TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AGENDA ITEM REQUEST

for Proposed Rulemaking

AGENDA REQUESTED: February 22, 2012

DATE OF REQUEST: February 3, 2012

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Charlotte Horn, 239-0779

CAPTION: Docket No. 2011-1639-RUL. Consideration for publication of, and hearing on, a proposed amendment to 30 Texas Administrative Code Chapter 114, Control of Air Pollution from Motor Vehicles, Subchapter J, Operational Controls for Motor Vehicles, Division 2, Locally Enforced Motor Vehicle Idling Limitations, Section 114.517, and corresponding revisions to the state implementation plan.

The proposed rulemaking would implement Senate Bill 493 from the 82nd Texas Legislature, 2011, Regular Session, by amending Section 114.517 to include an exemption for motor vehicles that have a gross vehicle weight rating greater than 14,000 pounds and are equipped with a 2008 or subsequent model year heavy-duty diesel engine or liquefied or compressed natural gas engine that has been certified by the United States Environmental Protection Agency or another state environmental agency to emit no more than 30 grams of nitrogen oxides emissions per hour when idling. (Holly Brightwell, Booker Harrison) (Rule Project No. 2011-060-114-EN)

Susana M. Hildebrand, P.E.
Chief Engineer

David Brymer
Division Director

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Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** February 3, 2012

Thru: Bridget Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

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

Docket No.: 2011-1639-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 114, Control of Air Pollution from Motor Vehicles
Motor Vehicle Idling Rule Revision
Rule Project No. 2011-060-114-EN

Background and reason for the rulemaking:
Title 30 Texas Administrative Code Chapter 114, Subchapter J, Division 2, Locally Enforced Motor Vehicle Idling Limitations, was originally adopted by the Texas Commission on Environmental Quality (TCEQ) on November 17, 2004, for use as a control strategy in the Austin area to maintain attainment with the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS). The adopted idling limitations rules provided any local government in Texas the option of applying the rules in their jurisdiction should additional control measures be needed to achieve or maintain attainment of the ozone NAAQS. Since its inception, 28 cities, two towns, and nine counties have signed memorandums of agreement (MOA) to enforce the idling restriction in their jurisdictions.

The 82nd Legislature, 2011, Regular Session, enacted Senate Bill (SB) 493, amending Chapter 382, Subchapter B, of the Texas Health and Safety Code (THSC) by adding §382.0191, which prohibits the commission from limiting the idling of a motor vehicle that has a gross vehicle weight rating greater than 14,000 pounds and that is equipped with a 2008 or subsequent model year heavy-duty diesel engine or liquefied or compressed natural gas engine that has been certified by the United States Environmental Protection Agency (EPA) or another state environmental agency to emit no more than 30 grams of nitrogen oxides (NO_X) emissions per hour when idling. Though SB 493 provides for an exemption of vehicles with a gross vehicle weight greater than 8,500 pounds and equipped with the low-NO_X engine, the proposed rule change exempts vehicles weighing greater than 14,000 pounds and equipped with the low-NO_X engine because only vehicles weighing more than 14,000 pounds are subject to the idling restrictions.

Staff received approval from the executive director on July 19, 2011, to move forward with initiating rulemaking regarding SB 493. This proposed rulemaking would incorporate the amendment into the existing Motor Vehicle Idling Rule.

Scope of the rulemaking:
A.) Summary of what the rulemaking will do:
The proposed rule revision would amend Chapter 114, Subchapter J, as follows:

- Amend §114.517 to include an exemption for motor vehicles having a gross vehicle weight rating greater than 14,000 pounds and equipped with a 2008 or subsequent model year heavy-duty diesel engine or liquefied or compressed natural gas engine that has been certified by the EPA or another state environmental agency to emit no more than 30 grams of NO_X emissions per hour when idling.

The amended section will be submitted to the EPA as a revision to the state implementation plan (SIP).

B.) Scope required by federal regulations or state statutes:
The amendment is required to incorporate SB 493, enacted by the 82nd Legislature, 2011, Regular Session.

C.) Additional staff recommendations that are not required by federal rule or state statute:
None.

Statutory authority:
This rulemaking is proposed under the authority of Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendment is also proposed under THSC, §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendment is also proposed under 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; THSC, §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; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; and THSC, §382.208, which authorizes the commission 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 proposed amendment implements THSC, §382.0191.

