

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**  
**AGENDA ITEM REQUEST**  
**for Proposed Revision to the State Implementation Plan**

**AGENDA REQUESTED: August 17, 2011**

**DATE OF REQUEST: July 29, 2011**

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Joyce Spencer, 239-5017**

**CAPTION: Docket No. 2011-0899-MIS.** Consideration for publication of, and hearing on, proposed Memorandum of Agreement (MOA) between the Texas Commission on Environmental Quality (TCEQ) and the City of El Paso.

The 2001 MOA with the City of El Paso is being revised to reflect the alternative control measures proposed in revisions to 30 Texas Administrative Code (TAC) Section 111.147 in a concurrent rulemaking (Rule Project No. 2010-046-111-EN) and the respective responsibilities of the City of El Paso and the TCEQ under the El Paso State Implementation Plan (SIP) revision for particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>). (Shelley Naik, Erin Selvera) (Non-Rule Project No. 2011-026-MIS-NR)

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**Copy to CCC Secretary? NO X YES**

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** July 29, 2011

**Thru:** Melissa Chao, Acting Chief Clerk  
Mark R. Vickery, P.G., Executive Director

**From:** Susana M. Hildebrand, P.E., Chief Engineer

**Docket No.:** 2011-0899-MIS

**Subject:** Commission Approval for Proposed Memorandum of Agreement (MOA)  
with the City of El Paso  
Non-Rule Project No. 2011-026-MIS-NR

### **Background and reason(s) for the proposed MOA:**

The City of El Paso (El Paso area) was designated nonattainment under Federal Clean Air Act (FCAA), §107(d)(4)(B) for National Ambient Air Quality Standard (NAAQS) for particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>) and subsequently classified as a moderate nonattainment area. In November 1991, the Texas Air Control Board (TACB), a predecessor agency of the Texas Commission on Environmental Quality (TCEQ), submitted an attainment demonstration SIP revision. The SIP revision included particulate matter (PM) control measures in 30 Texas Administrative Code (TAC) Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter, Subchapter A, Division 4, Materials Handling, Construction, Roads, Streets, Alleys, and Parking Lots. The control measures adopted in §111.147 required paving as a method of dust control in the El Paso area for specified roads and added a requirement that alleys be paved at the rate of 15 miles per year. Section 111.147 also set frequencies for street sweeping in designated sections of the El Paso area.

On November 5, 1991, a Memorandum of Understanding (MOU) between the City of El Paso local government (the City) and the TACB was signed to outline the responsibilities and regulatory requirements for both parties. This MOU was submitted to the United States Environmental Protection Agency (EPA) as Appendix Q of the 1991 El Paso PM<sub>10</sub> attainment demonstration SIP revision. The EPA approved the MOU as part of the El Paso PM<sub>10</sub> SIP on January 18, 1994.

On October 9, 2001, the 1991 MOU was replaced with a Memorandum of Agreement (MOA) since MOUs are typically used only for agreements between two state agencies and this agreement was between an agency and a city. Although the MOA was submitted to the EPA in a letter dated February 19, 2002, it did not go before the commission, and was not adopted as a SIP revision. Furthermore, the existing MOA is not included in the listed SIP documents in the Code of Federal Regulations (CFR). The proposed MOA would replace the current MOA and be incorporated into the El Paso PM<sub>10</sub> SIP as a SIP revision.

To prepare the proposed revisions to the Chapter 111 rules and MOA, the TCEQ requested information from the City on December 28, 2009, to ascertain what efforts the City is

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taking to control PM emissions. In a response letter dated January 29, 2010, the City of El Paso indicated the following:

- the City has programs funded annually in both the City's capital improvement budget and in the Department of Transportation operations budget in an effort to comply with environmental regulations;
- the City has committed to an alley paving program at a level in alignment with its own internal budgetary capacities, but not at the rate of 15 miles per year as required under §111.147;
- the City maintains an inventory of street and alley paving efforts to document the current status and projections for future paving activities; and
- the City's Air Quality Program conducts surveillance and investigations to ensure compliance with, and enforcement of, Chapter 111 rules.

For the site reporting regulatory PM<sub>10</sub> data for all three years from 2007 through 2009 (Socorro AQS ID 481410057), there were no exceedances of the PM<sub>10</sub> 24-hour NAAQS. The inventory of unpaved alleys has decreased from 66% in 1991 to 16% in 2010, with approximately 23 miles of unpaved alleys remaining. City action to reduce airborne PM<sub>10</sub> has also reduced the need to sweep streets at the frequencies specified under the current §111.147 rule.

