

The Texas Commission on Environmental Quality (TCEQ or commission) proposes the repeal of §§114.3, 114.150, 114.151, and 114.153 - 114.157.

The commission also proposes to submit to the United States Environmental Protection Agency (EPA) revisions to the state implementation plan (SIP) addressing the repeal of these rules.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Federal Clean Air Act Amendments of 1990 (FCAA), §182(c)(4), required states to either adopt the Federal Clean Fuel Fleet (FCFF) Program outlined in FCAA, §246, or implement a program that demonstrates long-term reductions in ozone-producing and toxic air emissions equal to those achieved under the FCFF Program.

The FCFF Program requires federal, state, and local governments, and private fleets to purchase low emission vehicles (LEVs) in areas classified by the EPA as being in serious, severe, or extreme nonattainment of the National Ambient Air Quality Standards (NAAQS) for ozone and carbon monoxide (CO). The federal program mandates increasing percentages of LEV purchases by the affected fleets in the covered nonattainment areas in vehicle model years 1999, 2000, and 2001.

The State of Texas, in a committal SIP revision submitted to the EPA on November 15, 1992, opted out of the FCFF Program in order to implement a fleet emission control program designed by the state.

In 1994, the commission submitted the state's opt-out program in a SIP revision to the EPA and adopted rules to implement the Texas Alternative Fuel Fleet Program as a substitute to the FCFF Program in the areas of Texas classified by EPA as being in serious, severe, or extreme nonattainment of the NAAQS for ozone or CO.

In 1995, the 74th Legislature modified the state's alternative fuels program through the passage of Senate Bill (SB) 200. The legislature facilitated fuel neutrality through the incorporation of the federal LEV standards for certain affected fleets regardless of fuel type. The legislation required the commission to adopt regulations to implement the program in all ozone nonattainment areas.

In response, the commission adopted regulations to implement the modified program and developed a revision to the SIP outlining the state's substitute program to the FCFF Program. However, the 75th Legislature met in 1997 and removed the commission's authority to require the program in moderate nonattainment areas through passage of SB 681. This new legislation limited the commission's authority to the serious and above ozone nonattainment areas. In addition, SB 681 modified the state's alternative fuels program. The legislature retained the basic requirement of LEV purchases, but modified the implementation schedule, added an additional exception from the program, and altered the grandfathering provisions of the statute. This new legislation required the commission to adopt regulations to implement the program.

On December 16, 1997, the EPA finalized federal regulations for the National Low Emission Vehicle (NLEV) Program. The NLEV Program was developed to allow manufacturers to commit to meet

tailpipe standards for cars and light-duty trucks that were more stringent than the EPA could mandate prior to 2004. The EPA made a final determination on implementation of NLEV on March 2, 1998. With the NLEV Program successfully implemented nationally, the commission was able to use emission reductions achieved through the NLEV Program to offset any shortfall in emission reductions resulting from the state's substitute for the FCFE Program.

On July 29, 1998, the commission adopted regulations and a revision of the Texas Clean Fleet (TCF) SIP to set forth the LEV requirements for mass transit fleets in each of the serious and above nonattainment areas, and for local government and private fleets operated primarily within the serious and above nonattainment areas. These rules satisfied the state requirements to adopt rules to implement SB 681.

On February 10, 2000, the EPA finalized federal regulations for the Tier II emission standards for all passenger vehicles, including sport utility vehicles (SUVs), minivans, vans, and light-duty trucks that were 77% - 95% cleaner than the current emission standards. The new emission standards set a corporate average standard for nitrogen oxides of 0.07 grams per mile for all classes of passenger vehicles beginning in 2004. This includes all light-duty trucks, as well as the largest SUVs. Vehicles weighing less than 6,000 pounds will be phased-in to this standard between 2004 and 2007. Later that same year on October 6, 2000, the EPA finalized federal regulations for emission standards for model year 2004 and newer heavy-duty diesel engines (HDDE) and vehicles that were equivalent to the ultra low emission vehicle (ULEV) standards under the FCFE Program.