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Effect on the:

A.) Regulated community:

Local jurisdictions that have signed an MOA with the TCEQ to implement and enforce the idling restrictions would have to add vehicles weighing greater than 14,000 pounds that are equipped with a 2008 or newer engine certified to emit no more than 30 grams of NO_X emissions per hour when idling to their list of vehicles exempt from idling restrictions. There would be no fiscal impacts on the regulated community.

B.) Public:

The proposed rule revisions would not have an adverse effect on the public. There would be no fiscal impacts on the public.

C.) Agency programs:

There is no anticipated effect on any agency program by implementing the proposed rule revisions. There would be no fiscal impacts on the agency.

Stakeholder meetings:

No stakeholder meetings were held for this rulemaking.

Potential controversial concerns and legislative interest:

It is expected that the EPA and local governments will express concern that the proposed rulemaking constitutes backsliding because it allows a further exemption to the idling rule. However, the exemption will not interfere with attainment or reasonable further progress in the SIP because the excess NO_X reduction achieved through the Voluntary Mobile Emissions Reduction Program commitments demonstrate that backsliding will not occur. Any potential increases resulting from an exemption should be offset by these reductions.

During the previous Motor Vehicle Idling Rule change, the TCEQ received comment from local governments and the EPA regarding objections that the agency did not reinstate the prohibition from idling in a school zone, within 1,000 feet of a hospital, or within 1,000 feet of a public school during operating hours. This prohibition had previously been in the Motor Vehicle Idling Rule but expired September 1, 2009. The TCEQ determined that there was not sufficient evidence connecting NO_X reductions and this prohibition. As a result, the TCEQ did not reinstate the prohibition. This proposed rulemaking will likely receive similar comment.

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

No policies are affected by this proposed rulemaking.

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

Not going forward with this rulemaking would put the Motor Vehicle Idling rule out of compliance with state statute.

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Key points in the proposal rulemaking schedule:

Anticipated proposal date: February 22, 2012
Anticipated *Texas Register* publication date: March 9, 2012
Public hearing dates: April 2, and April 3, 2012
Public comment period: March 2, 2012 – April 9, 2012
Anticipated adoption date: August 8, 2012

Agency contacts:
Holly Brightwell, Rule Project Manager, 239-4905, Air Quality Division
Ross Henderson, Staff Attorney, 239-6257
Charlotte Horn, Texas Register Coordinator, 239-0779

Attachments
SB 493, 82nd Texas Legislature, 2011, Regular Session

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Holly Brightwell
Charlotte Horn

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §114.517.

If adopted, the amended section 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 Proposed Rule

Chapter 114, Subchapter J, Division 2, Locally Enforced Motor Vehicle Idling Limitations, was originally adopted by the commission on November 17, 2004, at the request of the local air quality planning organization in the Austin Early Action Compact (EAC) area (Bastrop, Caldwell, Hays, Travis, and Williamson Counties) for use as a control strategy in its EAC agreement to maintain attainment of the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS), as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11347). The adopted Motor Vehicle Idling Rule provides any local government in Texas the option of applying the rules in their jurisdiction in the event additional control measures are needed to achieve or maintain attainment of the ozone NAAQS.

The EAC concept of an early, voluntary air quality plan was endorsed by the EPA Region 6 in June 2002. It was slightly modified and made available nationally in November 2002. A key point of an EAC was the flexibility allowed to areas to select emission

reduction measures such as limiting vehicle idling. Beginning on August 1, 2005, members of the Austin EAC and the TCEQ signed the locally enforced idling restrictions memorandum of agreement (MOA). This MOA allowed participating counties and cities to enforce the idling restriction rule in their jurisdictions. Members of the Austin EAC area signing the MOA included Bastrop, Caldwell, Hays, Travis, and Williamson Counties, and the cities of Austin, Bastrop, Georgetown, Hutto, Lockhart, Luling, Round Rock, and San Marcos. Idling restrictions are a control measure put in place in the Austin-Round Rock 1997 Eight-Hour Ozone Flex Plan, which was signed in September 2008.

Four counties, 20 cities, and two towns in the Dallas-Fort Worth (DFW) area have also signed agreements to enforce the Motor Vehicle Idling Rule in their jurisdictions. Idling restrictions are a Voluntary Mobile Emissions Reductions Program (VMEP) control measure in the DFW 1997 Eight-Hour Ozone Attainment Demonstration SIP revision, which was adopted by the commission on May 23, 2007.

