

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §114.6 and §114.319.

The amendments will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On June 15, 2004, the Houston-Galveston-Brazoria (HGB) ozone nonattainment area was classified as a moderate nonattainment area under the eight-hour national ambient air quality standard (NAAQS) under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 *et seq.*). The HGB area is therefore required to attain the eight-hour ozone NAAQS of 0.08 parts per million (ppm) by the end of ozone season 2009, and to submit a SIP revision by June 15, 2007 (69 FR 23857). Control strategies for this SIP revision must be in place by January 1, 2009. For the HGB area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, the TCEQ has developed this eight-hour ozone SIP revision in accordance with 42 USC, §7410. Hence, this rulemaking is part of the first HGB SIP revision under the eight-hour ozone standard.

The one-hour ozone NAAQS, which preceded the eight-hour ozone standard, was revoked June 15, 2005 (69 FR 23951). The one-hour ozone control strategies in the HGB area will remain in place.

This set of strategies is extensive and will continue to reduce the amount of ozone precursors and ozone in the HGB airshed. On September 6, 2006 (71 FR 52656), EPA published approval of the HGB

nonattainment area's one-hour ozone attainment demonstration and associated rules. The approval was published in six parts, covering the rules for the control of highly-reactive volatile organic compounds (HRVOC), the HRVOC emission cap and trade (HECT) program, the mass emission cap and trade (MECT) program for nitrogen oxides (NO_x), the one-hour ozone attainment plan, the emissions credit banking and trading program, and the discrete emission credit banking and trading program. For a more complete background on the one-hour ozone SIP revisions please see Chapter 1 of the eight-hour SIP revision that has been submitted for proposal concurrent with this rule package (Project Number 2006-027-SIP-NR).

The commission is proposing in this rulemaking a revision to the definition of diesel fuel in §114.6(7) as it is used in Subchapter H (relating to Low Emission Fuels). This revision requires that any fuel that is commonly or commercially known, sold, or represented as Marine Distillate fuel X (DMX), Marine Distillate fuel A (DMA), or Marine Gas Oil (MGO) that is sold in the counties listed in §114.319(b)(2), specifically: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, meets low emission diesel fuel (LED) requirements. It was brought to the attention of the commission that certain owners or operators of marine vessels have been switching from regulated Grade No. 1-D and Grade No. 2-D diesel fuel to diesel fuels commonly known as DMX, DMA, or MGO to avoid the LED regulations of Chapter 114. By regulating these marine fuels, the commission will be able to reduce NO_x by an estimated 0.9 tons per day (tpd) in the HGB nonattainment counties as listed in §114.319(b)(2).

DMX, DMA, Grade No. 1-D, and Grade No. 2-D diesel fuels are all light distillates that share many fuel parameters. Therefore, the commission does not anticipate major difficulties in the process of either changing vessel fuels back to LED-compliant Grade No. 1-D or Grade No. 2-D or having DMX or DMA marine fuels utilize approved additives as tested and approved under the methods of §114.315.

The grades of marine fuel that are included in this proposal are normally only used by harbor craft vessels (e.g., crew and supply boats, charter fishing vessels, commercial fishing vessels, ferry or excursion vessels, pilot vessels, towboats or push boats, tug boats, and work boats). Ocean-going vessels will not be included in these regulations because they typically use heavier marine residual fuels such as Marine Distillate fuel B (DMB), Marine Distillate fuel C (DMC), or other marine residual fuels that have a higher viscosity; therefore, they do not share the characteristics of lighter 1-D and 2-D diesel fuels.

The commission is also proposing in this rulemaking a revision to the compliance schedule in §114.319 as it is used in Subchapter H (relating to Low Emission Fuels). This revision contains a new subsection (d), which establishes the compliance dates for the use of LED-compliant diesel fuels commonly known as DMX, DMA, or MGO in the HGB area. These amendments will provide producers and importers sufficient time to complete modifications that may be needed in order to comply with the LED requirements and will give sufficient time for downstream facilities to deplete existing inventory of noncompliant fuels.

