

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of Subchapter I, Non-Road Engines; Division 2, Heavy Equipment Fleets - Compression-Ignition Engines; §§114.410, 114.412, 114.416, 114.417, and 114.419; Division 4, Construction Equipment Operating Limitations; §§114.432, 114.436, 114.437, and 114.439; Division 8, Houston/Galveston Heavy Equipment Fleets - Compression-Ignition Engines; §§114.470, 114.472, 114.476, 114.477, and 114.479; Division 9, Houston/Galveston Construction Equipment Operating Restrictions; §§114.482, 114.486, 114.487, and 114.489; and corresponding revisions to the state implementation plan (SIP). These repeals are being proposed as part of the implementation of Senate Bill (SB) 5 (relating to the Texas Emission Reduction Plan) of the 77th Texas Legislature, 2001.

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

The rules under Divisions 2 and 4 being proposed for repeal were originally adopted on April 19, 2000 as part of the SIP control strategy for the Dallas/Fort Worth (DFW) ozone nonattainment area to achieve attainment with the national ambient air quality standard (NAAQS) for ozone. The rules under Divisions 8 and 9 being proposed for repeal were originally adopted on December 6, 2000 as part of the SIP control strategy for the Houston/Galveston (HGA) ozone nonattainment area to achieve attainment with the ozone NAAQS. The purpose of the rules in Divisions 4 and 9 was to establish a restriction on the use of construction and industrial equipment (non-road, heavy-duty diesel equipment rated at 50 horsepower (hp) and greater) as an air pollution control strategy to delay the emissions of nitrogen oxides (NO<sub>x</sub>), a key ozone precursor, until later in the day, thus limiting ozone formation. By delaying the hours of operation during the effective time period, the NO<sub>x</sub> emissions will not mix in the atmosphere with other ozone-causing compounds until later in the day. The critical time for the mixing (chemical reactions) of NO<sub>x</sub> and

volatile organic compounds (VOC) is early in the day, and thus, higher ozone levels occur most frequently on hot summer afternoons. By delaying the operation of the affected equipment, the NO<sub>x</sub> emissions are less likely to mix in the atmosphere with other ozone-forming compounds until after the critical mixing time has passed. Therefore, production of ozone will be stalled until later in the day when optimum ozone formation conditions no longer exist, ultimately minimizing the peak level of ozone produced.

The purpose of the rules in Divisions 2 and 8 was to achieve a reduction of ozone levels by requiring the owners or operators of diesel-powered construction, industrial, commercial, and lawn and garden equipment 50 hp and above to replace their affected equipment with newer Tier 2 and Tier 3 equipment. The rules would have required that the portion of the fleet with affected equipment in the range from 50 hp to 100 hp would be 100% Tier 2 by the end of the calendar year 2007. For the portion of the fleet in the 100 hp to 750 hp range, 50% of such equipment would be Tier 3 and the remaining Tier 2 by the end of the calendar year 2007. Finally, for the portion of the fleet greater than 750 hp, 100% of such equipment would be Tier 2 by the end of calendar year 2007. Tier 2 and Tier 3 equipment emit less NO<sub>x</sub> and VOC than Tier 1 and unregulated equipment, therefore formation of ozone would be reduced.

Recently, the 77th Legislature of the State of Texas passed SB 5. Section 18 of SB 5 requires the commission to submit a SIP revision to the United States Environmental Protection Agency (EPA) deleting the requirements of these rules from the SIP no later than October 1, 2001. If adopted, these rule repeals will be submitted to EPA as a SIP revision, thus implementing this legislative requirement.

The diesel emission reduction incentive program contained in SB 5 will replace the existing rules and result in a similar level of emission reductions. Therefore, the NO<sub>x</sub> reductions previously claimed in the DFW Attainment Demonstration SIP will, as a result of this rulemaking, be achieved through an alternate, but equivalent federally enforceable mechanism.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications to units of state or local government as a result of implementation of the proposed amendments, which are intended to repeal the construction equipment operating limitations rules and the accelerated purchase of Tier 2/Tier 3 diesel equipment rules for the DFW nonattainment area adopted by the commission in April 2000, and adopted for the HGA nonattainment area in December 2000.