In June 2005, the state statutes requiring the commission to establish and implement LEV requirements for mass transit fleets and for private and local government fleets (i.e., the TCF Program) as codified in Texas Health and Safety Code (THSC), Chapter 382, Subchapter F, were repealed by SB 1032 by the 79th Legislature, 2005. Currently, the commission's rules in §§114.3 and 114.150, 114.151, and 114.153 - 114.157 implementing these statutes require mass transit authorities, private companies, and local government fleets in the Houston-Galveston-Brazoria (HGB), Dallas-Fort Worth (DFW), and El Paso ozone nonattainment areas to ensure that a specified percentage of their new fleet vehicle purchases are vehicles that have been certified by the EPA to the federal LEV standards.

The commission had recommended that the Texas Legislature repeal these enabling statutes because the LEV standards have been superseded by the cleaner federal Tier II emission standards that were promulgated in February 2000 and the federal 2004 heavy-duty engine emission standards that were promulgated in October 2000. As a result of these new emission standards, requiring fleets to comply with a mandatory LEV percent-of-purchase requirement is no longer an effective method to reduce emissions from fleet vehicles. In addition, the continued implementation of a mandatory vehicle purchase program is no longer necessary since, under the Texas Emissions Reduction Plan (TERP), the commission's Emissions Reduction Incentive Grants Program provides financial incentives to private, local government (including school districts), and mass transit fleets to voluntarily purchase the cleanest vehicles possible that meet their operational needs.

The proposed repeal of these rules would have no impact on the emissions from fleets since all new fleet vehicles are being certified by the EPA to either the federal Tier II emission standards or the

federal 2004 heavy-duty engine emission standards, both of which are cleaner than the federal LEV standards currently being required under these rules. In addition, the proposed repeals would remove an administrative burden since the affected fleets would no longer be required to submit biennial fleet compliance reports to the commission.

In conjunction with the proposed repeal of these rules, the commission proposes to revise the SIP to remove the TCF Program as an ozone control strategy since the federal emission standards for model year 2004 and later light-duty and heavy-duty motor vehicles are more stringent than those required by the FCFF Program as outlined in the FCAA. The federal emission standards for HDDE in model years 2004 - 2006 are equivalent to the heavy-duty ULEV standards under the FCFF Program and the federal standards for HDDE in model years 2007 and later are approximately 90% cleaner than ULEV. The emission reductions achieved by the Tier II and HDDE standards far surpass the emission reductions that would be expected from implementation of the TCF Program in any of the state's ozone nonattainment areas. The commission requests that the EPA accept the implementation of the Tier II and HDDE emission standards as a substitute to the FCFF Program in the areas of Texas classified by the EPA as being in serious, severe, or extreme nonattainment of the NAAQS for ozone or CO.

SECTION BY SECTION DISCUSSION

The proposed rulemaking would repeal §114.3 in Subchapter A and §§114.150, 114.151, and 114.153 - 114.157, Subchapter E, in its entirety, in accordance with the directive indicated by SB 1032 by the 79th Legislature.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Walter Perry, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed repeals are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government.

The proposed action implements SB 1032, and would repeal the existing rules governing the TCF Program. The standards identified under this program have since been superseded by the cleaner federal Tier II emission standards and the federal 2004 heavy-duty engine emission standards. The continued implementation of the TCF Program is no longer necessary. Under TERP, the commission's Emissions Reduction Incentive Grants Program provides financial incentives to private, local government (including school districts), and mass transit authorities to voluntarily purchase the cleanest vehicles possible that meet their operational needs. The vehicles purchased through this program meet or exceed the new Tier II and federal 2004 heavy-duty engine emission standards.

The proposed repeals would affect all mass transit authorities in the state and all state government, local government, and private fleets in the HGB, DFW, and El Paso ozone nonattainment areas. Under the existing rules, the affected entities were required to report their percentage of the fleet purchases that were certified to be compliant with the EPA's federal LEV standards. Entities that were required to report this information to the agency on a biennial basis would no longer be required to report the information or maintain compliance records. State and local governments may realize a cost savings as a result of the reduced administrative costs required to ensure that a percentage of their new

fleet vehicle purchases are certified by the EPA to meet the LEV standards and the costs to prepare and submit compliance reports on a biennial basis. These cost savings are not anticipated to be significant.

PUBLIC BENEFITS AND COSTS

Mr. Perry also determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from the changes seen in the proposed action would be a more efficient use of state resources.

