

The Texas Commission on Environmental Quality (commission) proposes new §§101.150, 101.151, 101.153, and 101.155.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

House Bill (HB) 1526 of the 80th Legislature (2007), codified in Texas Health and Safety Code, §382.401, and in Texas Water Code, §5.752(2), requires the commission to establish by rule a program that allows the owner or operator of a facility to voluntarily use as a supplemental detection method any leak detection method that has been incorporated and adopted by the United States Environmental Protection Agency (EPA) into a program for detecting leaks or emissions of air contaminants. The only known contaminant for which alternative leak detection technology is applicable is Volatile Organic Compounds (VOC). On December 22, 2008, EPA adopted its rule regarding Alternative Work Practice to Detect Leaks from Equipment (*73 Federal Register* 78199).

These rules would provide incentives for participation in a voluntary leak detection program. Incentives would include enforcement discretion and compliance history-based penalty reductions.

These new rule sections will not be submitted as a revision to the State Implementation Plan (SIP) under the Federal Clean Air Act, codified at 42 United States Code, §7401 *et seq.* This incentive program is not required by federal law or by the existing Texas SIP.

This rulemaking project addresses leaks from components or equipment that are not subject to the commission's regulatory program for leak detection and repair (LDAR) components. Leaks from LDAR components will be addressed through the commission's rulemaking in 30 TAC Chapter 115 for

Alternative Work Practice (AWP) standards (Rule Project 2009-030-115-EN) to incorporate an AWP similar to the work practice adopted by the EPA. The AWP uses similar imaging-based technology for required fugitive leak detection.

#### SECTION BY SECTION DISCUSSION

The commission proposes new §101.150, Purpose and Applicability, which describes the purpose of new Subchapter C regarding the Supplementary Leak Detection program. It sets forth the applicable facilities and equipment that may be included in the program.

The commission proposes new §101.150(a), which describes the program as a means to encourage, through incentives, the use of alternative leak detection technology with subsequent timely repairs that are not part of a Method 21 LDAR program.

The commission proposes new §101.150(b), which provides a scope of equipment or components that are eligible for this program. The scope is written by exception, where all equipment or components except that under a required fugitive monitoring program, or that required by permit or rule to use the alternative leak detection method may qualify for the program.

The commission proposes new §101.151, Voluntary Supplemental Leak Detection Definitions, which defines terms used in this new subchapter. This section defines alternative leak detection technology, imaging, leak, optical gas imaging instrument, repair, and supplemental detection method for the express purposes of this program.

The commission proposes new §101.153, Voluntary Supplemental Leak Detection Program, that describes the general program objectives, elements of an approvable program, exceptions, repair, and recordkeeping requirements for the owner or operator participating in this program.

The commission proposes new §101.153(a), which describes the general program to encourage supplementary LDAR.

The commission proposes new §101.153(b), which outlines the minimum requirements for an owner or operator to qualify to include annual surveys, minimum equipment specifications, and operator training requirements when optical gas imaging technology is used. Equipment specifications are consistent with EPA's specifications for imaging equipment in their AWP rules.

The commission proposes new §101.153(c), which lists the types of emissions and leak records that cannot be used under this program. Emissions and leak records that are excluded from use in this program include those that were part of an investigation, records of audits conducted under The Texas Environmental, Health, and Safety Audit Privilege Act, and emissions from equipment or facilities that lack authorization.

The commission proposes new §101.153(d), which describes the minimum requirements for LDAR activities to be met in order to qualify for the program incentives. These requirements include a 30-day repair deadline, and that the leak and its repair had not caused a nuisance as defined in §101.4.

The commission proposes new §101.153(e), which describes the records required by the owner or

operator conducting leak detection under this program. These records include information that supports the elements of an approvable program, and each LDAR made in accordance with this Subchapter.

The commission proposes new §101.155, Program Incentives, which describes how the commission will provide incentives that encourage voluntary supplemental leak detection, and conditions upon which those incentives will be awarded.

