

The Texas Commission on Environmental Quality (commission or TCEQ) adopts the repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 as published in the February 29, 2008 issue of the *Texas Register* (33 TexReg 1741) *without changes* and will not be republished.

The commission will submit a request to the United States Environmental Protection Agency (EPA) to withdraw these repealed sections from consideration for approval in the State Implementation Plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEAL

In 1998, the federal government and seven heavy-duty diesel engine (HDDE) manufacturers entered into consent decrees after enforcement actions were brought against HDDE manufacturers that a majority of the diesel engine manufacturers had programmed their engines to defeat federal test procedures (FTP) which were established to measure compliance with the EPA promulgated diesel emission standards in effect at the time. A so-called "defeat device" was employed because its use would provide some increase in fuel economy. However, its use would also cause the engine to produce higher nitrogen oxides (NO_x) emissions while the engine was running in the open-road or cruise mode.

In the consent decrees, the manufacturers were required, among other things, to produce HDDE that met a 2.5 gram per brake horsepower-hour standard for non-methane hydrocarbons plus NO_x emissions by no later than October 1, 2002. The consent decrees also required the manufacturers to comply with supplemental test procedures for a period of two years (2003 and 2004). The two components of the supplemental tests are known as the "Not to Exceed" (NTE) test and the Euro III European Stationary Cycle test. However, the EPA's NTE rules for HDDE that would include the NTE test requirements were delayed until model year 2007. This delay resulted in a regulatory gap for two model years (2005 and

2006) between the expiration for the NTE test requirements under the consent decree following model year 2004 and the commencement of NTE test requirements for model year 2007. To prevent any "backsliding" by HDDE manufacturers during the 2005 and 2006 model years, the California Air Resources Board (CARB) adopted rules under Title 13, California Code of Regulations (13 CCR) §1956.8 on December 8, 2000. The rules were effective on July 25, 2001, requiring HDDE manufacturers to comply with supplemental procedures including the NTE test.

The TCEQ originally adopted the rules under 30 TAC Chapter 114, Subchapter L in August 2001 to join with California and twelve other states to prevent potential significant increases in diesel exhaust emissions due to possible "backsliding" by engine manufacturers because of the absence of federal standards during the 2005 and 2006 model years. The EPA's implementation of federal emission control standards (66 Federal Register 5001, January 18, 2001) including NTE standards, for 2007 and newer model year HDDE and heavy-duty on-highway (HDOH) vehicles, i.e., motor vehicles with a gross vehicle weight rating of greater than 8500 pounds, mitigates the original justification for Texas to require CARB-certified HDDE. These federal standards now require HDDE manufacturers to meet emission limits for 2007 and newer HDDE and HDOH vehicles that are equivalent to the California standards required under Subchapter L.

On June 27, 2007, the commission directed staff to initiate rulemaking after consideration of a petition from the Engine Manufacturers Association (EMA) to repeal Subchapter L and the executive director's subsequent analysis in support for repealing these rules.

The current regulations under Subchapter L require all HDDE produced for sale or other use in Texas for

the 2005 and newer model years to be certified to meet the California emission control standards specified under 13 CCR §1956.8 that were revised by CARB on December 8, 2000, and effective on July 25, 2001. The EMA petition requested the TCEQ to initiate rulemaking to repeal Subchapter L to allow for the sale or other use in Texas of any 2008 or newer model year HDDE that are certified by the EPA as compliant with all applicable EPA emission control regulations.

The EMA states that revisions by CARB to 13 CCR §1956.8 effective on November 15, 2006, enacting additional emission control requirements for automatic engine idle shutdown devices on 2008 and newer model year HDDE impact the validity of TCEQ's current regulations under Subchapter L since these rules are no longer consistent with California's new rules. The EMA contends that subsequent implementation of TCEQ's regulations under Subchapter L may be construed as a violation of the identity (i.e., "no third car") requirement in Section 177 of the Clean Air Act (42 United States Code (USC), §7507).

Section 177 of the Clean Air Act (42 USC, §7507) allows states to adopt and implement vehicle and engine emission standards that are more stringent than federal requirements if the standards are identical to the California standards for which a waiver has been granted by the EPA for the model years affected by the standards. However, this section prohibits states from taking "any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

SECTION BY SECTION DISCUSSION

The repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 removes regulations that have been rendered unnecessary by the EPA's implementation of federal emission control standards (66 *Federal Register* 5001, January 18, 2001), including NTE standards, for 2007 and newer model year HDDE and HDOH vehicles that require HDDE manufacturers to meet emission limits that are equivalent to the California standards that were required under §§114.700 - 114.702, 114.706, 114.707, and 114.709. Repealing these sections provides regulatory flexibility by allowing persons selling or offering to sell new HDDE and HDOH vehicles in Texas with the option of selling new 2008 and newer HDDE and HDOH vehicles that are either certified by the EPA or by CARB, while having no significant impact on air quality. In addition, the repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 eliminates the potential violation of the identicality (i.e., "no third car") requirement in Section 177 of the Clean Air Act (42 USC, §7507) that might occur if the TCEQ enforced the rules specified under §§114.700 - 114.702, 114.706, 114.707, and 114.709 to require 2008 and newer model year HDDE and HDOH vehicles to be certified to meet the California emission control standards referenced by these rules.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking to repeal §§114.700 - 114.702, 114.706, 114.707, and 114.709 considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking did 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 this rulemaking is to repeal the heavy duty diesel engine requirements in state rule because these have been rendered unnecessary by the

EPA's implementation of federal emission control standards. The repeal itself does not specifically protect human health or the environment, or adversely affect materially the economy, productivity, competition, jobs, etc. Therefore, the repeal does not constitute a major environmental rule, and thus was not subject to a formal regulatory analysis.