The TCEQ participated in a Houston-Galveston Area Council (HGAC) stakeholder meeting in March 2006 to discuss potential control strategies. The TCEQ also conducted an informational meeting October 5, 2006, to present the rule concepts and answer questions.

SECTION BY SECTION DISCUSSION

The proposed change to §114.6 amends the definition of diesel fuel to include marine grades of fuel commonly known as DMX, DMA, or MGO in accordance with the active version of International Organization for Standardization (ISO) 8217. This proposed change will cause fuel commonly known as DMX, DMA, or MGO to be diesel fuel in the HGB counties as listed in §114.319(b)(2). Currently, the definition only refers to Grade No. 1-D and Grade No. 2-D diesel fuels. This proposal gives the commission power to regulate fuels commonly known as DMX, DMA, or MGO grades of marine fuel, which are currently not regulated under the LED rules. By including these fuels in the LED regulation, the commission will reduce NO_x and other emissions in the HGB ozone nonattainment area. These reductions are necessary for this area to be able to make positive progress towards attainment with the NAAQS for ozone.

The proposed change to §114.319 adds a new subsection (d) to include a compliance schedule for the introduction of LED-compliant diesel fuels commonly known as DMX, DMA, or MGO to the HGB area. The compliance schedule provides sufficient time for refiners to make modifications that may be necessary to produce a compliant LED fuel and provides sufficient time for facilities downstream of the refiner to deplete existing inventories of noncompliant fuels. The schedule is phased in to ensure

adequate supply of compliant fuels will be available at the retail level by January 1, 2008. A revision is also made to subsection (a) to refer to the schedule as added in subsection (d).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency due to the implementation of the proposed rules. Fiscal implications are, however, anticipated for owners and operators of certain harbor craft in the coastal areas of the HGB nonattainment area, and for businesses and individuals who use their services. No fiscal implications are anticipated for other units of state or local government unless they own or operate certain harbor craft in the aforementioned areas of the state. State agencies, cities, counties, or port authorities that own or operate ferries, tugboats, push boats, or other harbor craft are expected to experience higher vessel operating costs due to the implementation of the proposed rule.

The proposed rule is intended to obtain an estimated 0.9 tpd reduction in emissions of NO_x in the HGB nonattainment area. The proposed rule would affect coastal areas of counties where LED is required. Many marine vessels use certain marine distillate fuels that are not covered under the current definition of low emission diesel fuel. This revision would maximize NO_x reductions in counties where further reductions are needed.

The proposed rule is expected to affect harbor craft vessels that use certain light diesel fuels. These vessels would include towboats or push boats, tug boats and work boats, charter fishing vessels,

commercial fishing vessels, ferry or excursion vessels, pilot vessels, and crew and supply boats.

Ocean-going vessels will not be included in these regulations because they typically use heavier marine residual fuels. The transition for refineries to produce the LED-compliant fuel for these vessels is not expected to be difficult.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be an improvement in air quality by reducing NO_x and other pollutants in the HGB nonattainment area.

Fiscal implications are anticipated for businesses and individuals who own or operate certain harbor craft in the affected nonattainment counties and for the businesses and individuals who purchase their services. The cost for diesel fuel for these vessels is expected to increase between an estimated \$.04 to \$.08 per gallon of LED.

As previously mentioned, the proposed rule is expected to affect harbor craft vessels that use certain light diesel fuels including towboats or push boats, tug boats and work boats, charter fishing vessels, commercial fishing vessels, ferry or excursion vessels, pilot vessels, and crew and supply boats.

