

The Texas Commission on Environmental Quality (commission or TCEQ) proposes the repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709.

The proposed repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 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

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 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 due to 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 mitigates the original justification for Texas to require CARB-certified HDDE since the 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 to propose the repeal of Subchapter L based on their consideration of a petition from the Engine Manufacturers Association (EMA) and the executive director’s support for repealing these rules to address issues raised by the petitioner.

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 claims 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 identicality (i.e. "no third car") requirement in Section 177 of the Clean Air Act (42 United States Code (USC), §7507).

The Clean Air Act 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, Section 177 of the Clean Air Act (42 USC, §7507) 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 proposed repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 would remove 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 required under §§114.700 - 114.702, 114.706, 114.707, and 114.709.

Repealing these sections would provide 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 impact on the regulated emissions currently affected by these rules. In addition, the proposed repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 would eliminate the potential violation of the identicality (i.e. "no third car") requirement in Section 177 of the Clean Air Act (42 USC, §7507) that would 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed repeals are in effect, no 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 proposed rulemaking would repeal Chapter 114, Subchapter L, which regulates the types of HDDE and HDOH vehicles that can be sold in Texas, in its entirety. Persons selling or offering for sale HDDE or HDOH vehicles would, by default, be able to sell vehicles certified by either the EPA or by the CARB.

The proposed rules will have no fiscal implications on the agency because emission modeling used by the agency in the SIP already uses current 2007 federal emission standards for HDDE and HDOH vehicles.

Other state agencies or local governments will not be affected by the proposed rules since they do not sell these types of vehicles.

The proposed rulemaking would repeal §§114.700 - 114.702, 114.706, 114.707, and 114.709 (Subchapter L). Repealing Subchapter L would remove an out-dated regulation; provide regulatory flexibility by allowing persons selling or offering to sell new HDDE engines and HDOH vehicles in Texas with the option of selling HDDE and HDOH vehicles that are either certified by EPA or by CARB, thus having no impact on the regulated emissions currently affected by these rules; and eliminate the potential violation of the identity (i.e. “no third car”) requirement in Section 177 of the Clean Air Act that would 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. Repeal of the current rules would guarantee that Texas rules would comply with the Clean Air Act because only EPA rules or CARB rules, as allowed by the Act, would govern.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from the changes seen in the proposed rulemaking will be consistency between state and federal regulations and flexibility for sellers and buyers of HDDE and HDOH vehicles to sell or buy either EPA approved vehicles or those complying with CARB standards.

The proposed repeal is not expected to have any fiscal implications for persons or entities selling or offering for sale HDDE and HDOH vehicles since these persons or entities would have the option of supplying vehicles that are certified by either EPA or CARB. Buyers of these vehicles are not expected to experience fiscal implications as a result of the proposed repeal of rules since they would have the option of buying either EPA or CARB certified HDDE or HDOH vehicles.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that sell or buy HDDE or HDOH vehicles as a result of the proposed repeal of rules. Small or micro-businesses would have the option of selling or buying vehicles certified by either the EPA or CARB.

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 do not 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 repeal of §§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 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 this proposal 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 is not subject to a formal regulatory analysis.

In addition, the proposed 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 proposal 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, 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, 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 is adopted solely under the general powers of the agency.

Based on the foregoing, this proposed 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 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 the proposed rulemaking action under Texas Government Code, §2007.043. The specific purpose of this proposed rulemaking is to repeal §§114.700-114.702, 114.706, 114.707, and 114.709, which would provide 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 impact on the regulated emissions currently affected by these rules. The proposed repeal of §§114.700-114.702, 114.706, 114.707, and 114.709 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. 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 repeal 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 HEARING

The commission will hold a public hearing on this proposal at the following time and location: March 20, 2008, 10:00 a.m., Texas Commission on Environmental Quality, Building E, Room 201S, 12100 Park 35 Circle, Austin. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available to informally discuss the proposal 30 minutes before the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Kristin Smith, General Law Division, at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Kristin Smith, 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/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-056-114-EN. The comment period closes March 26, 2008. Copies of the proposed rule can be obtained from the commission's Website at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Morris Brown of the Air Quality Division at (512) 239-1438.

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

[§114.700. Definitions.]

[Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meaning commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise.]

[(1) Heavy-duty diesel engine (HDDE) - A diesel engine that is used to propel a heavy-duty vehicle.]

[(2) Heavy-duty, on-road vehicle - Any vehicle, except a passenger vehicle, which can be legally operated on the public roads in the State of Texas and having a manufacturer's gross vehicle weight rating of 14,001 pounds or greater.]

[(3) Ultra-small volume manufacturer - Any manufacturer with California sales less than or equal to 300 new passenger cars, light-duty trucks, medium-duty vehicles, heavy-duty vehicles, and heavy-duty engines per model year based on the average number of vehicles and engines sold by the manufacturer in the previous three consecutive model years.]

[(4) Urban bus - A passenger-carrying vehicle powered by a heavy-duty diesel engine (HDDE), or of a type normally powered by a HDDE, with a load capacity of 15 or more passengers and intended primarily for intra-city operation, i.e., within the confines of a city or greater metropolitan area. Urban buses would normally have equipment installed for the collection of fares, and are typically characterized by the absence of equipment and facilities for long distance travel.]

[\$114.701. Applicability.]

[The rules in this division apply to all heavy-duty diesel engines produced for sale or other use in the State of Texas for the model year 2005 and subsequent model years.]

[\$114.702. Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards.]

[The emission standards and associated performance test procedures for new model year 2005 and thereafter heavy-duty diesel engines; as certified for use in California in accordance with Title 13, California Code of Regulations, §1956.8, pertaining to Exhaust Emissions Standards and Test Procedures - 1985 and Subsequent Model Heavy-Duty Engines and Vehicles, as revised by the California Air Resources Board on December 8, 2000 and effective on July 25, 2001; are hereby incorporated by reference.]

[\$114.706. Recordkeeping Requirements.]

[All persons who sell, or offer for sale, diesel engines which meet the applicability requirements of §114.701 of this title (relating to Applicability) must maintain, for a minimum of two years, documentation that each applicable engine complies with the requirements of §114.702 of this title (relating to Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards), and provide those certification documents upon request by the agency.]

[§114.707. Exemptions and Technology Review.]

[The following engines are exempt from the requirements of §114.702 of this title (relating to Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards):]

[(1) any model year 2005 or 2006 heavy-duty diesel engine (HDDE) manufactured by an ultra-small volume manufacturer or intended for use in an urban bus;]

[(2) any engine if, followed by a technology review, the California Air Resources Board determines that it is inappropriate to require compliance for HDDE of that particular model year;]

[(3) any vehicle acquired by a resident of this state for the purpose of replacing a vehicle registered to that resident which was damaged, became inoperative beyond reasonable repair, or which was stolen while out of this state; provided the replacement vehicle is acquired out of the state at the same time the previously-owned vehicle was either damaged, became inoperative, or was stolen; and]

[(4) any vehicle transferred by inheritance, or by a decree of divorce, dissolution, or legal separation entered by a court of competent jurisdiction.]

[\§114.709. Affected Counties and Compliance Schedules.]

[Beginning with model year 2005, but no later than January 1, 2005, all sales and offers of sale of new heavy-duty diesel-powered, on-road vehicles in the State of Texas shall comply with §§114.701, 114.702, and 114.706 of this title (relating to Applicability; Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards; and Recordkeeping Requirements).]