TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AGENDA ITEM REQUEST

for Proposed Rulemaking

AGENDA REQUESTED: March 26, 2014

DATE OF REQUEST: March 7, 2014

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Bruce McAnally, (512) 239-2141

CAPTION: Docket No. 2013-1869-RUL. Consideration for publication of, and hearing on, amended Sections 114.301, 114.306, 114.307, 114.309, and repealed Section 114.304 of 30 Texas Administrative Code, Chapter 114, Control of Air Pollution from Motor Vehicles, and corresponding revisions to the state implementation plan.

The proposed rulemaking would remove the prohibition on the increased use of methyl-tertiary-butyl-ether (MTBE) in gasoline to conform to the low Reid vapor pressure (RVP) gasoline requirements; remove the registration requirements for gasoline producers and importers that supply low RVP gasoline to the affected counties; remove the annual reporting and certification requirements on the use of MTBE in low RVP gasoline; and make other non-substantive clarifying changes as needed for accuracy and consistency. (Morris Brown, Troupe Brewer) (Rule Project No. 2014-002-114-AI)

Deputy Director

Division Director

Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** March 7, 2014

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Steve Hagle, P.E., Deputy Director, Office of Air

Docket No.: 2013-1869-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 114, Control of Air Pollution from Motor Vehicles
Low RVP Gasoline Program Rule Revisions
Rule Project No. 2014-002-114-AI

Background and reason(s) for the rulemaking:

The current state regulations for the Regional Low Reid Vapor Pressure (RVP) Gasoline Program, as specified under the Chapter 114 gasoline volatility rules in §114.301, prohibit the sale of all gasoline from gasoline-dispensing facilities that has a RVP greater than 7.8 pounds per square inch (psi) within the 95 central and eastern Texas counties affected by these regulations from June 1 through October 1 of each year. This prohibition applies to all other affected entities in the affected 95 counties from May 1 through October 1 of each year. These rules also prohibit the increased use of methyl-tertiary-butyl-ether (MTBE) in gasoline to comply with the low RVP gasoline requirements during the period of May 1 through October 1 each year over that used in the period May 1 through October 1, 1998, on an average per gallon basis.

Low RVP gasoline is refined to have a lower evaporation rate and lower volatility than conventional gasoline. Low RVP gasoline reduces the evaporative emissions generated during vehicle refueling and therefore decreases the emissions of volatile organic compounds (VOC) and other ozone-forming emissions.

The Regional Low RVP Gasoline Program rules, as specified in §114.304, also require all gasoline producers and importers that supply gasoline to the affected counties to register with the Texas Commission on Environmental Quality (TCEQ). In addition, all registered gasoline producers and importers are required, as specified in §114.306, to submit an annual report certifying that the use of MTBE in the gasoline supplied to the affected counties, from May 1 through October 1 of the current reporting year, has not increased on an average per gallon basis from that used during the period of May 1 through October 1, 1998.

The following 95 Texas counties, as specified in §114.309, are affected by the Regional Low RVP Gasoline Program regulations: Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper,

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Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The use of MTBE as an oxygenate for compliance with federal reformulated gasoline regulations (RFG) and as a gasoline octane enhancing additive was common when the Regional Low RVP Gasoline Program regulations in Chapter 114 were originally adopted in June 1999. Concerns over the potential MTBE contamination of groundwater and surface water led the commission to adopt the MTBE prohibition specified in §114.301(c) in April 2000 to prevent gasoline producers from increasing the use of MTBE in gasoline to conform to the low RVP requirements. The gasoline producer and importer registration requirements in §114.304 and the annual reporting requirements specified in §114.306(c) were also adopted in April 2000 to enhance the enforceability of the MTBE prohibition specified in §114.301(c). The United States Environmental Protection Agency (EPA) approved the Low RVP Gasoline Program rules in Chapter 114 as a state implementation plan (SIP) control strategy for the one-hour ozone National Ambient Air Quality Standard (NAAQS) in the Houston-Galveston-Brazoria and Dallas-Fort Worth nonattainment areas on April 26, 2001 (66 FR 20927).

Subsequently, with the passage of the Energy Policy Act in 2005, the federal regulations requiring the use of oxygenates, such as MTBE, in RFG were repealed and a new federal renewable fuel standard requiring the use of ethanol in gasoline was enacted. As a result, gasoline producers began to blend ethanol into gasoline to meet the new federal renewable fuel standard and MTBE was effectively removed from general use as a gasoline additive by the gasoline refining industry, primarily due to growing concerns over the MTBE contamination of groundwater and surface water. Samples of gasoline collected statewide in 2011 for a summer fuel field study conducted by the TCEQ showed only trace amounts of MTBE in some samples, i.e., less than 0.1% by volume, while every gasoline sample collected contained ethanol ranging from 1.99% to 9.44% by volume. The proposed amendments to the Regional Low RVP Gasoline Program rules would remove obsolete requirements that provide no benefit to the state and are no longer necessary for the implementation and enforcement of the primary gasoline volatility control requirements of the rule. In addition, the proposal would provide regulatory consistency between the Chapter 114 gasoline volatility requirements and the El Paso Low RVP Gasoline requirements specified in the 30 Texas Administrative Code (TAC) Chapter 115 regulations in §§115.252, 115.253, 115.255 – 115.257, and 115.259, which do not prohibit the use of MTBE and do not require registration and annual reporting.

Scope of the rulemaking:

The proposed rule revision would amend Chapter 114 as follows:

- amend §114.301 to remove the prohibition on the increased use of MTBE in gasoline to conform to the low RVP gasoline requirements;

- repeal §114.304 to remove the registration requirements for gasoline producers and importers that supply low RVP gasoline to the affected 95 counties;
- amend §114.306 to remove the annual reporting and certification requirements on the use of MTBE in the low RVP gasoline and to make clarifying changes to the section heading as needed for accuracy and consistency with the proposed changes to the section; and
- amend §114.307 and §114.309 to make non-substantive clarifying changes as needed for accuracy and consistency with the proposed changes to §114.306.

A.) Summary of what the rulemaking will do:

The proposed rulemaking would remove the prohibition on the increased use of MTBE in gasoline to conform to the low RVP gasoline requirements; remove the registration requirements for gasoline producers and importers that supply low RVP gasoline to the affected counties; remove the annual reporting and certification requirements on the use of MTBE in low RVP gasoline; and make other non-substantive clarifying changes as needed for accuracy and consistency.

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

None.

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

None.

Statutory authority:

The amendments and repeal are proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The amendments and repeal are also proposed under Texas Health and Safety Code (THSC), §382.002, concerning 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, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning 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, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004.

The amendments and repeal implement THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

Effect on the:

A.) Regulated community:

The proposal would have a beneficial effect on the regulated gasoline producers and importers since it would remove obsolete administrative requirements, such as annual reporting to certify no increase in the use of MTBE in gasoline, which has not been an issue since 2005.

B.) Public:

The proposal would have no effect on the public since the primary controls specified in the rules that require the sale of low RVP gasoline during the ozone season would remain unchanged.

C.) Agency programs:

The proposal would have a beneficial effect on current agency programs by allowing staff resources allocated to administer the registration and annual MTBE reporting provisions of the Regional Low RVP Gasoline Program to be assigned to different tasks.

Stakeholder meetings:

Stakeholder meetings have not been held on this proposed rulemaking.

Potential controversial concerns and legislative interest:

Although the proposed revisions primarily address administrative requirements, the EPA may require further documentation to demonstrate compliance with the anti-backsliding provisions of Section 110(l) of the Federal Clean Air Act. In addition, the proposed removal of the prohibition on the increased use of MTBE to meet low RVP gasoline requirements may generate concern from the public that this removal could cause an increase in the use of MTBE in all gasoline as a result, especially if there was any change to the current federal ethanol mandates. However, gasoline producers are already allowed to add MTBE to gasoline for other reasons, such as octane enhancement, under the current regulations. An increased use of MTBE is unlikely due to concerns by gasoline producers with their lack of liability protection under federal law for potential MTBE contamination of groundwater and surface water.

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

This proposed rulemaking will have no significant effect on any current policy nor will it require any new policies to be developed.

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

1. Refrain from rulemaking and maintain the status quo of requiring the submission of annual MTBE reports and the registration of new gasoline producers and importers.
2. Exercise enforcement discretion for annual MTBE reporting and any new registration.

Key points in the proposed rulemaking schedule:

Anticipated proposal date: March 26, 2014

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Anticipated *Texas Register* publication date: April 11, 2014
Anticipated public hearing date (if any): May 8, 2014
Anticipated public comment period: April 11, 2014 – May 12, 2014
Anticipated adoption date: September 10, 2014

Agency contacts:

Morris Brown, Rule Project Manager, (512) 239-1438, Air Quality Division
Troupe Brewer, Staff Attorney, (512) 239-0676
Bruce McAnally, *Texas Register* Coordinator, (512) 239-2141

Attachments:

None.

cc:

Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Tucker Royall
John Bentley
Office of General Counsel
Morris Brown
Bruce McAnally

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§114.301, 114.306, 114.307, and 114.309; and the repeal of §114.304.

Repealed §114.304 and amended §114.307 and §114.309 are proposed to be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

The current state regulations for the Regional Low Reid Vapor Pressure (RVP) Gasoline Program, as specified under the Chapter 114 gasoline volatility rules in §114.301, prohibit the sale of all gasoline from gasoline-dispensing facilities that has a RVP greater than 7.8 pounds per square inch (psi) within the 95 central and eastern Texas counties affected by these regulations from June 1 through October 1 of each year. This prohibition applies to all other affected entities in the affected 95 counties from May 1 through October 1 of each year. Low RVP gasoline is refined to have a lower evaporation rate and lower volatility than conventional gasoline. Low RVP gasoline reduces the evaporative emissions generated during vehicle refueling and therefore decreases the emissions of volatile organic compounds (VOC) and other ozone-forming emissions. Reducing emissions of VOC benefits the regional 95-county area and the rest of the state and assists in the attainment and maintenance of the National Ambient Air Quality Standard (NAAQS) for ozone. These rules also prohibit the increased use of methyl-

tertiary-butyl-ether (MTBE) in gasoline to comply with the low RVP gasoline requirements during the period of May 1 through October 1 each year over that used in the period May 1 through October 1, 1998, on an average per gallon basis.

The Regional Low RVP Gasoline Program rules, as specified in §114.304, also require all gasoline producers and importers that supply gasoline to the affected counties to register with the TCEQ. In addition, all registered gasoline producers and importers are required, as specified in §114.306, to submit an annual report certifying that the use of MTBE in the gasoline supplied to the affected counties, from May 1 through October 1 of the current reporting year, has not increased on an average per gallon basis from that used during the period of May 1 through October 1, 1998.

The following 95 Texas counties, as specified in §114.309, are affected by the Regional Low RVP Gasoline Program regulations: Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Somervell, Titus,

Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The use of MTBE as an oxygenate for compliance with federal reformulated gasoline (RFG) regulations and as a gasoline octane enhancing additive was common when the Regional Low RVP Gasoline Program regulations in Chapter 114 were originally adopted in June 1999. Concerns over the potential MTBE contamination of groundwater and surface water led the commission to adopt the MTBE prohibition specified in §114.301(c) in April 2000 to prevent gasoline producers from increasing the use of MTBE in gasoline to conform to the low RVP requirements. The gasoline producer and importer registration requirements in §114.304 and the annual reporting requirements specified in §114.306(c) were also adopted in April 2000 to enhance the enforceability of the MTBE prohibition specified in §114.301(c). The EPA approved the Low RVP Gasoline Program rules in Chapter 114 as a SIP control strategy for the one-hour ozone NAAQS in the Houston-Galveston-Brazoria and Dallas-Fort Worth nonattainment areas in the April 26, 2001, issue of the *Federal Register* (66 FR 20927).

