

AGENDA ITEM IV

Central Texas Clean Air Coalition's Comments on TCEQ's Heavy Duty Diesel Vehicle Idling Rule Proposal (Rule Project No. 2009-054-114-EN)

Summary

- The Clean Air Coalition does not support adoption of the sleeper berth exemption, because it will make the rule difficult to enforce, diminish incentives for installation of idle reduction measures and discourage jurisdictions from participation in the MOAs;
- If TCEQ does adopt the sleeper berth exemption, it should be limited as follows:
 1. Prohibit sleeper-berth idling in residential areas as defined by Local Government Code §244.001, within school zones, within 1,000 feet of a public school during operating hours, and within 1,000 feet of a hospital;
 2. Restrict the exemption only to heavy-duty vehicles with a primary diesel engine meeting the nitrogen oxide idling emission standard in Title 13, of the California Code of Regulations, Section 1956.8(a)(6)(C);
 3. Allow the exemption for no longer than two years; and
 4. Modify the geographic applicability by increasing from not within two (2) miles of a facility offering external heating or air conditioning to not within thirty (30) miles of such a facility.
- The Clean Air Coalition requests that, in light of TCEQ's proposal for the sleeper berth exemption, instead of eliminating the expired prohibition on idling in residential areas, near schools, and near hospitals, the TCEQ eliminate the expiration date for this provision;
- The Clean Air Coalition disagrees with TCEQ's reasons for proposing the sleeper berth exemption and removing the prohibition on residential/school zone/hospital zone idling;
- The Clean Air Coalition has no objection to the armored car exemption;
- The Clean Air Coalition supports year-round enforcement;
- The Clean Air Coalition requests that TCEQ review its legal authority to establish the amount of fines for offenses under the rule, and if able to, specify maximum fine amounts for idling in all situations;
- The Clean Air Coalition requests that the TCEQ clarify that entering into an MOA under this rule does not make businesses within the jurisdiction ineligible for TERP funding for idle reduction equipment;
- The Clean Air Coalition requests that the effective date of any rule change be after the end of the 2011 ozone season so as not to interfere with implementation of the rule this year.

AGENDA ITEM IV

Sleeper Berth Exemption

The Clean Air Coalition does not support TCEQ's proposal to reinstitute the sleeper berth exemption. If adopted in its proposed form, this exemption will make enforcement action against extended idling difficult to implement. The exemption would put an unattainable burden of evidence on any law enforcement agent attempting to enforce the rule. Any driver found exceeding idling limits can claim to be observing the government-mandated rest period. The only way a law enforcement officer could enforce this rule would be if the idling was occurring within two miles of a "facility offering external heating or conditioning." Therefore, the officer would also need to know the exact distance to the nearest such facility in order to determine whether to take enforcement action or not. This change as proposed would thwart any practical attempt at rule enforcement.

Given the hurdles to effective enforcement that this change would institute, jurisdictions that have agreed to enforce this rule under a Memorandum of Agreement with the TCEQ may be unable to justify continuing the program. This includes the members of the Clean Air Coalition, all of whom have signed such Memoranda with the TCEQ.

Since jurisdictions that have already agreed to enforce this rule will have no practical way to do so, the rule effectiveness will be reduced. Therefore, the Coalition disagrees with TCEQ's contention that this action will not interfere with attainment or reasonable further progress of the NAAQS. The Dallas-Fort Worth area is not currently attaining the 1997 eight-hour ozone standard, and the Austin area has only recently monitored attainment of the 2008 ozone standard-partly due to emission reduction measures such as the locally enforced idling restrictions.

The sleeper berth exemption as proposed has no limits associated with it (except within two miles of a facility equipped with heating or conditioning). This removes any regulatory incentive to install idling emission reduction technology or to avoid idling when other options are available.

The legislature decided in 2007 to allow the exemption to expire in 2009. The lack of legislative action on the issue in 2009 provided ample time for the regulated community to take advantage of technology that would have reduced or eliminated emissions associated with idling. This includes applying for available TERP funding. The regulated community's failure to take advantage of that window of opportunity before the exemption expired should not now be grounds for extending the exemption permanently. We are concerned that putting this exemption in place now, with no expiration date, will discourage adoption of idle reduction technology.

