

The Texas Commission on Environmental Quality (commission) adopts the amendment to §115.247. Section 115.247 is adopted *with changes* to the proposed text as published in the January 26, 2007, issue of the *Texas Register* (32 TexReg 282).

The adopted amendment will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

For facilities where 95% or more of the motor vehicle fleet being fueled onsite is equipped with onboard refueling vapor recovery (ORVR) equipment, Stage II vapor recovery equipment is an unnecessary expense because refueling emissions are captured via the vehicle's ORVR equipment instead of the Stage II dispenser. The EPA estimates it costs about \$40,000 to install a Stage II vacuum-assist system and \$4,100 per year to maintain it. ORVR systems capture vapors otherwise vented to the atmosphere. ORVR systems are passive systems that force gasoline vapors displaced from a vehicle's fuel tank during refueling to be directed to a carbon-canister holding system and ultimately to the engine where they are consumed. EPA phased in ORVR systems for automobiles starting with model year 1998. All automobiles manufactured after 2000 must be equipped with ORVR. Phase-in of ORVR for light-duty trucks began in model year 2001, and by model year 2003, all new light-duty trucks were required to have ORVR systems.

SECTION DISCUSSION

The adopted amendment to §115.247, Exemptions, would add paragraph (3) *any motor vehicle*

dispensing facility where 95% or more of the motor vehicle fleet being fueled onsite is equipped with onboard refueling vapor recovery equipment. To maintain a facility's exempt status under this paragraph, the owner or operator must submit documentation showing the fleet meets the requirements under this paragraph on an annual basis no later than January 31 of each year to the executive director or designated representative.

ANTI-BACKSLIDING DEMONSTRATION

The Stage II program is a Federal Clean Air Act (FCAA) specified volatile organic compound (VOC) control strategy for certain ozone nonattainment areas. Stage II vapor recovery equipment must be certified by EPA to achieve a minimum 95% control efficiency for VOC emissions, as detailed in their Stage II Vapor Recovery Systems-Options Paper dated February 7, 2006. ORVR systems capture VOC emissions inside the vehicle thus making Stage II vapor recovery equipment unnecessary. Therefore, exempting facilities that refuel only ORVR-equipped vehicles from the Stage II program will not result in increased VOC emissions because the fugitive emissions will be captured via the vehicle's ORVR system.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. A "major environmental rule" is a rule which is specifically intended 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 intent of this rulemaking action is to provide an exemption from Stage II vapor recovery requirements for facilities where 95% or more of the motor vehicle fleet being fueled onsite is equipped with ORVR equipment because use of both provides no net environmental benefit. The commission solicited public comment on the draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination. Also, the amendment is adopted to continue to meet the requirements of 42 United States Code, §7511a(b)(3) and Texas Health and Safety Code (THSC), §382.019 and §382.208, but in a less financially burdensome manner on owners and operators of gasoline dispensing facilities.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply to the adopted amendment because this action discontinues Stage II vapor recovery requirements for specific regulated activities. Promulgation and enforcement of the proposed amendment would be neither a statutory or constitutional taking of private real property. Specifically, the proposed amendment does not affect a landowner's rights in private real property, because this rulemaking action does not burden, restrict, nor limit the owner's rights to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action 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 CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, 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 rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is 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 will be authorized and the adopted revisions will maintain the same level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CPM goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 115 contains applicable requirements under 30 TAC Chapter 122, Federal Operating Permits;

therefore, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 115 requirements for each emission unit at their sites affected by the revisions to Chapter 115.

PUBLIC COMMENT

The proposal was published in the January 26, 2007, issue of the *Texas Register* (32 TexReg 282). The commission held a public hearing on February 27, 2007, and on February 28, 2007. The comment period closed on March 15, 2007. The commission received comments from the Environmental Protection Agency (EPA), Harris County Public Health & Environmental Services, Kelly Hart & Hallman LLP, on behalf of General Motors, and Sierra Club.

RESPONSE TO COMMENTS

The Sierra Club commented that there are no record-keeping requirements to document that only ORVR equipped vehicles are fueled at a pump with no Stage II equipment and that there are no procedures that would ensure that a non-ORVR equipped vehicle would be fueled at a pump with no Stage II equipment. The Sierra Club also asks where the description of TCEQ compliance and enforcement programs required to implement this proposed exemption are.

The commission appreciates the comment. This exemption is targeted toward those facilities with fleets. When the facilities are inspected by TCEQ Compliance and Enforcement staff, they will be required to provide documentation showing what vehicles are in their fleet. At that time, TCEQ staff will review the documentation to ensure that all vehicles in the fleet are ORVR equipped.

Facilities will also have to apply for an exemption every year.

The Sierra Club asks how the TCEQ will verify that the ORVR systems are working so that volatile organic compound emissions are not escaping into the air when fueled at pumps with no Stage II equipment.

The vehicle's On Board Diagnostic system identifies any malfunctions via the Malfunction Indicator Light with the vapor recovery system and alerts the vehicle operator that repairs are necessary. In Inspection and Maintenance (I/M) program areas the On Board Diagnostic system is tested annually during the vehicle's On Board Diagnostic test. Vehicles with an identified problem are not allowed to receive the annual safety and emissions certificate unless and until the problem is corrected.

