

The Texas Natural Resource Conservation Commission (commission) proposes new §114.432 (Control Requirements), §114.436 (Recordkeeping Requirements), §114.437 (Exemptions), and §114.439 (Affected Counties and Compliance Dates). The commission proposes these revisions to add the new Division 4 (Construction Equipment Operating Limitations), Subchapter I (Non-road Engines), Chapter 114 (Control of Air Pollution from Motor Vehicles), and to the State Implementation Plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The commission proposes these revisions to Chapter 114 and to the SIP in order to control ground-level ozone in the Dallas-Fort Worth (DFW) ozone nonattainment area. The proposed revisions are one element of the control strategy for the proposed DFW Attainment Demonstration SIP. The purpose of these proposed rules is to establish a limitation on the use of heavy-duty diesel construction equipment as an air pollution control strategy to delay the emissions of oxides of nitrogen (NO_x) until later in the day, thus limiting ozone production. This control strategy is necessary for the counties included in the DFW nonattainment area to be able to demonstrate attainment with the national ambient air quality standard (NAAQS) for ozone.

The proposed revisions would implement an operating-use restriction program requiring that the heavy-duty diesel construction equipment, rated at 50-horsepower and greater, be restricted from use between the hours of 6:00 a.m. through 10:00 a.m., June 1 through October 31. The effected area would include the four-county DFW nonattainment area of Collin, Dallas, Denton, and Tarrant Counties, as well as the remaining eight counties in the consolidated metropolitan statistical area (CMSA), which

includes Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, and Rockwall Counties. The effective date would be June 1, 2001.

The intent of this proposed regulation is to limit the use of heavy-duty diesel construction equipment between the hours of 6:00 a.m. through 10:00 a.m. The equipment is restricted from operating. Other construction work not requiring the use of heavy-duty diesel equipment remains unrestricted under these proposed rules. It should be noted that construction equipment is banned from use during the hours specified regardless of how it is being used. For example, construction equipment such as bulldozers used in sanitary landfills are also covered by this proposed regulation. A second example, heavy, non-road cranes used in demolition work are also restricted. It is not the commission's intent to restrict the use of agriculture equipment, which does not meet the definition of construction equipment.

The North Texas Clean Air Steering Committee (steering committee), representing the DFW ozone nonattainment area counties, requested an air pollution control strategy involving the time restriction of heavy-duty diesel construction equipment as part of the DFW Attainment Demonstration to reduce ground level ozone necessary for the counties included in the DFW ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. At the request of the steering committee, the commission developed the proposed non-road construction equipment operating-use restriction which requires a ban of heavy-duty diesel construction equipment operation during certain hours of the summer ozone season. No existing regulation covers the operating-use restriction of construction equipment.

The steering committee estimates that area and non-road emissions make up 33% of all NO_x emissions in the DFW area. The steering committee calculates that 48% of the emissions from area and non-road emissions inventory come from construction equipment which amounts to 16% of the region's total NO_x emissions. The amount of emissions from construction equipment in the DFW 12-county CMSA amount to approximately 82 tons per day. Of the sources that contribute to this amount, 99% are attributed to the operation of heavy-duty diesel construction equipment. The non-road mobile source category is one of the few sources of ozone-causing emissions that are not currently regulated. Federal controls such as cleaner-burning engines and cleaner-diesel fuel have been proposed, but are not scheduled to be implemented until around the 2004 time frame.

By shifting the hours of construction for the heavy-duty diesel construction equipment until after 10:00 a.m. during the effective time period, the NO_x emissions will not mix in the atmosphere with other ozone-causing compounds until later in the day. Ozone is formed through chemical reactions between natural and man-made emissions of volatile organic compounds (VOC) and NO_x in the presence of sunlight. Higher ozone levels occur most frequently on hot summer afternoons. The critical time for the mixing of NO_x and VOC is early in the day. By delaying the release of NO_x emissions from construction equipment until later in the day, production of ozone will be stalled until optimum conditions no longer exist, thus avoiding the production higher levels of ozone.