A separate proposed rulemaking (Rule Project No. 2010-046-111-EN) would amend §111.147(1)(E) to remove the requirement for the City of El Paso to pave alleys at the rate of 15 miles per year and replace it with the following requirements: 1) all new alleys shall be paved; 2) alleys may not be used for garbage and recycling collection; and 3) reclaimed asphalt pavement (RAP) may be used as an alternate means of PM control for alleys. The proposal would also amend §111.147(2) to change the sweeping frequency requirement from four times per year to three times per year in the city limits and from six times per week to four times per week in the central business district. The City has demonstrated that the unpaved alley inventory will not increase due to a city ordinance that requires developers to pave any new alleys. Furthermore, alleys have not been used for garbage collection since 1997, so the traffic in alleys has been dramatically reduced. Finally, RAP has been used to cover some unpaved alleys, which has proven to be as effective as paving. In addition, the City continues to include paving and sweeping in its annual budget. The TCEQ staff believes that the combination of these actions demonstrates that the EPA anti-backsliding provisions in FCAA, §110(l) are met.

The 2001 MOA with the City would be revised to reflect these changes to §111.147.

### **Scope of the MOA:**

#### **A.) Summary of what the MOA will do:**

The 2001 MOA with the City is being revised to reflect the alternative control measures proposed in the revisions to 30 TAC §111.147 and the respective responsibilities of the City and TCEQ under the SIP.

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**B.) Scope required by federal regulations or state statutes:**

This revised MOA would be incorporated into the El Paso PM<sub>10</sub> SIP.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

None

**Statutory authority:**

The authority to propose and adopt this MOA is derived from Texas Water Code, §5.229, which authorizes the executive director to negotiate and with the consent of the commission to enter into contracts with states and political subdivisions of this state or any other entity to carry out the powers, duties, and responsibilities of the commission; Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.002, which provides that the policy and purpose of the TCAA is to safeguard the state's air resources from pollution; TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.033, which authorizes the commission to execute contracts and instruments that are necessary or convenient to perform its powers or duties; §382.115, which authorizes local governments to execute agreements with the commission; and Texas Government Code, Chapter 791, Interlocal Cooperation Contracts.

**Effect on the:**

**A.) Regulated community:**

The rule revision and revised MOA would update the PM controls required to attain and maintain the PM<sub>10</sub> NAAQS in the El Paso area. The City would have greater flexibility in the implementation of the PM control requirements in §111.147.

**B.) Public:**

Implementation of the revised rules and MOA would continue protection of public health through continued maintenance of the PM<sub>10</sub> standard.

**C.) Agency programs:**

There is no anticipated impact on agency programs.

**Stakeholder meetings:**

No stakeholder meetings were held.

**Potential controversial concerns and legislative interest:**

The separate rulemaking (Rule Project No. 2010-046-111-EN) would require a demonstration to comply with the EPA anti-backsliding provisions in §110(l) of the FCAA.

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The §110(l) demonstration would include the substitution of the alley paving and street sweeping measures as stated in §111.147(1)(E) and (2) with alternate control measures currently in place in the El Paso area that have resulted in PM<sub>10</sub> emissions reductions equivalent to, or greater than, what would have been achieved if the City had complied with the prior version of §111.147(1)(E) and (2). These control measures include reduced alley traffic, city ordinances requiring developers to pave any new alleys they create, and the use of RAP on existing alleys. The EPA has not yet approved these measures as meeting the §110(l) anti-backsliding provisions.

**Will this MOA affect any current policies or require development of new policies?**

No

**What are the consequences if this MOA does not go forward? Are there alternatives to this MOA?**

The commission could decide not to adopt the proposed amendments to Chapter 111, and a revised MOA would not be needed. The City of El Paso would still be obligated to comply with undated and unnecessary requirements.

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** August 17, 2011

**Public hearing date (if any):** September 27, 2011

**Public comment period:** September 2, 2011, to October 3, 2011

**Anticipated adoption date:** January 25, 2012

**Agency contacts:**

Shelley Naik, 239-1536, Air Quality Division

Erin Selvera, 239-6033, Environmental Law Division

Joyce Spencer, 239-5017, Air Quality Division

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Susana M. Hildebrand, P.E.  
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Ashley Morgan  
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Shelley Naik  
Joyce Spencer

# **MEMORANDUM OF AGREEMENT**

## **I. PARTIES**

This Memorandum of Agreement (MOA) is entered into between the Texas Commission on Environmental Quality (TCEQ) and the City of El Paso local government (the City), collectively the “Parties.”

1. The Parties represent that they have the authority to enter into this MOA, including the authority granted in the Texas Government Code Chapter 791 Interlocal Cooperation Contracts.
2. The TCEQ has authority under §5.229 of the Texas Water Code and §382.033 of the Texas Health and Safety Code to enter into this MOA.
3. The Local Governments have authority under §382.115 of the Texas Health and Safety Code to enter into this MOA.

## **II. INTENT AND PURPOSE**

The intent of this MOA is to memorialize the agreement between the Parties to provide the City with alternative methods of particulate matter (PM) control consistent with attainment and maintenance of the particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>) National Ambient Air Quality Standard (NAAQS).

The purpose of this MOA is to set forth in plain language the understanding of the Parties regarding their respective responsibilities under the Texas State Implementation Plan (SIP) as it pertains to the City of El Paso (El Paso area).