This proposed rulemaking amends the Motor Vehicle Idling Rule as stated in Chapter 114, Subchapter J, Division 2. The Motor Vehicle Idling Rule limits idling for gasoline and diesel-powered engines in motor vehicles within the jurisdiction of any local government in the state that has signed an MOA with the TCEQ delegating enforcement to that local government. Local enforcement is crucial to the effective implementation of

rules to reduce the extended idling of gasoline and diesel-powered heavy-duty vehicles and vital to the reduction of nitrogen oxides (NO_X) and volatile organic compounds (VOC) necessary to achieve or maintain attainment of the ozone NAAQS.

The 79th Legislature, 2005, enacted House Bill (HB) 1540, establishing Texas Health and Safety Code (THSC), §382.0191, Idling of Motor Vehicle While Using Sleeper Berth, which prohibited the commission from restricting the idling of a motor vehicle while a driver is using the vehicle's sleeper berth for a government-mandated rest period. HB 1540 also restricted drivers using the vehicle's sleeper berth from idling in a school zone or within 1,000 feet of a public school during its hours of operation, and it defined the penalty for an offense as a fine not to exceed $500. HB 1540 did not specify an enforcement period, but it set a September 1, 2007, expiration date on the section. The commission adopted Motor Vehicle Idling Rule revisions to be consistent with HB 1540 on April 26, 2006, as published May 12, 2006, in the *Texas Register* (31 TexReg 3900).

The 80th Legislature, 2007, enacted Senate Bill (SB) 12, which in part amended THSC, §382.0191, to extend the prohibition on the TCEQ from restricting certain idling activities from September 1, 2007 to September 1, 2009, as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1345). The prohibition in §114.512(b) of certain vehicles from idling within 1,000 feet of a school or hospital expired on September 1, 2009. Therefore, this subsection was deleted in previous rulemaking.

On May 22, 2008, the National Armored Car Association submitted a petition for rulemaking requesting that armored vehicles be added to the list of idling restriction exemptions under §114.517. The commission adopted rule changes incorporating the armored vehicle exemption on July 20, 2011. The July 20, 2011, rulemaking also deleted the ozone season dates under §114.512 to allow local governments to enforce idling limits year-round for consistent enforcement year-round (36 *TexReg* 4972).

The 82nd Legislature, 2011, enacted SB 493, amending THSC, Chapter 382, Subchapter B by adding THSC, §382.0191, which prohibits the commission from limiting the idling of a motor vehicle that has a gross vehicle weight rating greater than 8,500 pounds and that is equipped with a 2008 or subsequent model year heavy-duty diesel engine or liquefied or compressed natural gas engine that has been certified by the EPA or another state environmental agency to emit no more than 30 grams of NO_X emissions per hour when idling. Though SB 493 provides for an exemption of vehicles with a gross vehicle weight greater than 8,500 pounds and equipped with the low-NO_X engine, the proposed rule change exempts vehicles weighing greater than 14,000 pounds and equipped with the low-NO_X engine. The reason for this specification is because only vehicles weighing more than 14,000 pounds are subject to the idling restrictions. This proposed rulemaking incorporates the amendment into the existing Motor Vehicle Idling Rule.

Federal Clean Air Act, §110(l) Demonstration

The exemption will not interfere with attainment or reasonable further progress in the SIP. The rule currently includes an exemption for motor vehicles with a gross vehicle weight rating of 14,000 pounds or less; there is no net change in emissions to exempt vehicles with a gross vehicle weight rating between 8,500 and 14,000 pounds with an engine as specified in the statute.

Furthermore, adding the exemption for vehicles employing the newer engines as previously described will not interfere with attainment or reasonable further progress in the SIP because the DFW area achieved an excess of NO_X and VOC emissions reductions through the VMEP commitments. The excess emissions reductions achieved was greater than the 0.12 tons per day (tpd) NO_X and 0.004 tpd VOC emissions reduction shortfall estimated in the North Central Texas Council of Governments (NCTCOG) VMEP accounting for the Locally Enforced Idling Restrictions. In addition, the 0.86 tpd NO_X and 3.66 tpd VOC excess emissions reductions achieved for the overall VMEP, as estimated in the NCTCOG's VMEP accounting, were greater than the emissions reduction commitments for the Locally Enforced Idling Restrictions component of the VMEP.