Because this proposed strategy does not create an actual reduction in emissions or require the use of additional control equipment or any new technology, the commission estimates that the fiscal implications may be significant although the amount of fiscal implication is unknown. The shift in the

construction time may require that construction companies adjust their employees' work schedules to coincide with the regulation.

Exemptions have been proposed to allow for the operation of any heavy-duty diesel construction equipment used exclusively for safety purposes. In addition, heavy-duty diesel construction equipment used in the processing of wet concrete is also proposed for exemption. The commission would like to specifically request comment on allowing the use of added controls such as catalytic converters or other after-market devices or the use of United States Environmental Protection Agency (EPA)-certified cleaner equipment, to exempt such equipment from the construction ban for the years of 2001 - 2004.

The commission, at the request of the steering committee, has developed this strategy to cover the 12-county region comprising the DFW CMSA. The steering committee has recommended that the coverage area includes the four ozone nonattainment counties of Collin, Dallas, Denton, and Tarrant Counties, as well as the surrounding eight adjacent counties of Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, and Rockwall Counties. The involvement of all 12 counties as part of the NO_x emission control strategy is necessary for the area to demonstrate attainment of the ozone NAAQS.

SECTION BY SECTION ANALYSIS

Subchapter I is a new subchapter that is being proposed in concurrent rulemaking. The new Division 4 is proposed regarding construction equipment operating limitations.

The proposed new §114.432 establishes control requirements for construction equipment operating-use limitations. The proposal restricts the operation of any non-road diesel construction equipment of 50-horsepower and above, between the hours of 6:00 a.m. to 10:00 a.m., during the time period between June 1 and October 31.

The proposed new §114.436 requires all companies or independent equipment operators subject to the provisions of §114.432 to maintain daily records of equipment operation in the affected counties.

The proposed new §114.437 establishes exemptions from the control requirements of §114.432 and the recordkeeping requirements of §114.346. These exemptions include diesel equipment used exclusively for situations involving emergency operations and diesel equipment while being used for mixing, transporting, pouring, or processing of wet concrete.

The proposed new §114.439 specifies the counties which are subject to the new requirements and the dates and times these counties are subject to these requirements. The affected counties include all counties in the DFW CMSA which are Collin, Dallas, Denton, Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

FISCAL NOTE

Bob Orozco, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments to Chapter 114 are in effect significant fiscal implications are anticipated for units of state and local government as a result of administration or

enforcement of the proposed amendments. The proposed amendments would restrict the use of heavy-duty diesel construction equipment, rated at 50 horsepower and greater, from use between the hours of 6:00 a.m. through 10:00 a.m., June 1 through October 31. The restriction would apply to construction equipment in the 12-county DFW CMSA. The proposed amendments would become effective June 1, 2001. Units of state and local government within the DFW CMSA that have ongoing construction projects will be affected. Although the extent of the fiscal implications are not known at this time, the costs associated with delays and extended construction schedules may be significant in an amount that cannot be determined at this time. State and local agencies engaged in road construction and repair are anticipated to bear the heaviest burden among state and local agencies. The proposed amendments do not require additional control equipment or new emission control technologies to be applied to the affected diesel equipment.

The proposed amendments to Chapter 114 would establish a limitation on the use of heavy-duty diesel construction equipment as an air pollution control strategy to delay the emission of NO_x until later in the day, thus limiting ozone production. This control strategy is necessary for the counties included in the DFW nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The steering committee representing the DFW ozone nonattainment area counties has requested an air pollution control strategy, including the time restrictions on heavy-duty diesel construction equipment, to be established to reduce the formation of ozone and demonstrate attainment with the NAAQS. In addition to Dallas, Collin, Denton, and Tarrant Counties which comprise the DFW ozone nonattainment area, eight additional counties comprising the rest of the DFW CMSA are expected to agree to participate in this strategy. The DFW CMSA consists of Collin, Dallas, Denton, Ellis, Henderson, Hood, Hunt,

Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties. The proposed amendments are part of the commission's response to the request from the steering committee and one element of the proposed DFW Attainment Demonstration SIP. A SIP is a plan developed for any region where existing (measured and modeled) ambient levels of pollutant exceeds the levels specified in a national standard. The plan sets forth a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards.