Because the adopted April 2000 and December 2000 rules did not require emission reductions until 2004, the commission estimates there have been no significant fiscal expenditures to units of state and local government to comply with the adopted rules which are now proposed for repeal.

The existing rules would have: 1) prohibited owners and operators of diesel-powered construction and industrial equipment 50 hp and above from operating their affected equipment during the ozone season from 6:00 a.m. - 10:00 a.m. in DFW and 6:00 a.m. - noon in HGA beginning in 2005; and 2) required owner/operators in DFW and HGA to replace their diesel-powered construction, industrial, commercial,

and lawn and garden equipment 50 hp and above with newer Tier 2 and Tier 3 equipment beginning in December 2004.

The existing rules would have affected units of state and local government with ongoing or future construction projects and those units that owned and operated diesel equipment 50 hp and larger used in the construction, general industrial, lawn and garden, utility, and material handling categories in the DFW and HGA ozone nonattainment areas. Examples of equipment in the construction category include backhoes, bore/drill rigs, cement mixers, crawler tractors, excavators, graders, off-highway trucks, pavers, paving equipment, plate compactors, rollers, rubber-tire dozers, rubber-tire loaders, scrapers, signal boards, skid-steer loaders, trenchers, and feller/bunchers. Examples of equipment in the general industrial category include concrete/industrial saws, crushing equipment, oil field equipment, refrigeration/air conditioning units, scrubber/sweepers, and rail maintenance equipment. Examples of equipment used in the lawn and garden category include garden tractors, rear engine mowers, and chipper/grinders. Examples of equipment in the utility category include air compressors, hydro-power units, pressure washers, pumps, generator units, irrigation units, and welders. Examples of equipment in the material handling category include aerial lifts, cranes, forklifts, and rough-terrain forklifts.

The commission estimated at the proposal of the original rules that it would have cost affected owners and operators in DFW an estimated \$50 - \$70 million a year (actual cost was only derived for the Tier 2/3 rules) and owners and operators in HGA an estimated \$100 - \$135 million a year (\$70 - \$93 million for the construction operating restrictions rules and \$30 - \$42 million for the Tier 2/3 rules) to comply with the rule requirements that are being repealed in this rulemaking action. The specific number of units of state

and local government that would have had to comply with the existing rules, which are now proposed to be repealed, was not identified during the proposal period for these rules.

#### PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from the proposed rulemaking will be the implementation of certain provisions of SB 5, which directed the agency to delete the construction equipment operating restrictions rules and the accelerated purchase of Tier 2/Tier 3 diesel equipment rules from the SIP.

Because the existing rules, adopted in April 2000 and December 2000, did not require emission reductions until 2004, the commission estimates there have been no significant fiscal expenditures to individuals and businesses to comply with the existing rules which are now proposed to be repealed.

The existing rules would have: 1) prohibited owners and operators of diesel-powered construction and industrial equipment 50 hp and above from operating their affected equipment during the ozone season from 6:00 a.m. - 10:00 a.m. in DFW and 6:00 a.m. - noon in HGA beginning in 2005; and 2) require owner/operators in DFW and HGA to replace their diesel-powered construction, industrial, commercial, and lawn and garden equipment 50 hp and above with newer Tier 2 and Tier 3 equipment beginning in December 2004.

The existing rules would have affected individuals and businesses with ongoing or future construction projects and those entities that owned and operated diesel equipment 50 hp and larger used in the

construction, general industrial, lawn and garden, utility, and material handling categories in the DFW and HGA ozone nonattainment areas.

The commission estimated at the proposal of the existing rules, that it would have cost affected owners and operators in DFW an estimated \$50 - \$70 million a year (actual cost was only derived for the Tier 2/3 rules) and owners and operators in HGA an estimated \$100 - \$135 million a year (\$70 - \$93 million for the construction shift rules and \$30 - \$42 million for the Tier 2/3 rules) to comply with the rule requirements that are being repealed in this rulemaking action.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed changes, which would repeal the existing rules regarding heavy equipment fleets, compression-ignition engines and the rules regarding construction equipment operating restrictions which were adopted in April 2000 for the DFW ozone nonattainment area and in December 2000 for the HGA ozone nonattainment area.