The proposed repeal of the TCF rules would eliminate the need for mass transit authorities in the state, as well as state and local governments, and private fleets that operate primarily in the HGB, DWF, and El Paso ozone nonattainment areas to report the percentage of their fleet purchases that have been certified to be compliant with the EPA's federal LEV standards. The affected entities that were required to report this information to the agency on a biennial basis would no longer be required to report the information or maintain compliance records. The anticipated cost savings associated with the proposed action would result from the reduction in administrative costs required to ensure that a percentage of their new fleet vehicle purchases are certified by the EPA to meet the LEV standards and the costs to prepare and submit compliance reports on a biennial basis. These cost savings are not anticipated to be significant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed action. The repeal of the rules would result in no additional costs for small and micro-businesses.

Small and micro-businesses would experience the same potential cost savings as local governments and industry.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed action and determined that a local employment impact statement is not required because the proposed repeals do not adversely affect a local economy in a material way for the first five years that the proposed repeals are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed repeals in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the repeals do not meet the definition of a “major environmental rule.” Under Texas Government Code, §2001.0225, “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 proposed repeals would eliminate commission rules that currently require mass transit authorities, private companies, and local government fleets in the HGB, DFW, and El Paso ozone nonattainment areas to ensure that a specified percentage of their new fleet vehicle purchases are vehicles certified by the EPA as LEVs under the federal LEV standards. The proposed action is a rules repeal, and it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The TCF Program currently regulates a sector of the economy. Repeal of the program is therefore unlikely to adversely affect in a material

way the economy, a sector of the economy, productivity, competition, or jobs. Under TERP, the commission's Emissions Reduction Incentive Grants Program provides financial incentives to private, local government (including school districts), and mass transit fleets to voluntarily purchase the cleanest vehicles possible that meet their operational needs. This means the repeals are also unlikely to adversely affect in a material way the environment or public health and safety. Because the repeals would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, the repeals do not fit the Texas Government Code, §2001.0225, definition of "major environmental rule."

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the proposed repeals do not constitute a major environmental rule, a regulatory impact analysis is not required. The commission invites public comment regarding this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), "taking" means: 1) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or 2) a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or

limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a taking impact analysis for the proposed repeals. The repeal of the rules would not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The repeals also would not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed repeals would not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the proposed repeals relate 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 this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and

determined that the proposed repeals are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. The proposed action and SIP revision would ensure that the repeals comply with 40 Code of Federal Regulations (CFR) Part 50, National Primary and Secondary Air Quality Standards, and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. This proposed action is consistent with CMP goals and policies, in compliance with 31 TAC §505.22(e).

The commission solicits comments on the consistency of the proposed repeals with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 114 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; therefore, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permit to include the revised Chapter 114 requirements at their sites affected by the revisions to Chapter 114.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin, Texas, on January 10, 2006, at 10:00 a.m. in Building E, Room 201S, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals

may present oral or written statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak.

There will be no open discussion during the hearing; however, agency staff members will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Holly Vierk, Office of Legal Services, at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Brandon Smith, MC 206, Chief Engineer's Office, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-5687; or emailed to siprules@tceq.state.tx.us. All comments should reference Rule Project Number 2005-067-114-EN. Comments must be received by 5:00 p.m. on January 17, 2006. The proposed rules may be viewed on the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Morris Brown, Air Quality Planning and Implementation Division, at (512) 239-1438.

SUBCHAPTER A: DEFINITIONS

[§114.3]

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code (TWC), §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of THSC, Chapter 382 (also known as the Texas Clean Air Act). The repeal is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles.

The proposed repeal implements THSC, §§382.002, 382.011, 382.012, and 382.019.

§114.3. Low Emission Vehicle Fleet Definitions.

[SUBCHAPTER E: LOW EMISSION VEHICLE FLEET REQUIREMENTS]

[§§114.150, 114.151, 114.153 - 114.157]

STATUTORY AUTHORITY

The repeals are proposed under TWC, §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of THSC, Chapter 382 (also known as the Texas Clean Air Act). The repeals are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles.

The proposed repeals implement THSC, §§382.002, 382.011, 382.012, and 382.019.

§114.150. Requirements for Mass Transit Authorities.

§114.151. Requirements for Local Governments and Private Entities.

§114.153. Exceptions.

§114.154. Exceptions for Certain Mass Transit Authorities.

§114.155. Reporting.

§114.156. Record Keeping.

§114.157. Low Emission Vehicle Fleet Program Compliance Credits.