

The Texas Natural Resource Conservation Commission (commission) adopts 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 adopted as part of the implementation of Senate Bill (SB) 5 (relating to the Texas Emission Reduction Plan) of the 77th Texas Legislature, 2001. Sections 114.410, 114.412, 114.416, 114.417, 114.419, 114.432, 114.436, 114.437, 114.439, 114.470, 114.472, 114.476, 114.477, 114.479, 114.482, 114.486, 114.487, and 114.489 are adopted *without changes* to the proposal as published in the July 20, 2001 issue of the *Texas Register* (26 TexReg 5350).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE RULE REPEALS

The rules under Divisions 2 and 4 being repealed were originally adopted on April 19, 2000 as part of the SIP control strategy for the Dallas/Fort Worth (DFW) ozone nonattainment area to achieve attainment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 The rules under Divisions 8 and 9 being repealed were originally adopted on December 6, 2000 as part of the SIP control strategy for the Houston/Galveston (HGA) ozone nonattainment area to achieve attainment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_x), 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_x emissions would 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_x 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_x 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 would 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_x and VOC than Tier 1 and unregulated equipment, therefore formation of ozone would be reduced.

Recently, the 77th Texas Legislature 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. 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_x 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.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action 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 repealed 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 repealed rules are being replaced by a reduction strategy which will result in NO_x emission reductions similar to the NO_x 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. However, 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 these repeals under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rulemaking action 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 to make corresponding revisions to the SIP. These repealed rules will be replaced by reductions resulting from voluntary and incentive programs authorized by SB 5 which will obtain the similar NO_x 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 with compression-ignition engines and the rules regarding construction equipment operating restrictions were originally adopted, the commission determined that the 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_x 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 repealed rules are being replaced by voluntary and incentive programs authorized by SB 5, which will result in NO_x emission reductions similar to the NO_x reductions that would have been achieved by the rules. Therefore, this rulemaking action is also consistent with CMP goals and policies.

The commission solicited comments on the consistency of the proposed repeals with the CMP during the public comment period but no comments were received.

HEARINGS AND COMMENTERS

The commission held public hearings on this proposal on August 13, 2001 in Houston; on August 14, 2001 in Austin and in Arlington. The comment period closed on August 14, 2001. Comments were received from the Association of Automotive Service Providers (AASP); Behthul & Kean, LLP on behalf of the Associated Builders and Contractors of Greater Houston (Associated-Houston); Business Coalition for Clean Air (BCCA); City of Fort Worth (Fort Worth); City of Houston (Houston); Galveston-Houston Association for Smog Prevention (GHASP); Good Company (Good); Houston Sierra Club (Sierra-Houston); Alliance of Automobile Manufacturers (AAM); JMS Ventures (JMS); Metron Management (Metron); Metropolitan Transit Authority (Metro-Houston); Port of Houston (POH); Power Systems Associates on behalf of Darr Equipment Company, Holt Power Systems, and Mustang Power Systems (PSA); Public Citizen, Texas Office on behalf of the Texas Campaign for the Environment, SEED Coalition, Clean Water Action, Environmental Defense, and Sierra Club - Texas/Arkansas Field Office (Public Citizen); Sierra Club Texas/Arkansas Field Office (Sierra-

TX/AR); Sneed Institute (Sneed); Texas Campaign for the Environment (TCE); TXU Business Services (TXU); Texas Clean Air Working Group (TCAWG); Texas Department of Transportation (TxDOT); Texas State Inspection Association (TSIA); TranStar Energy Company (TranStar); EPA; and seven individuals.

RESPONSE TO COMMENTS

All the commenters were generally supportive of the repeals of the construction shift rules and Tier 2/Tier 3 rules, with some exceptions. Sierra-Houston did not support the repeal of the Tier 2/Tier 3 rules.

The commission has no choice other than to follow direction given by the Texas Legislature.

Senate Bill 5 specified that the Tier 2/Tier 3 rules will be removed from the SIP.

BCCA, Houston, and TCAWG commented that they support the repeals of the construction shift rules and Tier 2/Tier 3 rules and recommend that the commission fund projects in HGA so as to replace all of the reductions that would have been achieved with these two rules in place. In addition, BCCA suggested funding an additional 20 tons per day (tpd) to partially make up the remaining 56 tpd gap in the HGA SIP. Houston commented that the commission should maximize emission reductions and should facilitate the development and implementation of new technologies.

The commission agrees with the comments and plans to allocate funding of the SB 5 program, to the extent possible, to first cover the repealed rules and then 20 tpd of the gap. Further, the

commission will attempt to maximize the emission reductions from this program and aggressively encourage the development of new technology. The commission may reassess the funding levels after the first year of the program.

STATUTORY AUTHORITY

The repeals are adopted 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 adopted 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 repeals are required as part of the implementation of SB 5, §18, 77th Legislature, 2001.

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 adopted 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 adopted under Texas Health and Safety Code, 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 repeals are required as part of the implementation of SB 5, §18, 77th Legislature, 2001.

§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 adopted 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 adopted under Texas Health and Safety Code, 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 repeals are required as part of the implementation of SB 5, §18, 77th Legislature, 2001.

§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 adopted 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 adopted under Texas Health and Safety Code, 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 repeals are required as part of the implementation of SB 5, §18, 77th Legislature, 2001.

§114.482. Control Requirements.

§114.486. Recordkeeping Requirements.

§114.487. Exemptions.

§114.489. Affected Counties and Compliance Dates.