Agency staff are unable to estimate the exact number and type of vessels that will be affected by the proposed rule. However, most of the affected vessels are anticipated to operate in the Houston Ship Channel, and agency staff anticipates that most of them will be tow, push, or tug boats. According to a draft study prepared for the agency, staff estimates that there are at a minimum 530 tugs and tows

operating in the ship channel, and that by 2009 these vessels will account for 29% of NO_x marine emissions. In addition, it is estimated that these vessels would consume approximately 15 million gallons of diesel fuel per year. If the proposed rule increases the price of diesel between \$.04 and \$.08 per gallon, owners and operators of the estimated 530 tugboats and tow vessels could expect to pay an estimated \$600,000 to \$1.2 million more in fuel costs each year (\$1,100 to \$2,200 yearly increase per vessel). It is assumed that any increase in operating costs for the vessel owners will be passed on to those who purchase their services.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for small or micro-businesses. It is not known how many of the vessels affected by the proposed rules are owned or operated by small or micro-businesses, but for those that are, they can anticipate an increase in the cost of diesel fuel from \$.04 to \$.08 per gallon.

The following is an analysis of the cost per employee for any tug boats or towboats owned or operated by a small or micro-business affected by the proposed amendments. Small and micro-businesses are defined as having fewer than 100 or 20 employees respectively. Tug boat or towboat owners with 100 or fewer employees could incur additional annual costs of between \$1,100 to \$2,200 per vessel to comply with the proposed amendments or between \$11 and \$22 per employee. A micro-business with 20 or less employees would incur estimated additional costs of between \$55 and \$110 per employee. The projected costs are the same for small businesses as for larger businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking considering 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.” A 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 specific purpose of the proposed amendments to §114.6 and §114.319 is to subject certain grades of marine fuels used in the HGB nonattainment counties to the LED program requirements. These grades of marine fuels have been added as part of the strategy to reduce emissions of NO_x. It is anticipated that this proposed rulemaking will positively affect human health and the environment by reducing NO_x emissions that help form ozone, and not adversely affect the economy or productivity in any material manner. Moreover, the proposed rules would make positive progress towards attainment of the federally established eight-hour ozone standard in the HGB area. Therefore, the proposed rulemaking does not constitute a major environmental rule, and thus is not subject to a formal regulatory analysis.

In addition, the proposed amendments to Chapter 114 are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements. 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; 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.

Specifically, this rulemaking action, which is designed to reduce NO_x emissions from marine vessels in the HGB area that have not been included in the LED program previously, does not exceed an express requirement under state or federal law. Furthermore, there is no contract or delegation agreement that covers the topic that is the subject of this action. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.012, 382.017, and 382.202. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is adopted solely under the general powers of the agency.

Based on the foregoing, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), “taking” means 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 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 takings impact assessment for the proposed rulemaking action under Texas Government Code, §2007.043. The specific purpose of these revisions is to achieve reductions of NO_x emissions from marine vessels to reduce ozone formation in the HGB nonattainment area and thus help bring this area into compliance with the air quality standards established under federal law as NAAQS for ozone. As proposed, the amendments to §114.6 add certain grades of marine fuels to the

definition of diesel fuel, thus subjecting the fuels used in the HGB counties to LED requirements according to the schedule proposed in §114.319. These amendments will not place a burden on private, real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution because this action does not require an investment in the permanent installation of new refinery processing equipment. The proposal also will 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 amendments will not cause a taking under Texas Government Code, Chapter 2007

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the proposed 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 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 amendments 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 rulemaking will ensure that the amendments 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 rulemaking action is consistent with CMP goals and policies, in compliance with 31 TAC §505.22(e).

