, citing *Dudding v. Automotive Gas Co.*, 193 S.W.2d 517 (1946), Texas Attorney General Opinion JC-0012 (1999).

**Although the commission believes it has authority to adopt all future revisions by reference, the language incorporating “all future revisions” has been removed. Sections 114.420 through 114.422 have been amended to reflect this change. The commission has made this change to satisfy concerns of the commenters and to allow greater consideration of each change made by California prior to adoption in Texas.**

#### STATUTORY AUTHORITY

The new sections are adopted under the Texas Water Code (TWC), §5.103; which provides the commission the authority to adopt rules necessary to carry out its powers and duties under the TWC.

The new sections are also adopted under the Texas Health and Safety Code, TCAA, §382.011, which provides the commission the authority to control the quality of the state’s air; §382.012, which provides the commission the authority to prepare and develop a general, comprehensive plan for the control of the state’s air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which provides the commission the authority to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

## **CHAPTER 114: CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES**

### **SUBCHAPTER I: NON-ROAD ENGINES**

#### **DIVISION 3: NON-ROAD LARGE SPARK-IGNITION ENGINES**

##### **§114.420. Definitions.**

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise.

(1) The definitions found in Title 13, California Code of Regulations, Chapter 9, §2431, concerning Definitions, as effective on November 18, 1999, are hereby incorporated by reference.

(2) **Non-road, large spark-ignition (LSI) engine** - Any engine that produces a gross horsepower (hp) of 25 hp or greater, or is designed (e.g. through fueling, engine calibrations, valve timing, engine speed modifications, etc.) to produce 25 hp or greater. For engine families which have models at or greater than 25 hp, as well as models below 25 hp, only the models at or above 25 hp are considered LSI engines. The engine operating characteristics are significantly similar to the theoretical Otto combustion cycle, with the primary means of controlling power output being the limit on the amount of air that is throttled into the combustion chamber of the engine. LSI engines or alternate fuel-

powered LSI internal combustion engines are designed for, but not limited to, powering forklift trucks, sweepers, generators, industrial equipment, and other miscellaneous applications.

**(3) New non-road, large spark-ignition (LSI) engine** - Non-road, LSI model year 2004 and subsequent engines, and all equipment and vehicles that use such an engine.

**§114.421. Emission Specifications.**

(a) The provisions of this division shall apply to new non-road, large spark-ignition (LSI) engines as defined in §114.420 of this title (relating to Definitions).

(b) Exhaust emissions from new non-road, LSI engines manufactured for sale, sold, or offered for sale, or that are introduced, delivered or imported for introduction into commerce in the counties listed in §114.429 of this title (relating to Affected Counties and Compliance Schedules) shall not exceed the requirements of Title 13, California Code of Regulations, Chapter 9 (13 CCR 9), §2433(b), concerning Exhaust Emission Standards and Test Procedures -- Off-Road Large Spark-Ignition Engines, as effective on November 18, 1999.

(c) New non-road, LSI engines operated in the counties listed in §114.429 of this title shall not exceed the requirements of 13 CCR 9, §2433(b).

(d) Beginning on January 1, 2004, a new non-road, LSI engine, not including non-road equipment, intended solely to replace an engine in a piece of non-road equipment that was originally produced with an engine manufactured prior to the applicable implementation date as described in §114.429 of this title shall not be subject to the emissions requirements of subsection (b) of this section provided that the requirements of 13 CCR 9, §2433(e), have been met.

**§114.422. Control Requirements.**

(a) The emissions standards for new non-road, large spark-ignition (LSI) engines as certified for use in the State of California in accordance with Title 13, California Code of Regulations, Chapter 9 (13 CCR 9), Article 4.5, concerning Off-Road Large Spark-Ignition Engines, §§2430 - 2439, as effective on November 18, 1999, are hereby incorporated by reference.

(b) The emission control label requirements for new non-road, LSI engines found in 13 CCR 9, §2434, concerning Emission Control Labels -- 2001 and Later Off-Road Large Spark-Ignition Engines, as effective on November 18, 1999, are hereby incorporated by reference.

(c) The warranty statement and requirements for new non-road, LSI engines found in 13 CCR 9, §2435 and §2436, concerning Defects Warranty Requirements for 2001 and Later Off-Road Large Spark-Ignition Engines, and Emission Control System Warranty Statement, as effective on November 18, 1999, are hereby incorporated by reference.

(d) In the event that a new non-road, LSI engine is recalled in the State of California under 13 CCR 9, §2439, concerning Procedures for In-Use Engine Recalls for Large Off-Road Spark-Ignition Engines with an Engine Displacement Greater than 1.0 Liter, the manufacturer shall take identical corrective action to remedy the cause of the recall.

**§114.427. Exemptions.**

(a) All engines and equipment that fall within the scope of preemption as specified in the FCAA, §209(e)(1), as amended on November 15, 1990 (42 United States Code, §7543(e)(1)), and Title 40 Code of Federal Regulations, §85.1604, concerning Adoption of California Standards by Other States, as amended on December 30, 1997, are specifically excluded from the requirements of this division.

(b) The following new non-road, large spark-ignition engines are exempt from the requirements of this division:

(1) engines operated on or in any device used exclusively upon stationary rails or tracks;

(2) engines used to propel marine vessels;

(3) internal combustion engines attached to a foundation at a specific location for at least 12 consecutive months;

(4) non-road, recreational vehicles and snowmobiles; and

(5) stationary or transportable gas turbines used for power generation.

**§114.429. Affected Counties and Compliance Schedules.**

(a) The provisions of this division shall apply in the following counties: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(b) Beginning with model year 2004 but no later than January 1, 2004, all sales of new non-road, large spark-ignition (LSI) engines in the affected counties shall comply with §114.421(b) of this title (relating to Emissions Specifications) and §114.422 of this title (relating to Control Requirements).

(c) Beginning January 1, 2004, new non-road, LSI engines as defined in §114.420 of this title (relating to Definitions) which are used in the affected counties shall comply with §114.421(c) of this title.