The Texas Commission on Environmental Quality (commission or agency) adopts the amendment to §117.403 *without changes* to the proposed text as published in the August 28, 2009, issue of the *Texas Register* (34 TexReg 5866).

The amendment 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 ADOPTED RULE

On December 11, 2008, Elk Corporation of Texas submitted a petition for rulemaking requesting an amendment to §117.403, which currently exempts from Chapter 117, Subchapter B, Division 4, Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources, curing ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-bound chemical additives are used. The commission approved the petition for rulemaking on January 28, 2009, and issued an order on February 2, 2009, directing the executive director to examine the issues in the petition and to initiate rulemaking.

The adopted rule will amend Chapter 117, Subchapter B, Division 4, §117.403, for the Dallas-Fort Worth (DFW) 1997 eight-hour ozone nonattainment area. The adopted change will expand the exemption in §117.403(a)(12) to include low-temperature drying ovens and curing ovens used in wet-laid, non-woven fiber mat manufacturing as well as low-temperature drying ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-containing resins or other additives are used. The current §117.403(a)(12) only exempts curing ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-bound chemical additives are used. In response to comment by Owens Corning during the 2007 DFW 1997 eight-hour ozone nonattainment area rulemaking under Chapter 117, a provision was added

under §117.403(a)(12) to exempt curing ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-bound chemical additives are used because of technical feasibility issues with controlling nitrogen oxide ($NO_X$) emissions from curing ovens of this specific operation. While the type of manufacturing covered by this adopted rulemaking is different from that specified in the current rule exemption, the technical feasibility issue described is similar to the issue that is the basis of the current exemption in §117.403(a)(12). The addition of nitrogen-bound chemical additives contributes to the creation of non-combustion related thermal $NO_X$ that cannot be controlled using the control methodologies the commission identified as appropriate for curing ovens used in mineral wool-type fiberglass manufacturing. In addition, the $NO_X$ emissions from curing ovens of this type are estimated to be a small contribution to the total $NO_X$ emissions from this industry. If the rule revision is adopted, approximately 0.1 tons per day (tpd) of anticipated $NO_X$ emission reduction will need to be replaced in the 2007 DFW eight-hour ozone attainment demonstration SIP revision.

DEMONSTRATING NONINTERFERENCE UNDER FEDERAL CLEAN AIR ACT, SECTION 110(l)

*Issue*

The commission provides the following information to clarify why the adopted change to expand the exemption in §117.403(a)(12) will not negatively impact the status of the state's attainment with the ozone National Ambient Air Quality Standard (NAAQS).

The requirement for reasonable notice and public hearing was satisfied through a public hearing held on September 17, 2009, and the public comment period, held from August 28, 2009, to September 28, 2009. The purpose of the hearing was to accept written and oral comments on the proposed rulemaking. A written comment was submitted by the EPA. The EPA stated that it will provide comment on the

commissions' §110(l) demonstration in its comment letter pertaining to the proposed DFW Reasonably Available Control-Technology Update, 30 Texas Administrative Code Chapter 117 Rule Revision Noninterference Demonstration, and Attainment Demonstration Contingency Plan State Implementation Plan Revision.

The EPA issued draft guidance on June 8, 2005, titled "Demonstrating Noninterference Under Section 110(l) of the Clean Air Act When Revising a State Implementation Plan." The guidance states on page six that "areas have two options available to demonstrate noninterference for the affected pollutant(s)." This preamble provides details of the identified existing measures that the commission will use to establish compliance with option one of the EPA's guidance: substitution of one measure by another with equivalent or greater emissions reduction/air quality benefits.

*Background*

On May 23, 2007, the commission adopted a new Chapter 117, Subchapter B, Division 4, Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources, with new emission control requirements for major industrial, commercial, or institutional (ICI) sources of $NO_X$ in the DFW 1997 eight-hour ozone nonattainment area. This rulemaking was part of the DFW 1997 eight-hour ozone attainment demonstration, and the emission reductions associated with the rulemaking will help bring the DFW 1997 eight-hour ozone nonattainment area into compliance with the eight-hour ozone NAAQS.