Section Discussion

§114.517, Exemptions

This proposal amends §114.517 to include an exemption in proposed paragraph (2) for any motor vehicle with a gross vehicle weight rating greater than 14,000 pounds that is equipped with a 2008 or subsequent model year heavy-duty diesel engine or liquefied or compressed natural gas engine that has been certified by the EPA or another state environmental agency to emit no more than 30 grams of NO_X emissions per hour when idling. Though SB 493 provides for an exemption of vehicles with a gross vehicle weight greater than 8,500 pounds and equipped with the low-NO_X engine, the proposed rule change exempts vehicles weighing greater than 14,000 pounds and equipped with the low-NO_X engine. The reason for this specification is because only vehicles weighing more than 14,000 pounds are subject to the idling restrictions. In addition, the current exemptions in existing paragraphs (2) - (12) would be renumbered as paragraphs (3) - (13).

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rule is in effect no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed rule is not expected to have any fiscal impact on other state agencies or units of local government.

The proposed rule implements SB 493 and allows the idling of a motor vehicle with a

gross vehicle weight rating greater than 8,500 pounds that is equipped with a 2008 or newer engine as specified in the statute that has been certified by the EPA or another state environmental agency to emit no more than 30 grams of NO_X emissions per hour.

The EPA could require the agency to demonstrate that backsliding will not occur in the SIP under the proposed rule since there may be an increase in emissions due to idling of certain motor vehicles. The agency will use currently available resources to perform any required demonstrations and use excess emissions reductions achieved for the overall VMEP to offset any increase in emissions resulting from the exemption of these vehicles.

Participation in the idling program is voluntary and currently only the Central Texas Area (CTA) and the North Central Texas Area (NCTA) have signed agreements to implement vehicle idling limitations. The CTA includes Bastrop, Caldwell, Hays, Travis, and Williamson Counties and the cities of Austin, Bastrop, Georgetown, Hutto, Lockhart, Luling, Round Rock, and San Marcos. The NCTA includes Collin, Dallas, Kaufman, and Tarrant Counties, the cities of Arlington, Benbrook, Cedar Hill, Celina, Colleyville, Dallas, Euless, Hurst, Keene, Lake Worth, Lancaster, Mabank, McKinney, Mesquite, North Richland Hills, Pecan Hill, Richardson, Rowlett, University Park, and Venus, and the towns of Little Elm and Westlake. Participation in the vehicle idling program provides local governments with additional options to reduce emissions and maintain attainment with the federal ozone standards.

State agencies and local governments that own or operate motor vehicles with gross vehicle weight ratings greater than 8,500 pounds and are equipped with a 2008 and newer engine certified to emit no more than 30 grams of NO_X per hour when idling may benefit from the proposed rule since they will allow drivers to operate air conditioners or heating when idling. The proposed rule will also give the governmental entities participating in the voluntary idling program more flexibility concerning certain motor vehicles that may be idling in their area.

Neither the agency nor other state agencies track where certified engines are registered, and information regarding the number of vehicles certified to emit no more than 30 grams of NO_X per hour when idling in the CTA and NCTA is not available.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the anticipated public benefit from the proposed rule will be compliance with state law.

Individuals that drive certain motor vehicles that have the certified engines are expected to benefit from the proposed rule through the use of air conditioning and heating when idling during mandated rest breaks.

Businesses that own the types of motor vehicles that are affected by the proposed rule are not expected to experience any fiscal impacts as a result of this proposed rule. The proposed rule will allow employees to operate air conditioning and heating systems when idling certain motor vehicles during mandated rest breaks.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. A small business should experience the same type of fiscal impact as that experienced by a large business. The proposed rule will allow a small business to permit employees to operate air conditioning and heating systems when idling certain motor vehicles during mandated rest breaks.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required in order to comply with state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy for the first five years that the proposed rule will be in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking 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 proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that 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. Specifically, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this proposed rulemaking; and 4) the proposed rulemaking is authorized by specific sections of THSC, 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.

The proposed 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, 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 42 USC, 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. Participation in the idling program is voluntary, and currently only the local governments in the CTA and the NCTA have signed agreements to implement vehicle idling limitations. The affected idling limitations rules provide all local governments the option of applying the rules when additional control measures are needed to achieve or maintain attainment of the federal ozone standards.