The Coalition does not believe that reinstituting this exemption is consistent with the clear legislative intent to allow the exemption to expire. Since the legislature took no action to extend this exemption when it last convened in 2009, the Coalition sees no indication that it wanted TCEQ, unilaterally, to restore it.

However, if TCEQ decides to reinstate the sleeper berth exemption, the Coalition urges the TCEQ to include limitations listed in summary points at the beginning of these comments.

Residential, School Zone, Hospital Zone Idling Prohibition

The Coalition strongly believes that there should be no heavy-duty idling allowed for any duration in any residential area, near any school, or near any hospital. The legislature set the expiration date for both the sleeper berth exemption and the prohibition on idling in residential areas, near school zones, and near hospital zones as the same date. The effect was that after September 1, 2009, all areas in the jurisdictions that signed MOAs would be subject to the five-minute idle restriction.

AGENDA ITEM IV

It makes sense for TCEQ to remove regulations that have expired. However, when considered in conjunction with TCEQ's proposal to allow for unrestricted idling during government-mandated rest periods, the net effect of this rule proposal is problematic. It would allow a truck to idle indefinitely next to a school building or park, while children are exposed to the fumes. There would be no recourse from law enforcement officers.

If the TCEQ decides to provide for the sleeper berth exemption, the Coalition requests that the TCEQ strike the expiration date of September 1, 2009, from §114.512(b), while leaving the prohibition intact. This will at least enable local jurisdictions to protect residential areas, school zones, and hospital zones from emissions from idling.

Contradictions in Stated Reasons for Changes to Exemptions

The Coalition does not concur with TCEQ's stated reasoning for proposing to eliminate the prohibition in §114.512(b) while proposing to eliminate the September 1, 2009, expiration date in §114.517(12). If this rule proposal would implement the legislature's intent to end the explicit prohibition on residential, school zone, and hospital zone idling to expire on September 1, 2009, then it would be acting in contradiction to the legislature's intent to also eliminate the expiration date for sleeper-berth idling.

The heavy duty idling rule already only relies on the TCEQ's general authority. The Texas Health and Safety Code currently contains no explicit reference to heavy-duty idling restrictions. TCEQ already is relying on its more general powers under the Texas Clean Air Act.

Moreover, there is no longer any statutory language in the Health and Safety Code that addresses heavy duty idling. The only specific references to statutory authority beyond TCEQ's general authority to adopt rules mentioned in this proposal are the following:

- Sec. 382.012. STATE AIR CONTROL PLAN. The commission shall prepare and develop a general, comprehensive plan for the proper control of the state's air; and
- Sec. 382.019. METHODS USED TO CONTROL AND REDUCE EMISSIONS FROM LAND VEHICLES.
 - (a) Except as provided by Section 382.202(j), or another provision of this chapter, the commission by rule may provide requirements concerning the particular method to be used to control and reduce emissions from engines used to propel land vehicles.
 - (b) The commission may not require, as a condition precedent to the initial sale of a vehicle or vehicular equipment, the inspection, certification, or other approval of any feature or equipment designed to control emissions from motor vehicles if that feature or equipment has been certified, approved, or otherwise authorized under federal law.
 - (c) The commission or any other state agency may not adopt a rule requiring the use of Stage II vapor recovery systems that control motor vehicle refueling emissions at a gasoline dispensing facility in this state until the United States Environmental Protection Agency determines that the use of the system is required for compliance with the federal Clean Air Act (42 U.S.C. 7401 et seq.), except the commission may adopt rules requiring such vapor recovery systems installed in nonattainment areas if it can be demonstrated to be necessary for the attainment of federal ozone ambient air quality standards or, following appropriate health studies and in consultation with the Texas Department of Health, it is determined to be necessary for the protection of public health.

The Coalition believes that since TCEQ is not currently relying on specific and current statutory authorization or limitations as the basis for this action, and indeed, since none exist, the TCEQ should

AGENDA ITEM IV

focus on what modifications will make this rule more effective at reducing emissions from idling, rather than trying to discern the legislature's intent in expired statutes.