The commission proposes new §101.155(1), which provides enforcement discretion to the owner or operator. For the purposes of this Subchapter, enforcement discretion means the executive director shall not seek to address a violation through an order that includes an administrative penalty for that violation.

The commission proposes new §101.155(2), which acknowledges the owner or operator's participation in this program may be reflected on the facility's compliance history in accordance with Chapter 60.

Specifically, facilities using alternative technologies under the new rule and complying with all necessary actions in the rule may receive credit for participation in a voluntary pollution reduction program.

Participation in this program will not act as a component which calculates into the compliance history score. Participation in this program will be reflected on the compliance history report and act as a

mitigating factor when a facility has a classification of poor performer. According to 30 TAC

§60.2(e)(3), "the executive director shall evaluate mitigating factors for a site classified as a poor

performer." The evaluation to mitigate a facility from a poor performer to an average performer is

processed within the Enforcement Division with input from other areas of the agency prior to the annual

posting of compliance history classifications to the commission's website. In addition, the Enforcement

Division may evaluate a facility for mitigation in the event that a compliance history appeal is submitted

by the owner or operator of the facility, per 30 TAC §60.3(e).

HB 1526 states that the commission may offer other incentives that are not included in these rules. For example, the commission has implemented an on-site technical assistance program as authorized by Texas Health and Safety Code, §361.509(a)(7), which authorizes the commission to provide to business and industry, as resources allow, on-site assistance in identifying potential source reduction and waste minimization techniques and practices, and in conducting internal source reduction and waste minimization audits. Because this is an established program which is available to all regulated entities regardless of whether alternative leak detection technology is used, it is not included as part of this rule.

Also, HB 1526 provides that credits or offsets to the facility's emissions reduction requirements based on the emissions reductions achieved by voluntary use of alternative leak detection technology may be an incentive. In order to create credits and offsets under state and federal law, they must be creditable, quantifiable, enforceable, permanent reductions that are also surplus reductions (they must not be relied upon to meet other requirements). The commission is not including this as a possible incentive because the alternate leak detection technology cannot speculate or quantify emissions, and the use of the technology and associated repairs cannot ensure that emission reductions are permanent. Additionally, the use of the technology cannot ensure that the emission reductions are not being implemented to meet another state or federal requirement. Leaks of unauthorized emissions, even if repaired, cannot qualify as creditable emissions.

HB 1526 also requires the commission to limit reporting requirements only to those components that are not repairable within the commission's established reasonable repair time, and to provide exemptions

from commission enforcement for certain leaks. However, to maintain the integrity of, and compliance with, the Texas SIP and the Title V Permitting Program under the Federal Clean Air Act, the commission cannot implement these incentives. The Texas SIP includes reporting requirements for emissions associated with leaks and repair of leaks, such as for emissions inventories in §101.10 and excess emissions in §101.201 and §101.211. Texas' approved Title V permitting program requires deviation reporting under 30 TAC §122.145. Also, the Texas Title V program requires a set frequency of compliance certification reviews and on-site investigations to satisfy the Compliance Monitoring Strategy as required by EPA. Failure to satisfy that strategy could result in EPA identifying concerns regarding the administration of the program. Therefore, scheduling of compliance inspections was not addressed as an incentive in this proposed rulemaking.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

For the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The agency will implement a voluntary program using criteria and methodologies currently used in similar on-demand investigations and current prioritization strategies for investigation and enforcement. No additional staff resources will be required for this new voluntary program.

#### PUBLIC BENEFITS AND COSTS

For each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and greater protection of the environment and public health and safety through the reduction of VOC emissions that would

otherwise not be detected.

The proposed rules will not have a significant fiscal impact on individuals or businesses. Participation in the supplemental leak detection program will be voluntary. Facilities that process, store, or transfer VOCs are typically owned by large businesses. If a business chooses to voluntarily implement a supplemental leak detection program under the proposed rules, it could spend as much as \$108,000 for a camera, associated hardware, camera maintenance, training (for four operators), and recordkeeping in the first year of implementation. In years two through five, annual costs for maintenance and required training could be as much as \$9,000.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules since participation in the supplemental leak detection program is voluntary and most small businesses do not own or operate facilities that would benefit from participation in this voluntary program. If a small business does implement a supplemental leak detection program, it would experience the same costs as those experienced by a large business.

#### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and are not expected to adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

#### 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 in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "major environmental rule." Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). 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 proposed new rules would implement HB 1526, 80th Legislature (2007) by developing an incentive program that allows the owner or operator of a facility to voluntarily use as a supplemental detection method any leak detection method that has been incorporated and adopted by the EPA into a program for detecting leaks or emissions of air contaminants. The proposed new rules 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.

Further, this rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the

rule is specifically required by state 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. The proposed new rules do not exceed a standard set by federal law or exceed an express requirement of state law. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the commission, but is authorized by specific sections of the Texas Health and Safety Code and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed new rules do not meet any of the four applicability requirements.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

#### TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed new rules. The specific purpose of this rulemaking is to develop an incentive program that allows the owner or operator of a facility to voluntarily use as a supplemental detection method any leak detection method that has been incorporated and adopted by the EPA into a program for detecting leaks or emissions of air contaminants.

Promulgation and enforcement of the proposed new rules would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the proposed new rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise

exist in the absence of a governmental action. Therefore, the proposed new rules do not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the new rules are consistent with CMP goals and policies because the rulemaking, which involves an incentive program designed to enhance the current LDAR programs for air emissions, will have no adverse environmental impact; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the new rules will not violate (exceed) any standards identified in the applicable CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Information submitted in support of the voluntary supplemental LDAR program at sites subject to the Federal Operating Permits (FOP) Program may be used as potential credible evidence to indicate potential

noncompliance (or compliance) with FOP terms and conditions and subject to deviation reporting.

#### ANNOUNCEMENT OF HEARINGS

The commission will hold a public hearing on this proposal in Dallas on January 19, 2010 at 10:00 am in the Irving Library; Austin on January 20, 2010 at 10:00 am in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle; and in Houston on January 21, 2010 at 10:00 am in Conference Room B at the Houston-Galveston Area Council. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend any of these hearings should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, 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/>.

File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-040-101-CE. The comment period closes January 25, 2010.

Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Joseph

A. Janecka, P.E., Field Operations Support Division, at 512-239-1353 or e-mail

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**SUBCHAPTER C: VOLUNTARY SUPPLEMENTAL LEAK DETECTION PROGRAM**

**§§101.150, 101.151, 101.153, and 101.155**

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The new sections are also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules; THSC, §382.022, concerning Investigations, that authorizes the executive director to make or require certain investigations, and THSA,

§382.401, concerning Alternative Leak Detection Technology, the commission's establishment of an alternative leak detection technology incentive program; TWC, §5.752, concerning Definitions, which describes the commission's innovative programs; THSC, §5.754, concerning Classification and Use of Compliance History, that authorizes the commission to establish standards for the classification of a person's compliance history; and TWC, §7.002, concerning Enforcement Authority, that provides the commission enforcement authority.

The new sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.022, and 382.401; and TWC, §§5.752, 5.754, and 7.002.

**§101.150. Purpose and Applicability.**

(a) Purpose. The purpose of this subchapter is to provide a program that encourages and provides incentives for voluntary monitoring of non-United States Environmental Protection Agency Method 21 Leak Detection And Repair defined equipment in Volatile Organic Compound (VOC) service, using remote sensing technologies, such as optical gas imaging technology. Participation under this subchapter is voluntary.

(b) Applicability. The following sources are eligible for participation in the program - any authorized equipment or facilities in VOC service, including processing, storage, and transfer:

(1) that are not subject to a required fugitive monitoring program; or

(2) where an alternative leak detection method is not the monitoring method required in a permit or rule.

**§101.151. Voluntary Supplemental Leak Detection Definitions.**

(a) **Alternative leak detection technology** - Technology other than that specified by the United States Environmental Protection Agency Method 21, including optical gas imaging technology, designed to detect emissions of air contaminants.