Subsequently, with the passage of the Energy Policy Act in 2005, the federal regulations requiring the use of oxygenates, such as MTBE, in RFG were repealed and a new federal renewable fuel standard requiring the use of ethanol in gasoline was enacted. As a result, gasoline producers began to blend ethanol into gasoline to meet the new federal renewable fuel standard, and MTBE was effectively removed from general use as a

gasoline additive by the gasoline refining industry, primarily due to growing concerns over the MTBE contamination of groundwater and surface water. Samples of gasoline collected statewide in 2011 for a summer fuel field study conducted by the TCEQ showed only trace amounts of MTBE in some samples, i.e., less than 0.1% by volume, while every gasoline sample collected contained ethanol ranging from 1.99% to 9.44% by volume.

The proposed amendments to the Regional Low RVP Gasoline Program rules would remove obsolete requirements that provide no benefit to the state and are no longer necessary for the implementation and enforcement of the primary gasoline volatility control requirements of the rule. In addition, the proposal would provide regulatory consistency between the Chapter 114 gasoline volatility requirements and the El Paso Low RVP Gasoline requirements, specified in the 30 Texas Administrative Code (TAC) Chapter 115 regulations in §§115.252, 115.253, 115.255-115.257, and 115.259, which do not prohibit the use of MTBE and do not require registration and annual reporting.

Section 110(l) Anti-backsliding Demonstration

The proposed amendments to the Regional Low RVP Gasoline Program rules are also proposed as revisions to the Texas SIP. The EPA approved the Regional Low RVP Gasoline Program rules effective May 29, 2001, but specifically did not address the MTBE prohibition requirement of the Regional Low RVP Gasoline Program rules since the commission did not submit that requirement as a SIP revision. The EPA generally

approved the registration and recordkeeping and certification requirements. Federal Clean Air Act (FCAA), §11o(l) requires that the EPA not approve revisions to the SIP, if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the FCAA. The commission has reviewed the proposed amendments to the Regional Low RVP Gasoline Program rules and determined that the amendments would not interfere with attainment or maintenance of the one-hour ozone NAAQS, since the federal regulations requiring the use of oxygenates, such as MTBE, in RFG were repealed in 2005. Additionally, MTBE has effectively been replaced with ethanol as a gasoline additive by the gasoline refining industry due to concerns with water contamination and for compliance with federal renewable fuel requirements. The repeal of the registration requirements, which were originally adopted to enhance enforcement regarding the MTBE prohibition, is not expected to impact the purpose of the Regional Low RVP Gasoline Program since those rules remain intact. Similarly, the proposed amendments to §§114.306, 114.307, and 114.309 involve minor administrative clarifications necessary for consistency. The Regional Low RVP Gasoline Program rules remain in place as an effective means to provide continued emissions reductions of VOC to assist in attainment and maintenance of the one-hour ozone NAAQS primarily within the 95 county region where the rules apply but also having potential additional benefits throughout the state.

Section by Section Discussion

§114.301, Control Requirements for Reid Vapor Pressure

The proposal would amend §114.301 to delete subsection (c) to remove the prohibition on the increased use of MTBE in gasoline to conform to the low RVP gasoline requirements specified in subsection (a). The prohibition on increased use of MTBE is no longer necessary since the federal regulations requiring the use of oxygenates, such as MTBE, in RFG were repealed in 2005. Also, MTBE has effectively been replaced with ethanol as a gasoline additive by the gasoline refining industry, due to concerns with water contamination and for compliance with federal renewable fuel requirements. In addition, the proposed amendment would provide regulatory consistency with the El Paso Low RVP Gasoline requirements, specified in the Chapter 115 regulations in §§115.252, 115.253, 115.255-115.257, and 115.259, which do not contain a prohibition on the increased use of MTBE to comply with the rules.

§114.304, Registration of Gasoline Producers and Importers

The proposal would repeal §114.304 to remove the requirement for gasoline producers and importers that supply gasoline to the affected counties to register with the TCEQ for consistency with the proposed changes to §114.301, since these requirements were adopted by the commission in April 2000 to enhance the enforceability of the MTBE prohibition specified in §114.301(c). Repealing the registration requirements specified in this section would relieve gasoline producers and importers affected by these regulations from an administrative requirement that is no longer necessary for the

implementation of the low RVP gasoline rules. Repealing this section would also provide regulatory consistency with the El Paso Low RVP Gasoline requirements, specified in Chapter 115 regulations in §§115.252, 115.253, 115.255-115.257, and 115.259, which do not contain registration requirements.

§114.306, Recordkeeping, Reporting, and Certification Requirements

The proposal would amend §114.306 to delete subsection (c) to remove the reporting and certification requirements regarding the annual report on the use of MTBE in the gasoline, as needed for consistency with the proposed changes to §114.301. Removing the reporting and certification requirements specified in this subsection would relieve gasoline producers affected by these regulations from an administrative requirement that is no longer necessary for the implementation of the Chapter 114 low RVP gasoline rules. In addition, removing this subsection would provide regulatory consistency with the El Paso Low RVP Gasoline requirements, specified in the Chapter 115 regulations in §§115.252, 115.253, 115.255-115.257, and 115.259, which do not contain reporting requirements. The proposal would also amend §114.306 to make clarifying changes to the section heading as needed for accuracy and consistency with the proposed changes to the section.

§114.307, Exemptions

The proposal would amend §114.307 to make non-substantive clarifying changes as needed for accuracy and consistency with the proposed changes to §114.306.

§114.309, Affected Counties

The proposal would amend §114.309 to make non-substantive clarifying changes as needed for accuracy and consistency with the proposed changes to §114.306.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules. The proposed rules would remove oxygenate requirements that became obsolete with the passage of the Energy Policy Act of 2005.

The proposed amendments to the Regional Low RVP Gasoline Program rules would remove obsolete requirements that provide no benefit to the state and are no longer necessary for the implementation and enforcement of the primary gasoline volatility control requirements of the rule by repealing §114.304 and by amending §§114.301, 114.306, 114.307, and 114.309. Specifically, the proposed rulemaking would remove the prohibition on the increased use of MTBE in gasoline to conform to the low RVP gasoline requirements; remove the registration requirements for gasoline producers and importers that supply low RVP gasoline to the affected counties; remove the annual reporting and certification requirements on the use of MTBE in low RVP gasoline; and make other non-substantive clarifying changes as needed for accuracy and consistency.

Since the proposed rules remove obsolete regulations regarding the use of oxygenates and do not affect agency revenue or costs, the proposed rules have no fiscal impact on the agency. Also, other state agencies and units of local government will not be fiscally impacted by the proposed rules.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be greater consistency with federal regulations and clarity regarding applicable rules for gasoline volatility.

The proposed rules would not have a fiscal impact for individuals or businesses since they repeal obsolete requirements for gasoline volatility controls and associated reporting that the agency no longer needs.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules repeal obsolete gasoline volatility regulations.

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 rules

comply with federal regulations and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are 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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "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. Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only 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.

The proposed rulemaking would amend §§114.301, 114.306, 114.307, and 114.309; and would repeal §114.304. The revisions to Chapter 114 would remove the existing prohibition on the increased use of MTBE in gasoline and the registration and reporting requirements that have become effectively obsolete due to the passing of the Energy Policy Act in 2005, which effectuated a phase-out of the use of MTBE as a oxygenate for low RVP fuel. This requiring gasoline producers to register, document, and report use of MTBE is no longer necessary. While the proposed rulemaking addresses revisions to the low emission fuels requirements associated with gasoline volatility that are specifically intended to protect the environment or reduce risks to human health from environmental exposure, the proposed rulemaking is not expected to 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 since the revisions are to address federal requirements associated with the phase-out of the use of MTBE as an oxygenate for low RVP fuel.

The proposed rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP 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 (42 USC, Chapter 85). 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 to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact

analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment 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 SIP 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 SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by

the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the 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 un-amended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

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

The specific intent of these rules is to remove the existing prohibition on the increased use of MTBE in gasoline, which has effectively been ended by the Energy Policy Act of 2005, and address other administrative requirements for consistency. Requiring gasoline producers to register, document, and report use of MTBE is therefore simply no longer necessary. As discussed elsewhere in this preamble, the amendments to §§114.301, 114.306, 114.307 and 114.309, and the repeal of §114.304, amount to an administrative clean-up to remove outdated and no longer necessary rules and requirements. Additionally, even if the proposed rulemaking was a major environmental rule, the proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b) because the proposed rulemaking does not meet the definition of a

"major environmental rule," nor does it meet any of the four applicability criteria for a major environmental rule.

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 assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific purpose of the proposed rulemaking is to remove outdated and obsolete portions of the low RVP fuel standards. The proposed rules would substantially advance this stated purpose by: removing the prohibition on the increased use of MTBE in gasoline to conform to the low RVP gasoline requirements; removing the registration requirements for gasoline producers and importers that supply low RVP gasoline to the affected counties; removing the annual reporting and certification requirements on the use of MTBE in low RVP gasoline; and by making other non-substantive clarifying changes as needed for accuracy and consistency.

Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action

reasonably taken to fulfill an obligation mandated by federal law. With the passage of the Energy Policy Act in 2005, the federal regulations requiring the use of oxygenates, such as MTBE, in RFG were repealed and a new federal renewable fuel standard requiring the use of ethanol in gasoline was enacted. As a result, gasoline producers began to blend ethanol into gasoline to meet the new federal renewable fuel standard, and MTBE was effectively removed from general use as a gasoline additive by the gasoline refining industry. The proposed rules constitute an "action reasonably taken" to provide administrative conformity with the Energy Policy Act's repeal of the requirements for the use of oxygenates in fuel, as the proposed rules will simply do away with reporting and registration requirements that are no longer necessary due the passage of the Energy Policy Act in 2005. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a "taking" under Texas Government Code, Chapter 2007. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These proposed rules would simply remove obsolete requirements that provide no benefit to

the state and are no longer necessary for the implementation and enforcement of the primary gasoline volatility control requirements of the rule.

In addition, because the subject proposed regulations do not provide more stringent requirements they do not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these rules will not constitute a taking under the Texas Government Code, Chapter 2007. For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. 31 TAC §505.11(b)(2) applies only to air pollutant emissions, on-site sewage disposal systems, and underground storage tanks. 31 TAC §505.11(b)(4) applies to all other actions. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council Advisory Committee and determined that the revisions are consistent with CMP goals and policies because the proposed rulemaking is to remove outdated and obsolete portions

of the low RVP fuel standards; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the revisions will not violate (exceed) any standards identified in the applicable CMP goals and policies.

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.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 114 does not contain applicable requirements under 30 TAC Chapter 122, Federal Operating Permits; therefore, owners or operators subject to the Federal Operating Permit Program will not be required to revise their operating permits, consistent with the revision process in Chapter 122, to include the revised Chapter 114 requirements for each emission unit at their sites affected by the revisions to Chapter 114.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on May 8, 2014, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is 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 hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the 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 Bruce McAnally, 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 2014-002-114-AI. The comment period closes May 12, 2014. 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 Morris Brown, Air Quality Division, at (512) 239-1438.

SUBCHAPTER H: LOW EMISSION FUELS
DIVISION 1: GASOLINE VOLATILITY
[§114.304]

Statutory Authority

The repeal is proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The repeal is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning 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, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning 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, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004.

The proposed repeal implements THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

[§114.304. Registration of Gasoline Producers and Importers.]

[Each producer and importer that, as of May 1, 2000, sells, offers for sale, supplies, or offers for supply from its production facility or import facility gasoline to counties listed in §114.309 of this title (relating to Affected Counties) shall register with the executive director, or his designated representative, by July 1, 2000. Beginning July 1, 2000, gasoline producers and importers that are not supplying gasoline to the affected counties as of May 1, 2000, shall register within 30 days after the first date that such person will produce or import gasoline intended to be sold, offered for sale, supplied, or offered for supply from its production or import facility to counties listed in §114.309 of this title. Registration shall be on forms prescribed by the executive director, or his designated representative, and shall include a statement of acceptance of the standards and enforcement provisions of this division; and shall include a statement of consent by the registrant that the executive director, or his designated representative, shall be permitted access to documentation and records. The executive director, or his designated representative, shall maintain a listing of all registered producers and importers.]

SUBCHAPTER H: LOW EMISSION FUELS
DIVISION 1: GASOLINE VOLATILITY
§§114.301, 114.306, 114.307, and 114.309

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.002, concerning 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, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning 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, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004.

The amendments implement THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.301. Control Requirements for Reid Vapor Pressure.

(a) In the counties listed in §114.309 of this title (relating to Affected Counties), no person shall sell, offer for sale, supply, offer for supply, dispense, transfer, allow the transfer, place, store, or hold in any stationary tank, reservoir, or other container any gasoline with a Reid vapor pressure greater than 7.8 pounds per square inch, on a per gallon basis, which may ultimately be used to power a gasoline engine in the affected counties according to the schedule in subsection (b) of this section.

(b) Beginning May 1, 2000, all adjustments in the operation of affected facilities and all transfers or alterations of gasoline not meeting the requirements of this section must be completed as necessary to conform with the provisions of subsection (a) of this section during the following periods of each calendar year:

(1) June 1 through October 1 of each year for gasoline dispensing facilities; and

(2) May 1 through October 1 of each year for all other affected facilities.

[(c) No producer shall the increase the use of methyl-tertiary-butyl-ether in gasoline on an average per gallon basis during the period of May 1 through October 1 of any calendar year over that used in the period May 1 through October 1, 1998 to conform with subsection (a) of this section.]

§114.306. Recordkeeping[, Reporting, and Certification] Requirements.

(a) The owner or operator of any gasoline storage vessel, gasoline terminal, or gasoline bulk plant subject to the provisions of §114.301 of this title (relating to Control Requirements for Reid Vapor Pressure) shall maintain records of the Reid vapor pressure of all gasoline stored or transferred during the compliance period. All records shall be maintained for two years and be made available for review by the executive director, United States Environmental Protection Agency (EPA), and local air pollution control agencies. Records do not have to be stored on-site, but must be made available for inspection at the site within five business days.

(b) All parties in the distribution chain (producers, importers, terminals, pipelines, truckers, rail carriers, and retail fuel dispensing outlets) subject to the provisions of §114.301 of this title must maintain copies or records of product transfer documents for a minimum of two years and shall upon request, make such copies or records available to representatives of the commission, EPA, or local air pollution agency having jurisdiction in the area. The product transfer documents must contain, at a minimum, the following information:

(1) the date of transfer;

(2) the name and address of the transferor;

(3) the name and address of the transferee;

[(4) in the case of transferors or transferees who are producers or importers, the registration number of those persons as assigned by the commission under §114.304 of this title (relating to Registration of Gasoline Producers and Importers);]

(4) [(5)] the volume of gasoline being transferred;

(5) [(6)] the location of the gasoline at the time of transfer; and

(6) [(7)] the following certification statement: "This product complies with the requirements for Reid vapor pressure specified in Title 30 Texas Administrative Code, §114.301 and may be used in any Texas county requiring gasoline with a maximum RVP of 7.8 pounds per square inch."