The new Subchapter B, Division 4 requires owners or operators of major ICI sources of $NO_X$ in the DFW 1997 eight-hour ozone nonattainment area to reduce $NO_X$ emissions from a wide variety of stationary sources. One source category newly regulated under Chapter 117 during the 2007 rulemaking was curing

and drying ovens used in mineral wool-type fiberglass manufacturing. In response to comments made by Owens Corning during the comment period for the adopted rulemaking in 2007, the commission added a new provision under §117.403(a)(12) to exempt curing ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-bound chemical additives are used because of technical feasibility issues with controlling $NO_X$ emissions from curing ovens of this specific operation.

While the type of manufacturing covered by this adopted rulemaking is different from that specified by Owens Corning in the prior rulemaking, the petitioner's fiberglass manufacturing process has the same technical feasibility issue that is the basis of the current exemption in §117.403(a)(12). The addition of nitrogen-bound chemical additives contributes to the creation of non-combustion-related thermal $NO_X$ that cannot be controlled using the control methodologies the commission had identified as appropriate for curing ovens used in mineral wool-type fiberglass manufacturing. In addition, the amount of $NO_X$ from curing ovens of this type are estimated to be a small contribution to the total $NO_X$ emissions from this industry.

If this rulemaking is adopted, approximately 0.1 tpd of $NO_X$ emission reductions will need to be replaced in the 2007 DFW 1997 eight-hour ozone attainment demonstration SIP. The commission will replace the 0.1 tpd of $NO_X$ reduction with 0.1 tpd of $NO_X$ from surplus fleet turnover reductions. This replacement will be reflected in the commission's Discrete Emissions Reduction Credits (DERC) limit determination for 2010, consistent with 30 TAC §101.379(c)(2)(A).

*Conclusion*

Based upon all data presently before the commission, it has been determined that there are sufficient credits in place to offset the shortfall from expanding the exemption in §117.403(a)(12). The replacement reductions adopted by the commission in this rulemaking are achieved from motor vehicle fleet turnover that are ground-level emission sources.

SECTION BY SECTION DISCUSSION

The adopted rulemaking will amend Chapter 117, Subchapter B, Division 4, Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources. The adopted rule will expand the current exemption to include low-temperature drying ovens and curing ovens used in wet-laid, non-woven fiber mat manufacturing as well as low-temperature drying ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-containing resins or other additives are used.

*Section 117.403, Exemptions*

Section 117.403 specifies unit types, sizes, or uses that are exempted from the requirements of Chapter 117, Subchapter B, Division 4. The provisions of Chapter 117, Subchapter B, Division 4 exempts units where the unit type, maximum rated capacity, or specific use either cannot feasibly comply with the specifications due to technical or economic restraints or are regulated under another division.

The commission adopts the amendment to §117.403(a)(12) by expanding the current exemption to include low-temperature drying ovens and curing ovens used in wet-laid, non-woven fiber mat manufacturing as well as low-temperature drying ovens used in mineral wool-type fiberglass manufacturing. Currently, §117.403(a)(12) exempts curing ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-bound chemical additives are used. In response to comment during the

2007 revisions to Chapter 117, a provision was added under §117.403(a)(12) to exempt curing ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-bound chemical additives are used because of technical feasibility issues with controlling $NO_X$ emissions from curing ovens of this specific operation. The manufacturing process covered by this rulemaking is different from the process covered by the current §117.403(a)(12) exemption, but the technical feasibility issue is similar.

The adopted rule will also revise the rule language from "nitrogen-bound chemical additives" to "nitrogen-containing resins, or other additives." Resins may not always be considered an additive, so this adopted change clarifies that nitrogen-containing resins will qualify for this exemption.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the adopted rule does not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that a "major environmental rule" is, "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." Furthermore, while the adopted rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the adopted rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Health and Safety Code, §2001.0225 applies only to a major environmental rule which, "(1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3)

exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law."

The adopted rulemaking implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state.