The specific intent of the proposed rulemaking is to include an exemption implementing SB 493 for any motor vehicle with a gross vehicle weight rating greater than 8,500 pounds that is equipped with a 2008 or subsequent model year heavy-duty diesel engine or liquefied or compressed natural gas engine that has been certified by the EPA or

another state environmental agency to emit no more than 30 grams of NO_X emissions per hour when idling.

The proposed rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because while the specific intent of the proposed rulemaking is to protect the environment or reduce risks to human health from environmental exposure, as discussed previously in the Fiscal Note, Public Benefits and Costs, Small Business Regulatory Flexibility Analysis, and the Local Employment Impact Statement sections of this preamble, the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would the proposed rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. The idling restrictions are effective only in certain areas of the state where an MOA between the TCEQ and the local government is in effect and only in certain defined areas within those limited areas. The proposed rulemaking is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225 because it is not a major environmental rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by SB 633, 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 TCEQ. 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 exceeded 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 and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP 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 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 as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed 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 NAAQS. Therefore, the proposed rulemaking 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 (NAAQS). The commission is charged with protecting air quality within the state and to design and submit 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). The specific intent of the proposed rulemaking is to include the exemption for a motor vehicle that has a gross vehicle weight rating greater than 14,000 pounds and that is equipped with a 2008 or subsequent model year heavy-duty diesel engine or liquefied or compressed natural gas engine that has been certified by the EPA or another state environmental agency to emit no more than 30 grams of NO_X emissions per hour when idling. This proposal, therefore, does not exceed an express requirement of federal law. The amendment is needed to implement state law but does exceed those new requirements. The proposed rulemaking does involve a compact (in particular, the Austin EAC), which is an agreement between the state and federal government to implement a state and federal program; however, the proposed amendment does not exceed the requirements of that compact. Finally, this proposed rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the Statutory Authority section of this preamble, including THSC, §382.012 and §382.019. Because this proposed rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply, and a regulatory impact analysis is not required.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft

regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

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 percent 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."

Promulgation and enforcement of the proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. The primary purpose of the proposed rule is to implement THSC, §382.0191 added by SB 492. This proposed rule is not burdensome, restrictive, or limiting of rights to private real property because the proposed rulemaking regulates vehicle idling in certain limited areas. Furthermore, the proposed rulemaking would benefit the public by providing all local governments the option of applying the Motor Vehicle Idling Rule when additional control measures are needed to achieve or maintain attainment of the federal ozone standards. The proposed rulemaking 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. Therefore, this proposed rule would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code §§33.201 *et seq*., and therefore, must be consistent with all applicable CMP goals and policies. The commission reviewed

this proposed rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed rulemaking does not affect any coastal natural resource areas. The CMP goals applicable to the proposed rulemaking are to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. No new sources of air contaminants are authorized in those affected counties. The CMP policy applicable to this proposed rulemaking action is the policy that commission rules comply with regulations in the Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal area (40 CFR §501.32). This proposed rulemaking does not have a detrimental effect on SIP emissions reduction obligations relating to maintenance of the ozone NAAQS. This proposed rulemaking action complies with the CFR. Therefore, in compliance with 31 TAC §505.22(e), this proposed rulemaking action is consistent with CMP goals and policies. Promulgation and enforcement of this proposed rule does not violate or exceed any standards identified in the applicable CMP goals and policies, because the proposed rulemaking is consistent with these CMP goals and policies, and because this proposed rule does not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearings

The commission will hold public hearings on this proposal in Austin on April 2, 2012, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle, and in Fort Worth on April 3, 2012, at 2:00 p.m. in the Public Meeting Room, at the DFW TCEQ Region 4 Office located at 2309 Gravel Road. 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 be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to each hearing.

Persons who have special communication or other accommodation needs who are planning to attend a hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference

Rule Project Number 2011-060-114-EN. The comment period closes April 9, 2012.

Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Holly Brightwell, Air Quality Planning Section, (512) 239-4905.

SUBCHAPTER J: OPERATIONAL CONTROLS FOR MOTOR VEHICLES

DIVISION 2: LOCALLY ENFORCED MOTOR VEHICLE IDLING LIMITATIONS

§114.517

Statutory Authority

The amendment is proposed under the authority of the Texas Government Code and under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rulemaking necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendment is also proposed under 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, §382.003, concerning Definitions; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's

air; THSC, §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; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; and THSC, §382.208, Attainment Program, which authorizes the commission 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 proposed amendment implements SB 493, which established THSC, §382.0191.

