

Texas Natural Resource Conservation Commission

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** July 6, 2001

Thru: LaDonna Castañuela
Chief Clerk

From: Randolph Wood, Deputy Director
Office of Environmental Policy, Analysis, and Assessment

Subject: Consideration of a Petition for Proposed Rulemaking

Caption: **Docket No. 2001-0759-RUL.** Consideration of a petition for rulemaking filed by the Law Office of Erich Birch, P.C. on behalf of Rock-Tenn Company requesting that the commission revise 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds, Section 117.520, Compliance Schedule for Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas, to extend the compliance date for major sources of nitrogen oxides in the Dallas/Fort Worth ozone nonattainment area from March 31, 2002 to March 31, 2004. The staff recommendation is to deny the petition. (Eddie Mack/Janis Hudson/Jill Burditt) (Rule Log No. 2001-064-PET-AI)

Who Submitted the Petition:

On June 12, 2001, the commission received a petition for rulemaking from the Law Office of Erich Birch, P.C. on behalf of Rock-Tenn Company concerning the company's paper recycling operation in Dallas.

What the Petition Requests:

The petitioner requests rulemaking to revise 30 TAC §117.520(b) to extend the compliance date for owners and operators of industrial, commercial, and institutional combustion sources at major sources of nitrogen oxides (NO_x) in the Dallas/Fort Worth ozone nonattainment area (DFW) from March 31, 2002 to March 31, 2004.

Recommended Action and Justification:

The commission is required to act within 60 days after receiving a petition by denying the petition in writing stating the reasons for denial or by initiating rulemaking. Staff recommends denial of this petition for several reasons.

First, and most importantly, revisions to the compliance dates would require a revision to the state implementation plan (SIP) and, therefore, could jeopardize United States Environmental Protection Agency's (EPA) approval, effective April 16, 2001, of the Chapter 117 rules for major sources in DFW. These rules are a vital component of the DFW Attainment Demonstration SIP. Revisions to

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the compliance dates could also jeopardize EPA's proposed approval of the DFW Attainment Demonstration SIP (published in the January 18, 2001 issue of the *Federal Register*). The EPA has limited ability to delay DFW NO_x reduction measures because it is operating under a consent decree which allows it to approve extended attainment dates for areas such as DFW only if the individual SIP control measures are implemented as expeditiously as practicable.

The NO_x rules and compliance schedules adopted by the commission on April 19, 2000 provide for an expeditious, yet reasonable, implementation of emission reductions. The proposal was published in the December 31, 1999 issue of the *Texas Register*. The rules were highly publicized in the DFW area, and ten public hearings were held from January 24, 2000 through February 9, 2000. The comment period was originally scheduled to close on February 1, 2000, but was extended until February 14, 2000. Rock-Tenn did not comment on the rules when they were proposed for public comment. Staff did not specifically address Rock-Tenn in the preamble because Rock-Tenn was not identified as an affected facility since the company did not submit the required emissions inventory (EI) for any years prior to 1999. (Rock-Tenn is required by §101.10 to submit an annual EI; however, the company's first EI submittal (for calendar year 1999) was not received until March 16, 2000.)

Rock-Tenn suggested that the commission's adoption of the April 19, 2000 rule was based on incomplete information since Rock-Tenn was not specifically addressed in the preamble. Rock-Tenn stated that the commission set a shorter compliance schedule for non-utility sources in DFW than in Beaumont/Port Arthur since the DFW units do not operate "in near-continuous duty with strictly limited turnarounds." In contrast, Rock-Tenn stated that it operates continuously. It should be noted, however, that two similar boilers in DFW, which have already been modified to comply with the same emission standards to which Rock-Tenn is subject, were described by a company representative as operating "as steady-state as you can imagine." In other words, these boilers are quite comparable to Rock-Tenn's. The modifications to these boilers required less than one week of down time to complete.

Additionally, the petitioner states that Rock-Tenn cannot financially justify expending the funds necessary to modify or replace its boiler according to the schedule in the rule. The current Chapter 117 rules already allow flexibility for owners or operators of units in DFW to make individual business decisions to comply with emission control requirements either by installing and operating controls or by obtaining an emission reduction credit, mobile emission reduction credit, discrete emission reduction credit, or mobile discrete emission reduction credit under Chapter 101. Therefore, Rock-Tenn has alternative compliance options available. The TNRCC cannot control the availability or price of reduction credits.

Rock-Tenn asserts that its boiler would have to be out of service for ten weeks to make the necessary modifications. As noted previously, two similar boilers in DFW required less than one week of down time to be modified to comply with the same emission standards to which Rock-Tenn is subject. Also of note, since Rock-Tenn states that the drastic rise in the price of natural gas is one of the factors affecting its financial difficulties, is that the cost of the modifications for these similar boilers was estimated to be paid for by fuel savings within two years.

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Finally, because the compliance date is less than nine months away, other facilities subject to the same rules have already begun preparing for and making the modifications necessary to achieve compliance with the rules. Staff is aware of other sources with similar boilers in DFW which are in the process of being replaced or have already been modified to comply with the NO_x rules. Therefore, changing the compliance date for one facility this near to the deadline would be unjust to other facilities subject to the rule.

Staff realizes that Rock-Tenn plays a beneficial role as a paper recycler. However, staff believes for the reasons explained that a revision to the rule is not the appropriate solution for Rock-Tenn's situation. As an alternative to its petition, Rock-Tenn is also seeking a Regulatory Flexibility Order under Chapter 90.

Applicable Law:

Texas Government Code, §2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule;

Texas Clean Air Act (TCAA), Texas Health and Safety Code, §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 §382.017, concerning Rules, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA;

Federal Clean Air Act (FCAA) Amendments of 1990 as codified in 42 United States Code (USC), §7410, which requires a demonstration of attainment of the national ambient air quality standard (NAAQS) for ozone; 42 USC, §7502(a)(2), which requires attainment as expeditiously as practicable; and 42 USC, §7511a(c), which requires states to submit ozone attainment demonstration SIPs for serious ozone nonattainment areas such as DFW.

Affected Public:

A change to §117.520(b) as requested would affect all owners and operators of industrial, commercial, and institutional combustion sources at major sources of NO_x in the DFW ozone nonattainment area.

Affected Agency Programs:

The Field Operations Division of the Office of Compliance and Enforcement (OCE) conducts field inspections from the Arlington regional office to verify compliance with the Chapter 117 rule provisions. The Office of Permitting, Registration, and Evaluation, Air Permits Division, develops federal operating permits for these sources. The Strategic Assessment Division, Strategic Implementation Plans Section, of the Office of Environmental Policy, Analysis, and Assessment develops the Chapter 117 rules and SIP revisions.

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Attachment: Petition for Rulemaking from the Law Office of Erich Birch, P.C. on behalf of Rock-Tenn
Company

cc: 7 copies to the Chief Clerk for distribution