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations:

January 29, 2007, 2:00 p.m. and 6:00 p.m., Houston-Galveston Area Council, 3555 Timmons Lane, Houston; January 31, 2007, 7:00 p.m., J. Erik Jonsson Central Library Auditorium, 1515 Young Street, Dallas; February 1, 2007, 2:00 p.m., Arlington City Hall Council Chambers, 101 W. Abrams Street, Arlington; February 1, 2007, 6:00 p.m., Midlothian Conference Center, 1 Community Circle, Midlothian; February 6, 2007, 2:00 p.m., Longview Public Library, 222 W. Cotton Street, Longview; and February 8, 2007, 2:00 p.m., Texas Commission on Environmental Quality, Building E, Room 201S, 12100 Park 35 Circle, Austin. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to informally discuss the proposal 30 minutes before the hearings.

Persons planning to attend the hearings who have special communication or other accommodation needs, should contact Jennifer Stifflemire, Air Quality Division, at (512) 239-0573. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, MC 205, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087; or faxed to (512) 239-4808. Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>. All comments should reference Rule Project Number 2006-036-114-EN. The comment period closes February 12, 2007. Copies of the proposed rules can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Brandon Smith of the Air Quality Division at (512) 239-4471.

SUBCHAPTER A: DEFINITIONS
§114.6

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's 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; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of LED as described in the SIP is not required prior to February 1, 2005. The amendment is proposed under federal mandates contained in 42 United States Code, §7410, that require states to introduce pollution control measures in order to reach specific air quality standards in particular areas of the state.

The proposed amendment implements Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.6. Low Emission Fuel Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, also known as the Texas Clean Air Act (TCAA), or in the rules of the commission, the terms used in this subchapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by TCAA, §3.2, and §101.1 of this title (relating to Definitions), the following words and terms, when used in Subchapter H of this chapter (relating to Low Emission Fuels), have the following meanings, unless the context clearly indicates otherwise.

(1) - (6) (No change.)

(7) **Diesel fuel**-- Any fuel that is commonly or commercially known, sold, or represented as:

(A) Grade No. 1-D or Grade No. 2-D diesel fuel, in accordance with the active version of American Society for Testing and Materials (ASTM) D975 (Standard Specification for Diesel Fuel Oils), except for lubricity; and [.]

(B) Marine Distillate fuel X (DMX), Marine Distillate fuel A (DMA), or Marine Gas Oil (MGO) diesel fuel in accordance with the active version of the International Organization for Standardization (ISO) 8217 Specifications of Marine Fuels.

(8) - (22) (No change.)

SUBCHAPTER H: LOW EMISSION FUELS

DIVISION 2: LOW EMISSION DIESEL

§114.319

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's 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; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of LED as described in the SIP is not required prior to February 1, 2005. The amendment is proposed under federal mandates contained in 42 United States Code, §7410, that require states to introduce pollution control measures in order to reach specific air quality standards in particular areas of the state.

The proposed amendment implements Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.319. Affected Counties and Compliance Dates.

(a) Affected persons in the counties listed in subsection (b) of this section shall be in compliance in accordance with the schedule listed in subsection (c) of this section with §§114.312 - 114.317 of this title (relating to Low Emission Diesel Standards; Designated Alternate Limits; Registration of Diesel Producers and Importers; Approved Test Methods; Monitoring, Recordkeeping, and Reporting Requirements; and Exemptions to Low Emission Diesel Requirements), as applicable, for diesel fuel defined under §114.6(7)(A) of this title (relating to Low Emission Fuel Definitions) that may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle or in non-road equipment.

(b) - (c) (No change.)

(d) Affected persons in the counties listed in subsection (b) of this section shall be in compliance in accordance with the schedule listed in paragraph (1), (2), or (3) of this subsection with §§114.312 - 114.317 of this title, as applicable, for any diesel as defined under §114.6(7)(B) of this title, that may ultimately be used to power a diesel-fueled compression-ignition engine located on a marine vessel in any of the counties listed in subsection (b)(2) of this section:

(1) beginning October 1, 2007, for producers and importers;

(2) beginning November 15, 2007, for bulk plant distribution facilities; and

(3) beginning January 1, 2008, for retail fuel dispensing outlets, wholesale bulk purchaser/consumer facilities, and all other affected persons.