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Thomas Estrada

All HMOs and insurers filing the NAIC Health Blank shall comply with the requirements of §7.401 of this title (relating to Risk-Based Capital and Surplus Requirements).

[(a) Health Maintenance Organizations. This section applies to all domestic and foreign HMOs subject to the provisions of the Insurance Code, Chapter 20A.]

[(b) Health insurers. Insurers that file the NAIC Health Blank with the department under §7.65 of this title (relating to Requirements for Filing the 2002 Quarterly and 2002 Annual Statements, Other Reporting Forms, and Electronic Data Filings with the NAIC) are required to file the RBC Report adopted by reference in this section.]

[(c) Adoption of RBC formula by reference and filing requirements. The commissioner adopts by reference the 2002 NAIC Health Risk-Based Capital Report including Overview and Instructions for Companies which includes the RBC formula and the required diskettes. All HMOs and health insurers subject to this section are required to file the diskettes with the NAIC in accordance with and by the due date specified in the RBC instructions. The printed RBC Report should be available to the department on request.]

[(d) Conflicts. In the event of a conflict between the Insurance Code, any currently existing rule of the department or any specific requirement of this section, and the RBC formula and/or the RBC instructions, the Insurance Code, rule or specific requirement of this section shall take precedence and in all respects control. It is the express intent of this section that the adoption by reference of the RBC instructions does not repeal or modify or amend any rule of the department or the Insurance Code.]

[(e) Actions of commissioner. The commissioner may take the following actions against an HMO that fails to maintain, at a minimum, 70% of the authorized control level risk-based capital in the RBC Report as calculated in accordance with the RBC instructions:]

[(1) order the HMO to cease writing new business;]

[(2) place the HMO in supervision or conservation;]

[(3) find the HMO to be in hazardous financial condition as provided by the Insurance Code Article 20.19 and §11.810 of this title (relating to Hazardous Conditions for HMOs);]

[(4) find the HMO to be in violation of the minimum net worth requirements of Insurance Code Article 20A.13C and take action as provided by Insurance Code Article 20A.31, or]

[(5) apply any sanctions provided by the Insurance Code or Title 28 of the Texas Administrative Code.]

[(f) Prohibition on Announcements. Except as otherwise required under the provisions of this section, the department believes that the comparison of an HMO's total adjusted capital to its risk-based capital is a regulatory tool which may indicate the need for corrective action with respect to the HMO and such a comparison is not intended as a means to rank HMOs generally; therefore, the making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing an assertion, representation or statement with regard to any component derived in the calculation, by any HMO, insurer, agent, broker or person engaged in any manner in the insurance business would be misleading and is, therefore, prohibited.]

[(g) Limitations. In no event, shall the requirements of this section reduce the amount of net worth, capital and/or surplus otherwise required by provisions of the Insurance Code or Texas Administrative Code, or by order of the commissioner.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2004.

TRD-200407287

Gene C. Jarmon

General Counsel and Chief Clerk

Texas Department of Insurance

Earliest possible date of adoption: January 23, 2005

For further information, please call: (512) 463-6327



TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

The Texas Commission on Environmental Quality (commission) proposes amendments to §§115.10, 115.229, and 115.429; and corresponding revisions to the state implementation plan (SIP).

The commission proposes these revisions to Chapter 115, concerning Control of Air Pollution from Volatile Organic Compounds, in order to reduce ozone precursors in the five counties in the Dallas/Forth Worth area that were recently designated as nonattainment for the eight-hour ozone standard.

These amended sections and corresponding revisions to the SIP will be submitted to the United States Environmental Protection Agency (EPA).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Federal Clean Air Act (CAA) Amendments of 1990 as codified in 42 United States Code (USC), §§7401 *et seq.* require EPA to set national ambient air quality standards (NAAQS) to ensure public health, and to designate areas as either in attainment or nonattainment with the NAAQS, or as unclassifiable. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Each state is required to submit a SIP to the EPA that provides for attainment and maintenance of the NAAQS.