Armored Car Exemption

The Coalition does not object to the TCEQ's proposal to adopt an exemption for armored car idling.

Year-Round Enforcement

The Coalition supports year-round enforcement of this rule. This enables jurisdictions to adjust their enforcement protocol accordingly if EPA modifies the area's ozone monitoring period or if the area already has a longer ozone season than April through October. It should improve compliance since there would be no confusion for either truckers or law enforcement personnel as to when the restrictions are effective.

Regulatory Fine Amounts

Maintaining the residential/school zone/hospital zone restriction, with the specific fine stated in the regulation, would also allow counties to enforce the rule without resorting to enforcement of the offense as a Class B felony under the Water Code, which makes current enforcement of the rule in unincorporated areas impractical. The Coalition asks that §114.512(a) also be amended to add the following language: "An offense under this subsection shall be punishable by a fine not to exceed \$500." This change will eliminate a major obstacle to effective implementation of this rule in unincorporated areas. The Coalition asks that the commissioners consider allowing county enforcement cases to be treated the same way they would be if they were enforced by TCEQ personnel.

TERP Funding Eligibility

The Coalition requests that TCEQ clarify in the preamble to the rule that a jurisdiction's MOA with the TCEQ under this rule does not make businesses within the jurisdiction ineligible for TERP funding for idle reduction technology projects. To date, the executive director's interpretation of eligibility restrictions for Diesel Emissions Reduction Incentive Program funding in Texas Health and Safety Code Section 386.102(c) has made areas like Austin and Dallas-Fort Worth ineligible for funding for idle emission-reduction projects because the emission reductions from such projects are required anyway under the MOA.

The Coalition disagrees with the executive director's interpretation of the statute and requests that the commissioners use the opportunity of this rule change to clarify their interpretation of this restriction.

THSC §386.102(c) reads: "a project listed in Subsection (b) is not eligible if it is required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document. This subsection does not apply to:...(2) the purchase of an on-road diesel or equipment required only by local law or regulation or by corporate or controlling board policy of a public or private entity." Meanwhile, §386.108(b)(2) and (3) specifically authorize TERP funding for these types of infrastructure projects in TERP-eligible jurisdictions.

TCEQ staff have interpreted this language to mean that an otherwise eligible idle-reduction infrastructure project, such as auxiliary power unit installation or electrification of truck stops, would not be eligible in a jurisdiction that has signed an MOA under Chapter 114, Subchapter J, Division 2, since the MOA would mean that those projects would be "required" by virtue of the MOA. This means that if a jurisdiction agrees to enforce idling restrictions, it gives up any business's eligibility to receive funding to install idle emission reduction technology.

AGENDA ITEM IV

Nothing in the MOAs specifically requires installation of any equipment whatsoever. Moreover, the rule is only applicable in areas that voluntarily opt into the program, and all enforcement is carried out locally. As the rule proposal specifically states in its draft regulatory impact analysis determination, "participation in the idling program is voluntary" (page 13 of the rule proposal). If the rule is only effective by virtue of local government action, and the specific projects are not required, the commissioners should clarify that entering into an MOA under this program will not jeopardize the eligibility of local businesses for this funding assistance.

If the commissioners agree with the executive director's previous interpretation, they should clearly state so in the rule preamble and in the TERP funding eligibility guidelines. Jurisdictions need to be able to evaluate whether the tradeoff worthwhile.

If the commission agrees with the executive director's interpretation and adopts the proposed exemption for sleeper-berth idling, it should then also clarify that, by virtue of this exemption, jurisdictions that have entered into MOAs to enforce the rule will now be eligible for such funding.

The Coalition suggests the following change to the proposal:

Insert a sentence at the end of §114.511, stating "A jurisdiction's signature of a Memorandum of Agreement does not make an otherwise eligible diesel emission reduction incentive program infrastructure project under §386.108(b)(2) and (3) ineligible for funding under Texas Health and Safety Code, Chapter 386."

Effective Date of Rule Change

In order to eliminate any disruption to implementation of the existing rule in this ozone season, the Coalition asks that TCEQ make the effective date of any rule change the end of the current ozone season. Changing the rule in the midst of the ozone season would be confusing and counter-productive.