Because the existing rules, adopted April 2000 and December 2000, did not require emission reductions until 2004, the commission estimates there have been no significant fiscal expenditures to small or micro-businesses to comply with the existing rules which are now proposed to be repealed.

The existing rules would have: 1) prohibited owners and operators of diesel-powered construction and industrial equipment 50 hp and above from operating their affected equipment during the ozone season

from 6:00 a.m. - 10:00 a.m. in DFW and 6:00 a.m. - noon in HGA beginning in 2005; and 2) required owner/operators in DFW and HGA to replace their diesel-powered construction, industrial, commercial, and lawn and garden equipment 50 hp and above with newer Tier 2 and Tier 3 equipment beginning in December 2004.

The existing rules would have affected small and micro-businesses with ongoing or future construction projects and those entities that owned and operated diesel equipment 50 hp and larger used in the construction, general industrial, lawn and garden, utility, and material handling categories in the DFW and HGA ozone nonattainment areas.

The commission estimated at the proposal of the existing rules that it would have cost affected owners and operators in DFW an estimated \$50 - \$70 million a year (actual cost was only derived for the Tier 2/3 rules) and owners and operators in HGA an estimated \$100 - \$135 million a year (\$70 - \$93 million for the construction shift rules and \$30 - \$42 million for the Tier 2/3 rules) to comply with the rule requirements that are being repealed in this rulemaking action. The specific number of small or micro-businesses that would have had to comply with the existing rules, which are now proposed to be repealed, was not identified during the proposal period of these rules.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a “major environmental rule” as defined in that statute. 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. The rules being proposed for repeal were intended to protect the environment and reduce risks to human health from environmental exposure to ozone and would have affected, in a material way, a sector of the economy, competition, and the environment.

This rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rules proposed for repeal are being replaced by a reduction strategy which will result in NO<sub>x</sub> emission reductions similar to the NO<sub>x</sub> reductions that would have been achieved by the rules. These agreements will protect the environment and reduce risks to human health from environmental exposure to ozone. Therefore this rulemaking action 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.

#### TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for this proposed repeal of rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of

this rulemaking is to repeal Subchapter I, Non-Road Engines; Division 2, Heavy Equipment Fleets - Compression-Ignition Engines; §§114.400, 114.412, 114.416, 114.417, and 114.419; Division 4, Construction Equipment Operating Limitations; §§114.432, 114.436, 114.437, and 114.439; Division 8, Houston/Galveston Heavy Equipment Fleets - Compression-Ignition Engines; §§114.470, 114.472, 114.476, 114.477, and 114.479; Division 9, Houston/Galveston Construction Equipment Operating Restrictions; §§114.482, 114.486, 114.487, and 114.489; and corresponding revisions to the SIP. These rules will be replaced by reductions resulting from voluntary and incentive programs authorized by SB 5 which will obtain the similar NO<sub>x</sub> reductions necessary for the DFW and HGA ozone nonattainment areas to meet the NAAQS established under federal law. These repeals do not burden private real property.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

When HGA and DFW rules regarding heavy equipment fleets, compression-ignition engines and the rules regarding construction equipment operating restrictions were originally adopted, the commission determined that the proposed rulemaking related 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 Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §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 the previous adoption action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action was consistent with the applicable CMP goals and policies. The CMP goal applicable to

the rulemaking action was the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants were authorized and NO<sub>x</sub> air emissions were anticipated to be reduced as a result of these rules. The CMP policy applicable to the rulemaking action was 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)). The rulemaking action complied with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), these rulemaking actions were determined to be consistent with CMP goals and policies.