## **III. DEFINITIONS**

As used in this MOA the following terms have the meanings given below:

1. “EPA” shall mean the United States Environmental Protection Agency.
2. “TCEQ” shall mean the Texas Commission on Environmental Quality.
3. “the City” shall mean the City of El Paso, Texas local government.
4. “El Paso area” shall mean the City of El Paso PM<sub>10</sub> nonattainment area.
5. “SIP” shall refer to the State Implementation Plan.

## **IV. BACKGROUND**

1. Under §110 of the Federal Clean Air Act (FCAA), 42 United States Code (USC), §7410, each state that has a nonattainment area must submit a SIP to the EPA demonstrating strategies to come into compliance with the NAAQS.
2. Section 110 of the FCAA, 42 USC §7410 also requires Texas to submit to the EPA for approval any SIP revisions and to demonstrate that such SIP revisions will not interfere with any applicable requirement concerning attainment and reasonable

further progress or any other requirement of the FCAA, as required by §110(l) of the FCAA.

3. Under the 1990 FCAA Amendments, the El Paso area was designated nonattainment under FCAA §107(d)(4)(B) for the PM<sub>10</sub> NAAQS and subsequently classified as a moderate PM<sub>10</sub> nonattainment area.
4. In November 1991, the Texas Air Control Board (TACB), a predecessor agency of the TCEQ, submitted an attainment demonstration SIP revision. The SIP revision included PM control measures in 30 Texas Administrative Code (TAC) Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter, Subchapter A, Division 4, Materials Handling, Construction, Roads, Streets, Alleys, and Parking Lots.
5. The control measures adopted in 30 TAC §111.147 required paving as a method of dust control in the El Paso area for specified roads and added a requirement that alleys be paved at the rate of 15 miles per year. §111.147 also set frequencies for street sweeping in designated sections of the El Paso area.
6. In 1991, a Memorandum of Understanding (MOU) between the City and the TACB was approved to outline the responsibilities and regulatory requirements for both Parties.
7. The 1991 MOU was replaced with a MOA with the City in 2001.
8. This MOA replaces the 2001 MOA with the City. The MOA is being revised to reflect changes to the control measures in 30 TAC §111.147.

#### **V. UNDERSTANDING**

1. The City agrees to maintain programs funded annually in the City's capital improvement budget and in the Department of Transportation operations budget to comply with environmental regulations;
2. The Parties agree that the continued enforcement of no-burning periods may contribute to improvement in air quality in the El Paso area. The City will continue to enforce the regulations regarding burning contained in Chapter 9.38 of the El Paso City Code, and will continue to notify the local office of TCEQ of violations of Chapter 9.38 and 30 TAC §111.111.
3. The TCEQ agrees to submit this agreement to the EPA as an appendix to the El Paso PM<sub>10</sub> SIP revision.

#### **VI. TERM, RENEWAL, TERMINATION, AND MODIFICATION**

This MOA will become effective upon signature by all Parties and shall remain in effect for ten years or until superseded. Following this ten year period, the MOA shall automatically be renewed for successive one-year renewal terms, without the necessity of formal action on the part of either Party, unless one of the Parties shall provide written notice of non-renewal 90 days prior to the end of the renewal term, whereupon the MOA shall terminate at the end of the renewal term, as applicable. Representatives of the Parties will have by no later than the last day of March each year during the renewal term to consider whether any revisions or modifications to the MOA may be

necessary or desirable. Any revision, modification, or amendment of the terms of the MOA must be made in writing by agreement of the Parties.

**VII. MISCELLANEOUS**

This MOA represents the entire agreement between the TCEQ and the City and supersedes all other agreements, understandings or commitments, written or oral, relative to the intent of this MOA. This MOA may not be amended or modified except pursuant to a mutual written agreement executed by each of the Parties.

This MOA shall be governed by and interpreted in accordance with the laws of the State of Texas.

In Witness Whereof, Texas Commission on Environmental Quality and the City of El Paso, by their authorized officers, have made and executed this MOA in multiple copies, each of which is deemed an original.

AGREED to by the undersigned Parties, this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

ATTEST:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

By: \_\_\_\_\_  
Name: [name of designated signer] Date \_\_\_\_\_  
Title: El Paso SIP Coordinator

By: \_\_\_\_\_  
Name: Mark R. Vickery, P.G. Date \_\_\_\_\_  
Title: Executive Director

ATTEST:

CITY OF EL PASO, TEXAS

By: \_\_\_\_\_  
Name: [name of designated signer] Date  
Title: El Paso SIP Coordinator

By: \_\_\_\_\_  
Name: [name of designated signer] Date  
Title: [title of designated signer]

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

By: \_\_\_\_\_  
Name: [name of designated signer] Date  
Title: [title of designated signer]

By: \_\_\_\_\_  
Name: [name of designated signer] Date  
Title: [title of designated signer]

DRAFT