[(c) Each producer and importer subject to the provisions of §114.301 of this title shall submit to the executive director, or his designated representative, by November 30 of each year, a report which includes a quantification of the total gallons of gasoline and the total gallons of MTBE contained in gasoline for which the transfer documents contain the statement in subsection (b)(7) of this section during the periods May 1 through October 1 of 1998 and May 1 through October 1 of the current calendar year. The certifying report shall attest that all information contained in the report is true and accurate and is based on knowledge of the certifying official. The report must also include either:]

[(1) a certification statement that the use of MTBE in gasoline for which the transfer documents contain the statement in subsection (b)(7) of this section during the period May 1 through October 1 of the current calendar year has not increased on an average per gallon basis over that in the period May 1 through October 1, 1998; or]

[(2) if the average per gallon use of MTBE during the period May 1 through October l of the current calendar year exceeds the average per gallon use of MTBE during the period May 1 through October 1, 1998, documentation and explanation of the basis for the increased use in a manner sufficient to demonstrate that the producer or importer did not increase the use of MTBE during the period covered by the certification to conform with §114.301(a) of this title.]

§114.307. Exemptions.

(a) The following uses are exempt from §§114.301, 114.305, and 114.306 of this title (relating to Control Requirements for Reid Vapor Pressure; Approved Test Methods; and Recordkeeping[, Reporting, and Certification] Requirements):

(1) any stationary tank, reservoir, or other container:

(A) used exclusively for the fueling of implements of agriculture; or

(B) with a nominal capacity of 500 gallons (1,893 liters) or less; and

(2) all gasoline solely intended for use as aviation gasoline ("av-gas").

(b) Any gasoline that is either in a research, development, or test status; or is sold to petroleum, automobile, engine, or component manufacturers for research, development, or test purposes; or any gasoline to be used by, or under the control of petroleum, additive, automobile, engine, component manufacturers for research, development, or test purposes; or any independent research laboratories or academic institutions for use in research, development, or testing of petroleum, additive, automobile, engine, component products, is exempt from the provisions of this division (relating to Gasoline Volatility), provided that:

(1) the gasoline is kept segregated from non-exempt product, and the person possessing the product maintains documentation identifying the product as research, development, or testing fuel, as applicable, and stating that it is to be used only for research, development, or testing purposes; and

(2) the gasoline is not sold, dispensed, or transferred, or offered for sale, dispensing, or transfer from a retail fuel dispensing facility. It shall also not be sold, dispensed, or transferred, or offered for sale, dispensing, or transfer from a wholesale purchaser-consumer facility, unless such facility is associated with fuel, automotive, or engine research, development, or testing.

(c) Any gasoline that is refined, sold, dispensed, transferred, or offered for sale, dispensing, or transfer as competition racing fuel is exempted from the provisions of this division, provided that:

(1) the fuel is kept segregated from non-exempt fuel, and the party possessing the fuel for the purposes of refining, selling, dispensing, transferring, or offering for sale, dispensing, or transfer as competition racing fuel maintains documentation identifying the product as racing fuel, restricted for non-highway use in competition racing motor vehicles or engines;

(2) each pump stand at a regulated facility, from which the fuel is dispensed, is labeled with the applicable fuel identification and use restrictions described in paragraph (1) of this subsection; and

(3) the fuel is not sold, dispensed, transferred, or offered for sale, dispensing, or transfer for highway use in a motor vehicle.

(d) The owner or operator of a retail fuel dispensing outlet is exempt from all requirements of §114.306 of this title, except §114.306(b) of this title.

(e) Gasoline that does not meet the requirements of §114.301 of this title is not prohibited from being transferred, placed, stored, and/or held within the affected counties so long as it is not ultimately used to power:

(1) a gasoline-powered spark-ignition engine in a motor vehicle in the counties listed in §114.309 of this title (relating to Affected Counties), except for that used in conjunction with purposes stated in subsections (a) - (c) of this section; or

(2) a gasoline-powered spark-ignition engine in non-road equipment in the counties listed in §114.309 of this title, except for that used in conjunction with purposes stated in subsections (a) - (c) of this section.

§114.309. Affected Counties.

All affected persons in the following counties shall be in compliance with §§114.301 and 114.305 [114.304] - 114.307 of this title (relating to Control Requirements for Reid Vapor Pressure; [Registration of Gasoline Producers and Importers;] Approved Test Methods; Recordkeeping[, Reporting, and Certification] Requirements; and Exemptions) no later than the dates specified in §114.301(b) of this title: Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, San Patricio,[San Augustine,] Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.