The specific intent of the adopted rulemaking is to provide fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area. The current §117.403(a)(12) exempts from Chapter

117, Subchapter B, Division 4, Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources, curing ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-bound chemical additives are used. The exemption was added in response to comments during the 2007 DFW 1997 eight-hour ozone nonattainment area rulemaking under Chapter 117, because of technical feasibility issues with controlling $NO_X$ emissions from curing ovens of this specific operation. While the type of manufacturing covered by this adopted rulemaking is different from that specified in the current §117.403(a)(12) rule exemption, the technical feasibility issue described is similar. To further the specific intent of providing fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area, the adopted rule will broaden the current exemption to Chapter 117, Subchapter B, Division 4, Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources to include low-temperature drying ovens and curing ovens used in wet-laid, non-woven fiber mat manufacturing as well as low-temperature drying ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-containing resins or other additives are used.

The adopted rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because: 1) the specific intent of the adopted rule is not to protect the environment or reduce risks to human health from environmental exposure, but rather to provide fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area; and 2) as discussed previously and in the rule proposal, the adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor will the adopted rules adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state, because the lost $NO_X$ emission reduction created by this adopted expanded exemption will be offset by $NO_X$ reductions from surplus fleet turnover as discussed previously in the BACKGROUND AND

SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE section. Because the adopted rulemaking is not a major environmental rule, it is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225.

While this rulemaking does not constitute a major environmental law, even if it did, it would not be subject to a regulatory impact assessment under Texas Government Code, §2001.0225. The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program; or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The

legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that, "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of §2001.0225.

Regardless of whether the adopted rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the eight-hour ozone NAAQS in the DFW nonattainment area. Therefore, the adopted rule does not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law - the NAAQS. The commission is charged with protecting air quality within the state and with designing and submitting a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Envtl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, *no writ*). In addition, no contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking 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, §§382.011, 382.012, and 382.017.

This rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), for the following reasons. The adopted rulemaking is not a major environmental law because: 1) the specific intent of the adopted rule is not to protect the environment or reduce risks to human health from environmental exposure, but rather to provide fair and consistent application of SIP rules in the DFW eight-hour ozone nonattainment area; and 2) the adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor will it adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state, because the lost $NO_X$ emission reduction created by the adopted expanded exemption will be offset by $NO_X$ reductions from surplus fleet turnover. Furthermore, even if the adopted rulemaking was a major environmental rule, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the adopted rulemaking is part of the Dallas-Fort Worth Eight Hour Ozone Nonattainment Area Attainment Demonstration, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) no contract or delegation agreement covers the topic that is the subject of this rulemaking; and 3) the adopted rulemaking 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.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an analysis of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The commission determined that Texas Government Code, Chapter 2007 does not apply because this rulemaking provides for fair and consistent application of SIP rules in the DFW eight-hour ozone nonattainment area by expanding the exemption from Chapter 117, Subchapter B, Division 4, Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources, to include low-temperature drying ovens and curing ovens used in wet-laid, non-woven fiber mat manufacturing as well as low-temperature drying ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-containing resins or other additives are used.

Under Texas Government Code, §2007.002(5), taking means: "(A) 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 (B) a governmental action that: (i) 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 (ii) 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 specific purpose of the adopted rulemaking is to provide fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area. The current §117.403(a)(12) exempts curing

ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-bound chemical additives are used. The current exemption was added in response to comments during the 2007 DFW 1997 eight-hour ozone nonattainment area rulemaking under Chapter 117, because of technical feasibility issues with controlling $NO_X$ emissions from curing ovens of this specific operation. While the type of manufacturing covered by the adopted rule is different from that specified in the current §117.403(a)(12) exemption, the technical feasibility issue described is similar. Therefore, the adopted rulemaking would substantially advance this stated purpose by expanding the exemption from Chapter 117, Subchapter B, Division 4, Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources, to include low-temperature drying ovens and curing ovens used in wet-laid, non-woven fiber mat manufacturing as well as low-temperature drying ovens used in mineral wool-type fiberglass manufacturing in which nitrogen-containing resins or other additives are used.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. Because the adopted rule promulgates an exemption, it is less burdensome, restrictive, or limiting of rights to private real property than the existing rule. Furthermore, the adopted rule will benefit the public by providing fair and consistent application of SIP rules in the DFW 1997 ozone nonattainment area. The adopted rule does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property; nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules simply expand the existing exemption in §117.403 to include sources that have technological feasibility issues similar to those of the sources covered by the current exemption. Therefore, the adopted rule does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found it is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), 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 rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received concerning the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 117 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the amendment is adopted by the commission, owners or operators subject to the federal operating permits program that elect to comply with the §117.403(a)(12) exemption may need to revise their operating permit.

PUBLIC COMMENT

A public hearing was scheduled September 17, 2009, at 2:00 p.m., in Ennis, Texas. No oral comments were received. The comment period closed on September 28, 2009. A written comment was received from the EPA.

RESPONSE TO COMMENT

The EPA stated that it will provide comment on the commission §110(l) demonstration in its comment letter pertaining to the proposed Dallas-Fort Worth (DFW) Reasonably Available Control-Technology Update, 30 Texas Administrative Code Chapter 117 Rule Revision Noninterference Demonstration, and Attainment Demonstration Contingency Plan State Implementation Plan Revision.

**The commission thanks the EPA for its comment and looks forward to responding to any questions the EPA has concerning the §110(l) demonstration. No change was made to the rule based on this comment.**

**SUBCHAPTER B: COMBUSTION CONTROL AT MAJOR INDUSTRIAL, COMMERCIAL, AND INSTITUTIONAL SOURCES IN OZONE NONATTAINMENT AREAS**

**DIVISION 4: DALLAS-FORT WORTH EIGHT-HOUR OZONE NONATTAINMENT AREA MAJOR SOURCES**

**§117.403**

STATUTORY AUTHORITY

The amendment is adopted under the authority of the following: Texas Government Code, §2001.021, Petition for the Adoption of Rules, which authorizes an interested person to petition a state agency for the adoption of a rule; Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, and §5.105, General Policy (these provisions authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC); Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.002, 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, General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, TCAA, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The amendment is also adopted under THSC, §382.016, Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; THSC, §382.021, Sampling Methods and

Procedures, which authorizes the commission to prescribe sampling methods and procedures; and THSC, §382.051(d), Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.021, and 382.051(d).

**§117.403. Exemptions.**

(a) Units exempted from the provisions of this division (relating to Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources), except as specified in §§117.440(i), 117.445(f)(4) and (9), 117.450, and 117.454 of this title (relating to Continuous Demonstration of Compliance; Notification, Recordkeeping, and Reporting Requirements; Initial Control Plan Procedures; and Final Control Plan Procedures for Attainment Demonstration Emission Specifications), include the following:

(1) industrial, commercial, or institutional boilers or process heaters with a maximum rated capacity equal to or less than:

(A) 2.0 million British thermal units per hour (MMBtu/hr) for boilers; and

(B) 5.0 MMBtu/hr for process heaters;

(2) heat treating furnaces and reheat furnaces with a maximum rated capacity less than 20 MMBtu/hr;

(3) flares, incinerators with a maximum rated capacity less than 40 MMBtu/hr, pulping liquor recovery furnaces, sulfur recovery units, sulfuric acid regeneration units, molten sulfur oxidation furnaces, and sulfur plant reaction boilers;

(4) dryers, heaters, or ovens with a maximum capacity of 5.0 MMBtu/hr or less;

(5) any dryers, heaters, or ovens fired on fuels other than natural gas. This exemption does not apply to gas-fired curing ovens used for the production of mineral wool-type or textile-type fiberglass;

(6) any glass, fiberglass, and mineral wool melting furnaces with a maximum rated capacity of 2.0 MMBtu/hr or less;

(7) stationary gas turbines and stationary internal combustion engines, that are used as follows:

(A) in research and testing;