§114.517. Exemptions.

The provisions of §114.512 of this title (relating to Control Requirements for Motor Vehicle Idling) do not apply to:

(1) a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less;

<u>(2) a motor vehicle that has a gross vehicle weight rating greater than 14,000 pounds and that is equipped with a 2008 or subsequent model year heavy-duty</u>

diesel engine or liquefied or compressed natural gas engine that has been certified by the United States Environmental Protection Agency or another state environmental agency to emit no more than 30 grams of nitrogen oxides emissions per hour when idling;

(3) [(2)] the primary propulsion engine of a motor vehicle being used to provide air conditioning or heating necessary for employee health or safety in an armored vehicle while the employee remains inside the vehicle to guard the contents or while the vehicle is being loaded or unloaded;

(4) [(3)] a motor vehicle forced to remain motionless because of traffic conditions over which the operator has no control;

(5) [(4)] a motor vehicle being used by the United States military, national guard, or reserve forces, or as an emergency or law enforcement motor vehicle;

(6) [(5)] the primary propulsion engine of a motor vehicle providing a power source necessary for mechanical operation, other than propulsion, and/or passenger compartment heating, or air conditioning;

(7) [(6)] the primary propulsion engine of a motor vehicle being operated for maintenance or diagnostic purposes;

(8) [(7)] the primary propulsion engine of a motor vehicle being operated solely to defrost a windshield;

(9) [(8)] the primary propulsion engine of a motor vehicle that is being used to supply heat or air conditioning necessary for passenger comfort and safety in vehicles intended for commercial or public passenger transportation, or passenger transit operations, in which case idling up to a maximum of 30 minutes is allowed;

(10) [(9)] the primary propulsion engine of a motor vehicle being used to provide air conditioning or heating necessary for employee health or safety while the employee is using the vehicle to perform an essential job function related to roadway construction or maintenance;

(11) [(10)] the primary propulsion engine of a motor vehicle being used as airport ground support equipment;

(12) [(11)] the owner of a motor vehicle rented or leased to a person that operates the vehicle and is not employed by the owner; or

(13) [(12)] a motor vehicle when idling is necessary to power a heater or air

conditioner while a driver is using the vehicle's sleeper berth for a government-mandated rest period and is not within two miles of a facility offering external heating and air conditioning connections at a time when those connections are available.

AN ACT

relating to the idling of motor vehicles.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter B, Chapter 382, Health and Safety Code, is amended by adding Section 382.0191 to read as follows:

Sec. 382.0191. IDLING OF MOTOR VEHICLE. (a) In this section, "idling" means allowing an engine to run while the motor vehicle is not engaged in forward or reverse motion.

(b) The commission may not prohibit or limit the idling of any motor vehicle with a gross vehicle weight rating greater than 8,500 pounds that is equipped with a 2008 or subsequent model year heavy-duty diesel engine or liquefied or compressed natural gas engine that has been certified by the United States Environmental Protection Agency or another state environmental agency to emit no more than 30 grams of nitrogen oxides emissions per hour when idling.

SECTION 2. Subchapter Z, Chapter 622, Transportation Code, is amended by adding Section 622.955 to read as follows:

Sec. 622.955. INCREASE OF MAXIMUM WEIGHT FOR VEHICLES WITH IDLE REDUCTION SYSTEMS. (a) For purposes of this section, "idle reduction system" means a system that provides heating, cooling, or electrical service to a commercial vehicle's sleeper berth for the purpose of reducing the idling of a motor vehicle.

(b) Notwithstanding any provision to the contrary, the

maximum gross vehicle weight limit and axle weight limit for any vehicle or combination of vehicles equipped with an idle reduction system shall be increased by an amount necessary to compensate for the additional weight of the idle reduction system.

(c) The weight increase under Subsection (b) may not be greater than 400 pounds.

(d) On request by an appropriate law enforcement officer or an official of an appropriate regulatory agency, the vehicle operator shall provide proof that:

(1) the idle reduction technology is fully functional at all times; and

(2) the weight increase is not used for any purpose other than the use of an idle reduction system.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 493 passed the Senate on March 22, 2011, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 493 passed the House on May 19, 2011, by the following vote: Yeas 147, Nays 1, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor