

The Texas Commission on Environmental Quality (TCEQ or commission) proposes the repeal of §§115.620 - 115.622, 115.626, 115.627, and 115.629.

The repealed sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE REPEALED RULES

The EPA adopted a federal portable fuel container (PFC) rule (*72 Federal Register* 8432, February 26, 2007) that set a national standard for gasoline, diesel, and kerosene PFCs. All PFCs manufactured on or after January 1, 2009, are required to comply with the federal standards. The federal regulations are very similar to the revised PFC regulations adopted by the California Air Resources Board (CARB) on September 15, 2005. The current Texas PFC regulations are inconsistent with the federal standards because the state regulations were based on the previous PFC testing methods adopted by the CARB in 2001.

The design criteria requirements for PFCs and PFC spouts specified under §§115.620 - 115.622, 115.626, 115.627, and 115.629 were adopted on October 27, 2004. These PFC rules established design criteria for "no-spill" PFCs based primarily on the 2001 CARB standards. The Texas PFC regulations do differ from the 2001 CARB standards because the Texas rule does not require the control of permeation rates through the walls of the PFC. The control of permeation rates was not included in the Texas PFC regulations because the cost of compliance was expected to be large and the reduction in emissions small.

The Texas PFC rules became effective on December 31, 2005, and on January 11, 2006, the executive director received a petition for rulemaking under 30 TAC §20.15 from Mr. Jon Lips of L&W Innovations, LLC. L&W Innovations manufactures a one-time use emergency fuel carrier known as the "Gas-O-Haul." The "Gas-O-Haul" emergency fuel carrier is prohibited by regulation from sale in Texas because it does not comply with the performance standards and testing requirements of §115.622 and the labeling requirements of §115.626. In addition, the "Gas-O-Haul" emergency fuel carrier did not qualify for the exemption provided in §115.627 for one-time use containers filled by the manufacturer but are not intended for reuse, because the "Gas-O-Haul" is not a pre-filled container. On March 8, 2006, Docket Number 2006-0055-RUL, the commission approved the petition for rulemaking and instructed the executive director to initiate the rulemaking process that would allow one-time use, unfilled, emergency fuel containers to be exempt and be eligible for sale in the State of Texas. On May 1, 2006, the petitioner was granted an interim enforcement discretion waiver that is effective until the PFC rules are appropriately revised.

In December 2006, a concept memo was drafted to initiate proposed revisions to the PFC rules rulemaking. However, the rulemaking packet was put on hold while the EPA adopted the federal PFC rule. The federal rule defines a "portable fuel container" in 40 Code of Federal Regulations (CFR) §59.680 as "any reusable container." Thus, the "Gas-O-Haul" emergency fuel carrier is exempt under the federal rule because it can only be used once.

Since all PFCs manufactured on or after January 1, 2009, are required to comply with the federal standards, this action would provide a clear regulatory structure by repealing §§115.620 - 115.622, 115.626, 115.627, and 115.629.

SECTION BY SECTION DISCUSSION

The proposed repeal of §§115.620 - 115.622, 115.626, 115.627, and 115.629 would remove regulations that have become unnecessary with the EPA's implementation of the federal PFC rule (*72 Federal Register* 8432, February 26, 2007), which established a national standard for gasoline, diesel, and kerosene PFCs, and are therefore intended to eliminate duplication and provide a clear regulatory structure.

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 rule repeal is in effect, no significant fiscal implications are anticipated for the agency. In addition, no fiscal impact is expected for other units of state or local governments as a result of administration or enforcement of the proposed rule repeal.

The proposed rules repeal sections in Chapter 115 relating to the design criteria of PFCs and PFC spouts that were adopted by the agency on October 27, 2004. These rules are less stringent than federal PFC rules, and are no longer valid. The EPA adopted federal rules regarding PFCs for those manufactured on or after January 1, 2009, and nationwide manufacturers are required to produce PFCs meeting federal standards.

State agencies and local governments that use PFCs will be purchasing those that meet federal rules. PFCs that meet the federal standards are not expected to cost significantly more, and the repeal of state rules is not expected to have a fiscal impact on other state agencies or local governments.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule repeal is in effect, the public benefit anticipated from the changes seen in the proposed rule repeal will be consistent with federal rules that are protective of the environment.

The EPA adopted federal rules regarding PFCs for those manufactured on or after January 1, 2009, that apply nationwide. The proposed rules repeal sections in Chapter 115 concerning PFCs that are no longer valid and are less stringent. The repeal of the state rules is not expected to have a fiscal impact on businesses or individuals.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. The proposed rules repeal sections in Chapter 115 concerning PFCs that are no longer valid since new federal rules now determine the manufacturing standards of PFCs nationwide.

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 action repeals state rules that are no longer valid and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rule repeal is 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 rule repeal does not adversely affect a local economy in a material way for the first five years that the proposed rule repeal is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a "major environmental rule". Under Texas Government Code, §2001.0225, 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 rule repeal is intended to more effectively focus commission resources and to update administrative and technical requirements. While the rules being repealed were originally intended to protect the environment or reduce risks to human health from environmental exposure, they are no longer necessary because the EPA has promulgated federal rules that set a national standard for gasoline, diesel, and kerosene PFCs. All PFCs manufactured on or after January 1, 2009, are required to comply with the federal standards. The proposed repeal will remove requirements for PFC manufacturers in Texas, so that they can comply with the federal standard, which will prevent companies from having to determine compliance with duplicative standards. Because this rulemaking 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, the rulemaking does not fit the Texas Government Code, §2001.0225 definition of "major environmental rule".

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

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 Section 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 governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The commission has determined that the promulgation and enforcement of the proposed repeal will not affect 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 proposed repeal 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. The proposed repeal is administrative and does not impose any new regulatory requirements. The changes to §§115.620 - 115.622, 115.626, 115.627, and 115.629 would remove regulations that have become unnecessary by the EPA's implementation of federal PFC standards and are therefore intended to eliminate duplication and provide a clear regulatory structure. The proposed repeal is reasonably taken to fulfill requirements of state law. Therefore, the proposed repeal will 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 §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 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 in Austin on October 6, 2009, at 2:00 p.m., in Building E Room 201, at the commission's central office located at 12100 Park 35 Circle. The hearing is 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 the hearing should contact Michael Parrish, Office of Legal Services at (512) 239-2548. 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 2008-032-115-EN. The comment period closes October 12, 2009. 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. For further information, please contact

Lisa Shuvalov, Air Quality Planning Section, at 512-239-4484.

SUBCHAPTER G: CONSUMER-RELATED SOURCES

[DIVISION 2: PORTABLE FUEL CONTAINERS]

[§§115.620 - 115.622, 115.626, 115.627, 115.629]

STATUTORY AUTHORITY

The repeal 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; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal 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; and §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere.

The proposed repeal will implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.051.

[§115.620. Definitions.]

[The following words and terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §§3.2, 101.1, and 115.10 of this title (relating to Definitions).]

[(1) Nominal capacity--The volume indicated by a portable fuel container manufacturer that represents the maximum recommended filling level.]

[(2) Portable fuel container--Any vessel that is designed to be used in combination with a portable fuel container spout and that is designed or used primarily to receive, transport, store, or dispense fuel for use in internal combustion engines.]

[(3) Portable fuel container spout--Any device that is designed or manufactured to be attached to a portable fuel container for the purpose of dispensing fuel into a target fuel tank leading to an internal combustion engine.]

[(4) Target fuel tank--Any receptacle that receives fuel from a portable fuel container.]

[§115.621. Applicability.]

[Except as provided in §115.627 of this title (relating to Exemptions), this division shall apply to any person who sells, offers for sale, supplies, distributes, or manufactures portable fuel containers and portable fuel container spouts in the State of Texas.]

[§115.622. Performance Standards and Testing Requirements.]

[Except as provided in §115.627 of this title (relating to Exemptions), no person shall sell, supply, offer for sale, distribute, or manufacture any portable fuel container or portable fuel container spout which was manufactured on or after December 31, 2005, that does not comply with the following performance standards.]

[(1) Portable fuel containers must have only one opening in the vessel.]

[(2) Portable fuel container spouts must:]

[(A) contain an automatic shutoff device that stops the flow of fuel before the target fuel tank overflows, in accordance with California Air Resources Board (CARB) Test Method 510 (July 6, 2000);]

[(B) automatically close and seal when removed from the target fuel tank, and remain completely closed when not dispensing fuel, in accordance with CARB Test Method 511 (July 6, 2000);]

[(C) seal without leakage to the portable fuel container to which it is affixed;]

[(D) provide a fuel flow rate, in accordance with CARB Test Method 512 (July 6, 2000), of not less than:]

[(i) 1/2 gallon per minute when attached to a portable fuel container with a nominal capacity of 1.5 gallons or less;]

[(ii) one gallon per minute when attached to a portable fuel container with a nominal capacity greater than 1.5 gallons but less than or equal to 2.5 gallons; or]

[(iii) two gallons per minute when attached to a portable fuel container with a nominal capacity of greater than 2.5 gallons; and]

[(E) cut off fuel flow when the fuel level in the target fuel tank reaches:]

[(i) one inch from the top of a target fuel tank with a nominal capacity of 1.5 gallons or less; or]

[(ii) 1.25 inches from the top of a target fuel tank with a nominal capacity greater than 1.5 gallons.]

[§115.626. Labeling.]

[Portable fuel containers and portable fuel container spouts subject to the requirements of §115.622 of this title (relating to Performance Standards and Testing Requirements) must be labeled so as to indicate compliance with the requirements of §115.622 of this title. The label must also list the date the device was manufactured and must prominently include the word "spill-proof." The label must also specify with which portable fuel containers the portable fuel container spout must be used. These labeling requirements are in addition to any other federal or state labeling requirements that apply to portable fuel containers.]

[§115.627. Exemptions.]

[This division (relating to Portable Fuel Containers) does not apply to:]

[(1) portable fuel containers or portable fuel container spouts manufactured prior to December 31, 2005;]

[(2) portable fuel containers with a nominal capacity less than or equal to one quart, or greater than ten gallons;]

[(3) portable fuel containers or portable fuel container spouts that are sold, supplied, or offered for sale outside of Texas;]

[(4) portable fuel containers and portable fuel container spouts used in officially sanctioned racing competitions when the minimum flow rates provided in §115.622(2)(D) of this title

(relating to Performance Standards and Testing Requirements) would interfere with the competition by requiring too long to refuel vehicles during the race, if both the portable fuel container spout and the receiving tank have compatible spill-proof mechanisms to avoid spills when transferring fuel;]

[(5) safety cans when their use is required by the federal Occupational Safety and Health Administration under 29 Code of Federal Regulations §1926.155(1); and]

[(6) containers that are filled with fuel by the manufacturer prior to sale to consumers and that are not intended for reuse as portable fuel containers.]

[\$115.629. Affected Counties and Compliance Schedules.]

[All affected persons in all counties within the State of Texas shall be in compliance with the provisions of this division as soon as practicable, but no later than December 31, 2005.]