In addition, the repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the repeal 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 repeal provisions in state rule that have potentially become prohibited by federal law due to changes to CARB rules initially incorporated by reference in state rule, 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 (THSC), 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 THSC, §§382.012, 382.017, 382.019, and 382.208. Therefore, the repeal does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a

requirement of a delegation agreement, nor was 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 invited public comment on the draft regulatory impact analysis determination during the public comment period. No comments were received 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 by Article 1, Texas Constitution, §17 or §19; 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 this rulemaking action under Texas Government Code, §2007.043. The specific purpose of this rulemaking is to repeal §§114.700 - 114.702, 114.706, 114.707, and 114.709, which provides regulatory flexibility by allowing persons selling or offering to sell new HDDE and HDOH vehicles in Texas with the option of selling new 2008 or newer

HDDE and HDOH vehicles that are either certified by the EPA or by CARB, while having no significant impact on the regulated emissions currently affected by these rules. The repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 does not place a burden on private, real property in a manner that will require compensation to private real property owners under the United States Constitution or the Texas Constitution. The repeal also does 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 repeal does not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined this rulemaking related 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 repeal is 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 repeal complies 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).

PUBLIC COMMENT

A public hearing on this repeal was held in Austin on March 20, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201s. The commission did not receive any oral comments at the public hearing.

The public comment period for this repeal closed on March 26, 2008. The commission received written comments from the Engine Manufacturers Association (EMA), Environmental Defense Fund (EDF), City of Houston (Houston), Greater Houston Partnership (GHP), Houston-Galveston Area Council (HGAC), North Central Texas Council of Governments (NCTCOG), Houston Regional Group of the Sierra Club (Sierra Club), and the United States Environmental Protection Agency (EPA).

RESPONSE TO COMMENTS

The EDF, GHP, HGAC, Houston, NCTCOG, and Sierra Club opposed the proposed repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709. The EDF, Houston, NCTCOG, and Sierra Club commented that the commission should revise its current rules to adopt California's new 13 CCR §1956.8 rules that require automatic engine idle shut-down devices on 2008 and newer model year HDDE. The GHP and HGAC commented that the commission should take no action to repeal its current HDDE rules until a more complete analysis of the potential costs to consumers and emission reduction benefits of implementing the California rules requiring automatic engine idle shut-down devices in HDDE has been conducted, or alternatively the commission should amend its current rules to include the more stringent California standards.

California's amended 13 CCR §1956.8 rule will require automatic engine idle shut-down devices on 2008 and newer model year HDDE that activate after five minutes of continuous idling operation, with no exceptions made for idling while a driver is using the vehicle's sleeper berth for a government-mandated rest period. THSC, §382.0191, prohibits the commission from prohibiting or limiting the idling of a motor vehicle when idling is necessary to power a heater or air conditioner while a driver is using the vehicle's sleeper berth for a government-mandated rest period. Therefore, the commission cannot adopt California's new 13 CCR §1956.8 rules by reference as requested by these commenters; or cannot do so without adding significant limitations to correspond to the THSC. Such an option was not proposed and published for public comment. In addition, the federal HDDE standards that will be in effect in Texas after repeal of this rule will result in the same NOx reductions as the repealed rule. The commission notes that this repeal does not prevent future consideration of similar idling restrictions once THSC, §382.0191 expires on September 1, 2009, and if reductions are found to be necessary and reasonably available for SIP purposes. The commission has made no changes in response to these comments.

The EMA supported the proposed repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709, and commented that the proposed rulemaking properly recognizes that the Texas regulations have been rendered unnecessary by the EPA's implementation of stringent federal emission control standards, including strict NTE standards for 2007 and newer model year HDDE and HDOH vehicles, which are equivalent to the California standards originally adopted by the commission. The EMA also commented that the proposed rulemaking recognizes that the rationale for adopting the California standards originally adopted by the commission no longer pertains and that the continued enforcement of the commission's

HDDE rules would likely violate the identicality requirement of the federal Clean Air Act.

The commission acknowledges the EMA's support of this rulemaking.

The EPA did not oppose the repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709, based on the reasons stated in the proposal and commented that the commission should consider withdrawing the NTE rules previously submitted to the EPA as a SIP submittal under a letter dated July 15, 2002. The EPA commented that withdrawing these rules would save resources in both agencies, i.e., the commission submitting repealed rules and the EPA processing two SIP submittals that have no net benefit.

The commission acknowledges the EPA's support of this rulemaking. The commission will send a letter to the EPA withdrawing the repealed 30 TAC §§114.700 - 114.702, 114.706, 114.707, and 114.709 rules from consideration for approval in the SIP revision previously submitted to the EPA on July 15, 2002, since the rules are no longer applicable.

SUBCHAPTER L: ON-ROAD ENGINES

DIVISION 1: HEAVY-DUTY DIESEL ENGINES

§§114.700, 114.701, 114.702, 114.706, 114.707, 114.709

STATUTORY AUTHORITY

The repeals are 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 Texas Water Code. The repeals are also adopted under Texas Health and Safety Code (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; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §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; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.019, concerning Methods Used to Control and Reduce Emissions from Land Vehicles, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and THSC, §382.208, concerning Attainment Program, which authorizes the commission to coordinate with federal, state and local transportation planning agencies to develop and implement programs and other measures necessary to protect the public from exposure to hazardous air contaminants from motor vehicles.

The adopted repeals implement TWC, §5.103 and §5.105, and THSC, §§382.002, 382.011, 382.012, 382.017, 382.019, and 382.208.