(b) **Imaging** - A means or process of making emissions visible that may otherwise be invisible to the naked eye.

(c) **Leak** - For purposes of this subchapter, a leak is any emissions imaged by an optical gas imaging instrument, as defined in this section.

(d) **Optical gas imaging instrument** - An instrument that makes emissions visible that may otherwise be invisible to the naked eye.

(e) **Repair** - The adjustment or alteration of a component in order to eliminate a leak.

(f) **Supplemental detection method** - Any leak detection method that supplements or adds to an

existing technology approved by the executive director such as 40 Code of Federal Regulations Part 60, Appendix A-7, Method 21 monitoring program.

**§101.153. Voluntary Supplemental Leak Detection Program.**

(a) General program objective. Owners or operators are encouraged to voluntarily and routinely use an alternative leak detection technology to detect and repair leaks not otherwise detectable.

(b) Elements of an approvable program. In order to be considered for approval a program must include, at a minimum:

(1) A schedule for leak surveys to be conducted at least once per year.

(2) If optical gas imaging is the supplemental detection method used, then the leak detection devices shall meet the following specifications:

(A) the requirements of 40 Code of Federal Regulations (CFR) §60.18(i)(1) (December 22, 2008); and,

(B) the requirements of the daily instrument check as specified in 40 CFR §60.18(i)(2) (December 22, 2008).

(3) The daily instrument check must be performed by each person that is performing imaging for that day.

(4) If optical gas imaging is the supplemental detection method used, any person that performs the supplemental leak detection of this subchapter shall comply with the following minimum training requirements:

(A) The operator of the optical gas imaging instrument must receive a minimum of 24 hours of initial training on the specific make and model of the optical gas imaging instrument before using the instrument for the purposes of this supplemental leak detection.

(B) Operators using optical gas imaging instruments for this supplemental leak detection shall comply with one of the following requirements for on-going training purposes:

(i) operators shall attend an annual eight-hour refresher training class on the optical gas imaging instrument used for this supplemental leak detection; or

(ii) operators shall maintain a minimum of 100 hours per calendar year of hands-on operational experience with the model of optical gas imaging instrument used for the supplemental leak detection. Operators electing this option shall maintain a written log of the operator's operational experience with the optical gas imaging instrument.

(c) Exceptions. The following information cannot be used to support a program incentive under

this subchapter:

(1) where the leak was independently detected, or an investigation of the leak was initiated by the executive director or personnel of any air pollution program with jurisdiction, before the leak was detected by the owner or operator;

(2) information resulting from an audit performed under the Texas Environmental, Health, and Safety Audit Privilege Act; and

(3) emissions from equipment or facilities constructed or modified without authorization.

(d) Repair.

(1) Repairs must be completed within 30 days of the leak detected by the alternative leak detection technology; and,

(2) The leak and its repair must not have caused a nuisance (as defined in §101.4 of this title (relating to Nuisance)).

(e) Recordkeeping. The owner or operator participating in this program shall maintain records on site, or at a pre-determined off-site location, for five years. Records must be available for inspection by the executive director or local air pollution control program with jurisdiction upon request. The

records must include:

(1) If optical gas imaging is the supplemental detection method used:

(A) digital recordings of the leak when first observed;

(B) recordings which document the successful repair of the equipment or component;

(C) all digital recordings shall be saved in a non-proprietary file format; and,

(D) the digital recordings shall contain information readily available from the camera including date, time, and camera settings.

(2) Documentation demonstrating compliance with approvable program elements listed in subsection (b)(1) - (4) of this section.

(3) The records will include information on the completion of the repair sufficient to demonstrate compliance with this program.

**§101.155. Program Incentives.**

If leaks are detected and repairs are completed and recorded in compliance with this subchapter, one or both of the following incentives will be awarded:

(1) Enforcement discretion; or,

(2) Compliance history-based penalty reductions. The participation of the owner or operator in this program may be applied to the Compliance History in a manner consistent with Chapter 60 of this title (relating to Compliance History).