Exemptions have been proposed that allow for the operation of any heavy-duty diesel construction equipment used exclusively for safety/emergency operations. In addition, heavy-duty diesel construction equipment used for mixing, transporting, pouring, or processing of wet concrete is also proposed for exemption.

Units of state and local government within the DFW CMSA that have ongoing construction projects may have significant fiscal implications in an amount that cannot be determined at this time. Since this proposal was received late in the rulemaking process, the commission invites public comment regarding anticipated costs directly related to the proposed amendments. Because the proposed amendments do not require additional control equipment or new technology, the commission does not anticipate significant economic impacts to affected agencies and businesses beyond the shift in work schedule and possible implications caused by potential construction delays attributable to the proposed amendments. Delaying use of diesel construction equipment until after 10:00 a.m. may require affected state and local agencies and businesses to adjust their work schedules and could cause extensions of construction

timelines. The fiscal impact of potential delays would depend on the scope, magnitude, and time-critical nature of the construction project.

PUBLIC BENEFIT

Mr. Orozco also has determined that for each year of the first five years the proposed amendments to Chapter 114 are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be a potential reduction in the formation of ozone by delaying NO_x emissions from construction equipment until later in the day when optimum conditions for the formation of ozone no longer exist, potentially improved air quality, and contribution toward demonstration of attainment with the ozone NAAQS.

The proposed amendments would restrict the use of heavy-duty diesel construction equipment, rated at 50 horsepower and greater, from use between the hours of 6:00 a.m. through 10:00 a.m., June 1 through October 31. The restriction would apply to construction equipment in the 12-county DFW CMSA. The proposed amendments would become effective June 1, 2001.

Businesses within the DFW CMSA that have ongoing construction projects may have significant fiscal implications in an amount that cannot be determined at this time. Since this proposal was received late in the rulemaking process, the commission invites public comment regarding anticipated costs directly related to the proposed amendments. Because the proposed amendments do not require additional control equipment or new technology, the commission does not anticipate significant economic impacts to affected agencies and businesses beyond the shift in work schedule and possible implications caused

by potential construction delays attributable to the proposed amendments. Delaying use of diesel construction equipment until after 10:00 a.m. may require affected state and local agencies and businesses to adjust their work schedules and could cause extensions of construction timelines. The fiscal impact of potential delays would depend on the scope, magnitude, the slack time available in the schedule, and the time-critical nature of certain parts of the construction project.

Exemptions have been proposed that allow for the operation of any heavy-duty diesel construction equipment used exclusively for safety/emergency operations. In addition, heavy-duty diesel construction equipment used for mixing, transporting, pouring, or processing of wet concrete is also proposed for exemption.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSES

Small and micro-businesses within the DFW CMSA that have ongoing construction projects may have significant fiscal implications as a result of enforcement and administration of the proposed amendments. Since this proposal was received late in the rulemaking process, the commission invites public comment regarding anticipated costs directly related to the proposed amendments.

The proposed amendments would restrict the use of heavy-duty diesel construction equipment, rated at 50 horsepower and greater, from use between the hours of 6:00 a.m. through 10:00 a.m., June 1 through October 31. The restriction would apply to construction equipment in the 12-county DFW CMSA. The proposed amendments would become effective June 1, 2001.

Because the proposed amendments do not require additional control equipment or new technology, the commission does not anticipate significant economic impacts to affected small and micro-businesses beyond the shift in work schedule and possible implications caused by potential construction delays attributable to the proposed amendments. Delaying use of diesel construction equipment until after 10:00 a.m. may require affected small and micro-businesses to adjust their work schedules and could cause extensions of construction timelines. The fiscal impact of potential delays would depend on the scope, magnitude, the slack time available in the schedule, and the time-critical nature of certain parts of the construction project.