Harris County Public Health & Environmental Services (HCPHES) was generally in support of the rule. HCPHES expressed a concern regarding the ability of a facility to demonstrate and the record keeping necessary for inspectors to verify that the dispensing facility is indeed used exclusively for the fueling and/or refueling of vehicles equipped with ORVR.

The commission appreciates the comment. This exemption is targeted toward those facilities with fleets. When the facilities are inspected by TCEQ Compliance and Enforcement staff, they will be required to provide documentation showing what vehicles are in their fleet. At that time, TCEQ staff will review the documentation to ensure that all vehicles in the fleet are ORVR equipped.

Facilities will also be required to submit a Stage II Vapor Recovery Exemption Confirmation Form to the TCEQ on a yearly basis.

The EPA commented that in general, they were in support of this rulemaking. EPA did request clarification on the types of fleets affected in this rule and revision of the language to be clear that only fueling of new vehicles at automobile assembly plants and refueling of rental cars at rental car facilities are exempt. The EPA commented that the TCEQ may consider changing the rule language to “where 95% or more of the motor vehicle fleet being fueled onsite is equipped with ORVR” rather than “where more than 95% of the motor vehicle fleet being fueled onsite is equipped with ORVR.”

The commission appreciates the comment and has clarified the types of fleets this rule will affect.

The commission also agrees that the language should be changed and has done so.

The EPA commented that in order for them to approve an exemption from Stage II into the Texas SIP for the fueling of new vehicles at an automobile assembly plant or rental car facility, the State must include its technical evaluation that the widespread use benchmark has been achieved for these types of facilities. TCEQ must also provide assurance that any facility wishing to remove Stage II equipment maintains its eligibility for its motor vehicle fleet to operate under the exemption.

The commission contends that EPA’s December 12, 2006, Memorandum entitled “Removal of Stage II Vapor Recovery in situations Where Widespread Use of Onboard Refueling Vapor Recovery is Demonstrated” provides the technical evaluation that the widespread use benchmark

has been achieved for automobile assembly plants. The memo states that “EPA believes that if 95 percent of the vehicles in a fleet have ORVR, then widespread use will likely have been demonstrated.” The TCEQ will provide the assurance that that any automobile assembly plant wishing to remove Stage II equipment maintains its eligibility for its motor vehicle fleet to operate under the exemption by continuing to inspect the facilities. When the facilities are inspected by TCEQ Compliance and Enforcement staff, they will be required to provide documentation showing what vehicles are in their fleet. At that time TCEQ staff will review the documentation to ensure that all vehicles in the fleet are ORVR equipped. Facilities will also be required to submit a Stage II Vapor Recovery Exemption Confirmation Form to the TCEQ on a yearly basis.

The EPA commented that in order for them to approve any of these exemptions from Stage II into the Texas SIP, the State must include in its rulemaking process how the exemption meets the requirements of Section 110(l) of the FCAA.

The commission appreciates the comment and has addressed this in the anti-backsliding demonstration.

The EPA commented that in order for them to approve an exemption from Stage II into the Texas SIP for the fueling of flexible fuel vehicles at E85 facilities, the State must include in its rulemaking process its technical evaluation that any increase in emissions caused by operating E85 fueling facilities without Stage II controls is so small as to clearly not interfere with attainment of the ozone standard or reasonable further progress or any other applicable CAA requirement.

The commission appreciates the comment concerning the fueling of flexible fuel vehicles at E85 facilities, however this is beyond the scope of this rulemaking. This rulemaking will remove requirements for fleet refueling facilities only. This will not affect requirements for facilities open to the public. In order to be exempt under this rule, the facility will have to provide documentation proving 95% or more of the vehicles in the fleet are equipped with ORVR. No increase in emissions are expected, and therefore this rulemaking will not interfere with attainment of the ozone standard or reasonable progress toward meeting that standard.

Kelly Hart & Hallman LLP Attorneys at Law commented on behalf of General Motors Corporation in support of this rulemaking.

The commission appreciates the comment in support of the rulemaking.

SUBCHAPTER C: VOLATILE ORGANIC COMPOUND TRANSFER OPERATIONS

**DIVISION 4: CONTROL OF VEHICLE REFUELING EMISSIONS (STAGE II) AT MOTOR
VEHICLE FUEL DISPENSING FACILITIES**

§115.247

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §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 TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under THSC, §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; and §382.208, concerning Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, and 382.208.

§115.247. Exemptions.

The following are exempt from the requirements of this division (relating to Control of Vehicle Refueling Emissions (Stage II) at Motor Vehicle Fuel Dispensing Facilities):

(1) gasoline dispensing equipment used exclusively for the fueling of aircraft, watercraft, or implements of agriculture;

(2) any motor vehicle fuel dispensing facility for which construction began prior to November 15, 1992, and which has a monthly throughput of less than 10,000 gallons of gasoline. For the purposes of this paragraph, the monthly throughput shall be based on the maximum monthly gasoline throughput for any calendar month after January 1, 1991. To maintain a facility's exempt status under this paragraph, the owner or operator must submit the facility's monthly gasoline throughput on an annual basis no later than January 31 of each year to the executive director or designated representative; and

(3) any motor vehicle dispensing facility where 95% or more of the motor vehicle fleet being fueled onsite is equipped with onboard refueling vapor recovery equipment. To maintain a facility's exempt status under this paragraph, the owner or operator must submit documentation showing the fleet meets the requirements under this paragraph on an annual basis no later than January

31 of each year to the executive director or designated representative.