The Dallas/Fort Worth area, consisting of four counties (Collin, Dallas, Denton, and Tarrant), was designated nonattainment and classified as moderate, in accordance with the 1990 CAA Amendments, and was required to attain the one-hour ozone NAAQS by November 15, 1996. A SIP was submitted based on a volatile organic compound (VOC) reduction strategy, but the Dallas/Fort Worth area did not attain the NAAQS by the mandated deadline. Consequently, in 1998 the EPA reclassified the Dallas/Fort Worth area from "moderate" to "serious," resulting

in a requirement to submit a new SIP demonstrating attainment by the new deadline of November 15, 1999.

The Dallas/Fort Worth area also failed to reach attainment by the November 1999 deadline. In the attainment demonstration SIP adopted by the commission in April 2000, the importance of local nitrogen oxides (NO_x) reductions as well as the transport of ozone and its precursors from the Houston/Galveston/Brazoria ozone nonattainment area (HGB area) were considered. Based on photochemical modeling demonstrating transport from the HGB area, the agency requested an extension of the Dallas/Fort Worth area attainment date to November 15, 2007, the same attainment date as for the HGB area, in accordance with an EPA policy allowing extension of attainment dates due to transport of pollutants from other areas.

The EPA transport policy was overturned by federal courts, which ruled that EPA does not have authority to extend an area's attainment date based on transport. Although the Dallas/Fort Worth area was not the specific subject of any of these suits, the Dallas/Fort Worth area one-hour ozone attainment demonstration SIP, including an extended attainment date, was not approvable by EPA. Thus, the Dallas/Fort Worth area does not currently have an approved attainment demonstration SIP for the one-hour ozone NAAQS.

On July 18, 1997, EPA promulgated a revised ozone standard (the eight-hour ozone NAAQS), and on April 30, 2004, promulgated the first phase implementation rule for the eight-hour ozone NAAQS (Phase I Implementation Rule) (69 FR 23951). Also on April 30, 2004, the Dallas/Fort Worth area was designated as nonattainment and classified as moderate for the eight-hour ozone NAAQS. Five additional counties (Ellis, Johnson, Kaufman, Parker, and Rockwall) were added to the Dallas/Fort Worth eight-hour ozone nonattainment area (DFW area). The DFW area consists of nine counties (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant) effective June 15, 2004, for the eight-hour ozone NAAQS. The DFW area must attain the eight-hour ozone NAAQS by June 15, 2010.

EPA's Phase I guidance provided three options for eight-hour ozone nonattainment areas that do not have an approved one-hour ozone attainment SIP: 1) submit a one-hour ozone attainment demonstration no later than one year after the effective date of the designation (by June 15, 2005); 2) submit an eight-hour ozone plan no later than one year after the effective date of the designation (by June 15, 2005) that provides a 5% increment of reductions from the area's 2002 emissions baseline that is in addition to federal measures and state measures already approved by EPA, and to achieve these reductions by June 15, 2007; or 3) submit an eight-hour ozone attainment demonstration by June 15, 2005. Options one and three require successful photochemical grid modeling performance. Based on poor model performance, the commission, in coordination with EPA, determined that option two is the most expeditious approach to beginning to achieve the reductions ultimately needed to: 1) meet the June 15, 2005 transportation conformity deadline; and 2) attain the eight-hour ozone NAAQS by June 15, 2010. In order for the DFW area to comply with the requirement to submit a 5% increment of progress plan that provides a 5% emission reduction from the 2002 emissions baseline, additional emission reduction strategies are necessary.

The proposed rules represent two of the control strategies that have been selected to provide the 5% increment of progress.

The SIP revision will also establish a 2007 motor vehicle emissions budget (MVEB) for the DFW area, which is necessary to prevent a transportation conformity lapse after June 15, 2005.

Proposed amendments to Chapter 115, Subchapter A, Definitions, would revise the definitions of "Covered attainment counties" and "Dallas/Fort Worth area" by moving Ellis, Johnson, Kaufman, Parker, and Rockwall Counties from the "Covered attainment counties" definition to the "Dallas/Fort Worth area." This definition change is for the purposes of Subchapter C, Volatile Organic Compound Transfer Operations, Division 2, Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities, and Subchapter E, Solvent-Using Processes, Division 2, Surface Coating Processes.

Proposed amendments to Chapter 115, Subchapter C, Division 2, would lower the exemption level for facilities subject to Stage I vapor recovery controls from 125,000 gallons of gasoline in a calendar month to 10,000 gallons of gasoline in a calendar month in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties.

Proposed amendments to Chapter 115, Subchapter E, Division 2, would extend the control requirements to Ellis, Johnson, Kaufman, Parker, and Rockwall Counties.

The emission reduction requirements that will result from this proposed rulemaking, if adopted, will result in reductions in ozone formation in the DFW area and help bring the DFW area into compliance with the eight-hour ozone NAAQS. These emission reductions are one component of the Dallas/Fort Worth SIP that the state is required to submit to EPA to assure attainment and maintenance of the eight-hour ozone NAAQS. Attainment of the eight-hour ozone standard may require further reductions in NO_x emissions as well as VOC emissions. This rulemaking is one step toward meeting the state's obligations under the FCAA. EPA has not yet issued Phase II of its eight-hour implementation rule (Phase II guidance) for states to use in developing eight-hour ozone attainment demonstrations. Phase II guidance is expected to be promulgated by EPA in the fall of 2004, which will provide additional information relating to eight-hour ozone attainment demonstrations. The commission is continuing to prepare for the required eight-hour ozone attainment demonstration SIP.

SECTION BY SECTION DISCUSSION

Subchapter A, Definitions

§115.10, Definitions

The proposed amendment to §115.10 would revise, for the purposes of Subchapter C, Division 2, the definitions of "Covered attainment counties" and "Dallas/Fort Worth area" by moving Ellis, Johnson, Kaufman, Parker, and Rockwall Counties from the "Covered attainment counties" definition to the "Dallas/Fort Worth area" definition. Additionally, the proposed definition change for "Dallas/Fort Worth area," to include Ellis, Johnson, Kaufman, Parker, and Rockwall Counties, would apply to Subchapter E, Division 2. The existing definitions would continue to apply in the other sections of the chapter.

Subchapter C, Volatile Organic Compound Transfer Operations *Division 2, Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities*

§115.229, Counties and Compliance Schedules

The proposed amendment to §115.229 would add a new subsection (d) to specify that facilities in Ellis, Johnson, Kaufman,

Parker, and Rockwall Counties that have dispensed at least 10,000 but less than 125,000 gallons of gasoline per month must comply with the requirements as soon as practicable, but no later than June 15, 2007. This date is the deadline specified for control measures to be in place for the 5% increment of progress.

Subchapter E, Solvent-Using Processes

Division 2, Surface Coating Processes

§115.429, Counties and Compliance Schedules

The proposed amendment to §115.429 would designate the existing text in §115.429 as §115.429(a) and add a new subsection (b), to specify that surface coating facilities in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties must comply with the requirements as soon as practicable, but no later than June 15, 2007. This date is the deadline specified for control measures to be in place for the 5% increment of progress.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

40 Code of Federal Regulations §51.905(a)(ii) requires that one-hour nonattainment areas not having approved one-hour attainment demonstrations submit one of three options to EPA by June 15, 2005, to come into compliance with federal ozone standards. The three options are: an approvable one-hour attainment demonstration; an early 5% increment of progress plan; or an early eight-hour attainment demonstration ensuring that the first reasonable further progress will be achieved early. The 5% increment of progress requires the nonattainment area to reduce emissions, by 2007, by 5% from emission levels recorded in a 2002 baseline. These reductions represent a "down payment" for the full eight-hour attainment demonstration of emission reductions. The control strategy in this proposed rulemaking, which affects the DFW area, is one of the measures being applied to achieve the 5% increment of progress.

The proposed rulemaking affects motor vehicle fuel dispensing facilities and surface coating processes in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties. State and local governments do not typically own or operate these types of facilities. Therefore, the proposed rulemaking is not anticipated to have any significant fiscal impact on government entities in these counties. The commission does anticipate a slight increase in workload to ensure that private entities in these counties comply with the proposed rules. However, the commission expects that this slight increase in workload can be absorbed by existing staff.

PUBLIC BENEFITS AND COSTS

Ms. Chamness has 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 a reduction in VOC emissions, leading to a decrease in ozone formation in the DFW area. The reductions would be a part of a "down payment" on reductions needed to bring this nonattainment area into compliance with the EPA eight-hour ozone NAAQS.