The repeal of these rules will not invalidate the determination that the previous rulemaking actions were consistent with CMP goals and policies, because the rules proposed for repeal are being replaced by voluntary and incentive programs authorized by SB 5, which will result in NO<sub>x</sub> emission reductions similar to the NO<sub>x</sub> reductions that would have been achieved by the rules. Therefore, this rulemaking action is also consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

#### ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal on August 13, 2001 at 2:00 p.m., Houston City Hall Council Chambers, 2nd Floor, 901 Bagby, Houston; on August 14, 2001 at 9:00 a.m., Texas Natural Resource Conservation Commission, Building E, Room 201S, 12100 Park 35 Circle, Austin; and on August 14, 2001 at 2:00 p.m., North Central Texas Council of Governments, Transportation Board Room, 3rd Floor, 616 Six Flags Drive, Arlington. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing, and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, and who are planning to attend a hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Ms. Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-4808; or emailed to [terp@tnrcc.state.tx.us](mailto:terp@tnrcc.state.tx.us). All comments should reference Rule Log Number 2001-025a-114-AI.

Comments must be received by 5:00 p.m., August 14, 2001. The latest version of these proposed rules in

Chapter 114 and the SIP revision are available on the commission's web site at

<http://www.tnrcc.state.tx.us/oprd/sips/terp.html>. For further information, please contact Bill Jordan at (512) 239-2583 or Alan Henderson at (512) 239-1510.

#### STATUTORY AUTHORITY

The repeals are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These repeals are also proposed under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. Finally, these proposed repeals are required as part of the implementation of SB 5, §18, Acts of the 77th Legislature, 2001.

These proposed repeals implement SB 5, §18.

**SUBCHAPTER I: NON-ROAD ENGINES**

**DIVISION 2: HEAVY EQUIPMENT FLEETS - COMPRESSION-IGNITION ENGINES**

**§§114.410, 114.412, 114.416, 114.417, 114.419**

**§114.410. Definitions.**

**§114.412. Control Requirements.**

**§114.416. Reporting and Recordkeeping Requirements.**

**§114.417. Exemptions.**

**§114.419. Affected Counties.**

**SUBCHAPTER I: NON-ROAD ENGINES**

**DIVISION 4: CONSTRUCTION EQUIPMENT OPERATING LIMITATIONS**

**§§114.432, 114.436, 114.437, 114.439**

**STATUTORY AUTHORITY**

The repeals are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These repeals are also proposed under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. Finally, these proposed repeals are required as part of the implementation of SB 5, §18, Acts of the 77th Legislature, 2001.

These proposed repeals implement SB 5, §18.

**§114.432. Control Requirements.**

**§114.436. Recordkeeping Requirements.**

**§114.437. Exemptions.**

**§114.439. Affected Counties and Compliance Dates.**

**SUBCHAPTER I: NON-ROAD ENGINES**

**DIVISION 8: HOUSTON/GALVESTON HEAVY EQUIPMENT FLEETS - COMPRESSION-IGNITION ENGINES**

**§§114.470, 114.472, 114.476, 114.477, 114.479**

**STATUTORY AUTHORITY**

The repeals are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These repeals are also proposed under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. Finally, these proposed repeals are required as part of the implementation of SB 5, §18, Acts of the 77th Legislature, 2001.

These proposed repeals implement SB 5, §18.

**§114.470. Definitions.**

**§114.472. Control Requirements.**

**§114.476. Reporting and Recordkeeping Requirements.**

**§114.477. Exemptions.**

**§114.479. Affected Counties.**

**SUBCHAPTER I: NON-ROAD ENGINES**

**DIVISION 9: HOUSTON/GALVESTON CONSTRUCTION EQUIPMENT OPERATING  
RESTRICTIONS**

**§§114.482, 114.486, 114.487, 114.489**

**STATUTORY AUTHORITY**

The repeals are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These repeals are also proposed under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. Finally, these proposed repeals are required as part of the implementation of SB 5, §18, Acts of the 77th Legislature, 2001.

These proposed repeals implement SB 5, §18.

**§114.482. Control Requirements.**

**§114.486. Recordkeeping Requirements.**

**§114.487. Exemptions.**

**§114.489. Affected Counties and Compliance Dates.**