Exemptions have been proposed that allow for the operation of any heavy-duty diesel construction equipment used exclusively for safety/emergency operations. In addition, heavy-duty diesel construction equipment used for mixing, transporting, pouring, or processing of wet concrete is also proposed for exemption.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking meets the definition of a “major environmental rule” as defined in that statute. “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 amendments to Chapter 114 are intended to protect the

environment or reduce risks to human health from environmental exposure to ozone and, although we have no estimates of cost at this time, construction delays could affect a sector of the economy in a material way. The proposed amendments are intended to implement an operating-use restriction program requiring that certain heavy-duty diesel construction equipment be restricted from use between the hours of 6:00 a.m. through 10:00 a.m., June 1 through October 31. This program is part of the strategy to reduce the formation of ozone by delaying NO_x emissions from construction equipment until later in the day when optimum conditions for the formation of ozone no longer exist. The program was developed for the DFW ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The steering committee representing the DFW ozone nonattainment area counties has requested an air pollution control strategy, including the time restrictions on heavy-duty diesel construction equipment, to be established to reduce the formation of ozone and demonstrate attainment with the NAAQS. The proposed amendments are part of the commission's response to the request and one element of the proposed DFW Attainment Demonstration SIP. Although the proposed amendments meet the definition of a "major environmental rule" as defined in the Act, and will be considered a major environmental rule, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program or; 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements of a "major environmental rule."

Specifically, the time restrictions on heavy-duty diesel construction equipment within this proposal were

developed in order to meet the NAAQS for ozone set by the EPA under FCAA, §7409, and therefore meet a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once EPA has established those standards. Under FCAA, §7410 and related provisions, states must submit, for approval by EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. In addition, the commission is expressly required by state law, Texas Clean Air Act (TCAA), §382.039, to develop and implement measures necessary to demonstrate and maintain attainment of NAAQS and by TCAA, §382.012, to prepare and develop a comprehensive plan for the proper control of the state air.

Moreover, the proposal was developed specifically in order to meet the air quality standards established under federal law as NAAQS. This proposal is intended to help bring ozone nonattainment areas into compliance, and help keep attainment and near nonattainment areas from going into nonattainment.

The proposed amendments do not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by federal law, nor exceed a requirement of a delegation agreement. The proposed amendments were not developed solely under the general powers of the agency, but were specifically developed to meet the air quality standards established under federal law as NAAQS and under TCAA, §§382.012, 382.017, 382.019, and 382.039. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to establish a construction equipment operating-use limitation to delay NO_x

emissions that lead to high levels of ground-level ozone production. This proposed rulemaking will act as an air pollution control strategy to reduce NO_x emissions necessary for the four counties included in the DFW ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The proposed affected area consists of the 12 counties contained in the DFW CMSA. Promulgation and enforcement of the proposed rules will not burden private, real property as it only regulates mobile sources, and will not cause a takings to occur. Although the proposed rules do not directly prevent a nuisance, prevent an immediate threat to life or property, or prevent a real and substantial threat to public health and safety, the proposed rules partially fulfill a federal mandate under the FCAA, §7410. Specifically, the emissions limitations and delays within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the FCAA, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS, once the EPA has established them. Under the FCAA, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a construction equipment operating-use limitation necessary for the DFW nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which also applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. For the reasons stated, these proposed revisions will not constitute a takings under the Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this 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 Resource Code, §§33.201 et. seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), 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 has reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). No new sources of air contaminants will be authorized by the rule amendments. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

PUBLIC HEARING

The commission will hold public hearings on this proposal at the following times and locations:

January 24, 2000, 2:00 p.m., City of El Paso Council Chambers, 2 Civic Center Plaza, 2nd floor, El Paso; January 25, 2000, 10:00 a.m., Building E, Room 201S, Texas Natural Resource Conservation

Commission Complex, 12100 Park 35 Circle, Austin; January 26, 2000, 10:00 a.m., Longview City Hall Council Chambers, 300 West Cotton Street, Longview; January 26, 2000, 7:00 p.m., City of Irving Central Library Auditorium, 801 West Irving Boulevard, Irving; January 27, 2000, 10:00 a.m., Dallas Public Library Auditorium, 1515 Young Street, Dallas; January 27, 2000, 7:00 p.m.; Lewisville City Council Chambers, Municipal Center, Lewisville; January 28, 2000, 10:00 a.m., Council Chambers, 2nd floor, Fort Worth City Hall, 1000 Throckmorton Street, Fort Worth; January 31, 2000, 1:30 p.m., John Gray Institute, 855 Florida Avenue, Beaumont; and January 31, 2000, 7:00 p.m., Houston-Galveston Area Council, 3555 Timmons Lane, Houston. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, agency staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

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SUBMITTAL OF COMMENTS

Written comments may be submitted to Ms. Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808.

All comments should reference Rule Log Number 99055J-114-AI. Comments must be received by 5:00 p.m., February 1, 2000. For further information, please contact Alan Henderson at (512) 239-1510 or Brian Foster at (512) 239-1930.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which provides the commission the authority to control the quality of the state's air; §382.012, which provides the commission the authority to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which provides the commission the authority to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

SUBCHAPTER I: NON-ROAD ENGINES

DIVISION 4: CONSTRUCTION EQUIPMENT OPERATING LIMITATIONS

§§114.432, 114.436, 114.437, 114.439

§114.432. Control Requirements.

No person shall start or operate any non-road diesel construction equipment, of 50-horse power and above, between the hours of 6:00 a.m. to 10:00 a.m., during the time period between June 1 through October 31, in the counties listed in §114.439 of this title (relating to Affected Counties and Compliance Dates).

§114.436. Recordkeeping Requirements.

(a) Each company or independent equipment operator that operates non-road equipment listed in §114.432 of this title (relating to Control Requirements) in those counties listed in §114.439 of this title (relating to Affected Counties and Compliance Dates) is subject to requirements of this section.

(b) Each company or independent equipment operator shall provide to the executive director any records required to be maintained by the company or independent equipment operator in accordance with this section within five days of a written request from the executive director, if the request is received before expiration of the period during which the records are required to be maintained.

Whenever a company or independent equipment operator fails to provide records regarding the

operation of non-road equipment in accordance with the requirements of this section, the company or independent equipment operator shall be presumed to be in violation of the conditions specified in §114.432 of this title.

(c) Each company or independent equipment operator shall maintain daily operating records for a minimum of two years. The records as a minimum must contain:

- (1) date(s) of operation;
- (2) start and end times of daily operation;
- (3) types of equipment being used; and
- (4) name(s) of the equipment operator(s).

§114.437. Exemptions.

The following uses are exempt from §114.432 and §114.436 of this title (relating to Control Requirements; and Recordkeeping Requirements) in the counties listed in §114.439 of this title (relating to Affected Counties and Compliance Dates):

(1) equipment used exclusively for situations involving emergency operations provided the operation is required for an emergency; and

(2) equipment used for mixing, transporting, pouring, or processing of wet concrete provided such equipment is actually processing wet concrete.

§114.439. Affected Counties and Compliance Dates.

Effective June 1, 2001, affected persons in the following counties shall be in compliance with §114.432, §114.436, and §114.437 of this title (relating to Control Requirements; Recordkeeping Requirements; and Exemptions). These include Collin, Dallas, Denton, and Tarrant Counties in the Dallas/Fort Worth (DFW) ozone nonattainment area; as well as Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, and Rockwall Counties which comprise the remaining eight counties of the DFW consolidated metropolitan statistical area.