(B) for purposes of performance verification and testing;

(C) solely to power other engines or gas turbines during startups;

(D) exclusively in emergency situations, except that operation for testing or maintenance purposes is allowed for up to 100 hours per year, based on a rolling 12-month average. Any new, modified, reconstructed, or relocated stationary diesel engine placed into service on or after June 1, 2007, is ineligible for this exemption. For the purposes of this subparagraph, the terms "modification" and "reconstruction" have the meanings defined in §116.10 of this title (relating to General Definitions) and 40 Code of Federal Regulations (CFR) §60.15 (December 16, 1975), respectively, and the term "relocated" means to newly install at an account, as defined in §101.1 of this title (relating to Definitions), a used engine from anywhere outside that account;

(E) in response to and during the existence of any officially declared disaster or state of emergency;

(F) directly and exclusively by the owner or operator for agricultural operations necessary for the growing of crops or raising of fowl or animals; or

(G) as chemical processing gas turbines;

(8) any stationary diesel engine placed into service before June 1, 2007, that:

(A) operates less than 100 hours per year, based on a rolling 12-month average; and

(B) has not been modified, reconstructed, or relocated on or after June 1, 2007. For the purposes of this subparagraph, the terms "modification" and "reconstruction" have the meanings defined in §116.10 of this title and 40 CFR §60.15 (December 16, 1975), respectively, and the term "relocated" means to newly install at an account, as defined in §101.1 of this title, a used engine from anywhere outside that account;

(9) any new, modified, reconstructed, or relocated stationary diesel engine placed into service on or after June 1, 2007, that:

(A) operates less than 100 hours per year, based on a rolling 12-month average, in other than emergency situations; and

(B) meets the corresponding emission standard for non-road engines listed in 40 CFR §89.112(a), Table 1 (October 23, 1998), and in effect at the time of installation, modification, reconstruction, or relocation. For the purposes of this paragraph, the terms "modification" and "reconstruction" have the meanings defined in §116.10 of this title and 40 CFR §60.15 (December 16, 1975), respectively, and the term "relocated" means to newly install at an account, as defined in §101.1 of this title, a used engine from anywhere outside that account;

(10) boilers and industrial furnaces that were regulated as existing facilities by 40 CFR Part 266, Subpart H, as was in effect on June 9, 1993;

(11) brick or ceramic kilns with a maximum rated capacity less than 5.0 MMBtu/hr;

(12) low-temperature drying and curing ovens used in mineral wool-type fiberglass manufacturing and wet-laid, non-woven fiber mat manufacturing in which nitrogen-containing resins, or other additives are used;

(13) stationary, gas-fired, reciprocating internal combustion engines with a horsepower (hp) rating less than 50 hp;

(14) electric arc melting furnaces used in steel production;

(15) forming ovens and forming processes used in mineral wool-type fiberglass manufacturing; and

(16) natural gas-fired heaters used exclusively for providing comfort heat to areas designed for human occupancy.

(b) Increment of progress exemptions.

(1) Stationary, reciprocating internal combustion engines with a maximum rated capacity less than 300 horsepower are exempt from the emission specifications in §117.410(a) of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration).

(2) The emission specifications in §117.410(a) of this title no longer apply to any stationary, reciprocating internal combustion engine subject to the emission specifications of §117.410(b) of this title after the compliance date specified in §117.9030(b) of this title (relating to Compliance Schedule for Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources).

(3) Stationary engines that are demonstrated to operate less than 850 hours per year, based on a rolling 12-month average are exempt from the emission specifications in §117.410(a) of this title.

(c) Emergency fuel oil firing exemption for gas-fired boilers. The emission specifications in §117.410(b)(1) and (d) of this title do not apply to gas-fired boilers during periods that the owner or operator is required to fire fuel oil on an emergency basis due to natural gas curtailment or other emergency, provided:

(1) the fuel oil firing occurs during the months of November, December, January, or February; and

(2) the fuel oil firing does not exceed a total of 72 hours in any calendar month specified in paragraph (1) of this subsection.