Fiscal implications are anticipated for businesses and individuals who use, own, or operate motor vehicle fuel dispensing facilities and surface coating process facilities in the affected counties. Specifically, the proposed rules would subject these facilities to the same control, monitoring, testing, recordkeeping, and reporting requirements to which the facilities in the other four counties in the DFW area are currently subject.

Motor Vehicle Fuel Dispensing Facilities

Motor vehicle fuel dispensing facilities in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties that have dispensed 10,000 gallons of gasoline or more in a calendar month would be required to implement Stage I vapor recovery controls to reduce VOC emissions from the refilling of gasoline storage tanks at the facility. These controls are currently required only in facilities that have dispensed 125,000 gallons of gasoline or more during a calendar month. According to the commission's Petroleum Storage Tank Registration Database, there are approximately 966 storage tanks at approximately 421 sites in these counties.

The cost to upgrade a motor vehicle fuel dispensing facility with three underground storage tanks to meet the Stage I vapor recovery requirements is estimated to be between \$4,000 to \$5,000. This will be a one time cost over the first five years the proposed rules would be in effect and includes equipment, parts and labor, and installation costs. Additional costs for recordkeeping, testing, and reporting requirements are not anticipated to be significant. The total one time cost for the facilities in the newly covered counties would be approximately \$1.6 million to \$2.1 million.

Surface Coating Facilities

The proposed rules would affect surface coating facilities in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties. These facilities can choose a combination of coating substitutions and control equipment to comply with the proposed rules. Since the options are so varied, up-to-date cost estimates to comply with the proposed rules are not readily available. A number of factors will affect the costs for a regulated entity to comply with the proposed surface coating rules. If different coating formulations are used, total costs could include the cost differential between the old and new coatings, costs of new equipment to store and apply the new coatings, the need for larger equipment (such as drying ovens) if the new coatings take longer to cure, and possible costs for decreased production due to longer curing times. However, in some cases there could be cost savings due to more efficient application.

In the 1996 EPA control techniques guidelines for wood furniture manufacturing (EPA/453/R-96/007, April 1996), cost estimates were given for different "model plants" (presuming different sizes and operations). All costs were given in 1991 dollars. Annual costs were estimated to range from negative (cost savings) to almost \$316,000 per year, including capital and operating costs. The highest costs were for larger plants, with more than 250 employees. The commission invites public comment on these costs.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for small or micro-businesses affected by the proposed rulemaking. It is not known how many motor vehicle fuel dispensing or surface coating facilities in Ellis, Johnson, Kaufman, Parker, or Rockwall Counties are small or micro-businesses, but the cost for a small or micro-business to comply with the proposed rules would be the same as for

a large business. Small or micro-businesses are defined as having fewer than 100 or 20 employees respectively. Cost estimates for surface coating facilities are not available, however, for a small business of 100 employees owning a motor vehicle fuel dispensing facility, one time costs to comply with Stage I vapor recovery requirements are estimated to be \$40 - \$50 per employee. For a micro-business, these one time costs are estimated to be \$200 - \$250 per employee.

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 considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule." 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. The proposed amendments to §§115.10, 115.229 and 115.429 would lower the exemption level for motor vehicle fuel dispensing facilities subject to Stage I vapor recovery requirements in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties, extend surface coating requirements in Chapter 115 to the same counties, and revise the SIP to include these requirements. While this rulemaking is intended to protect the environment by reducing VOC emissions that help form ozone, the commission does not find that the additional motor vehicle fuel dispensing facilities and surface coating operations covered by this rulemaking comprise a sector of the economy, or that the rules will adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety in the DFW area.

The proposed amendments to Chapter 115 are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rules do not meet any of the four applicability requirements. Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal 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.

Specifically, the proposed amendments to Chapter 115 were developed as part of the control strategy to meet the eight-hour ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement. 42 USC, §7410, requires states to adopt and submit a SIP that provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While 42 USC, §7410 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). While 42 USC, §§7401 *et seq.* does require some specific measures for SIP purposes, like the inspection and maintenance program, the statute also provides flexibility for states to select other necessary or appropriate measures. The federal government, in implementing 42 USC, §§7401 *et seq.*, recognized that the states are in the best position to determine what programs and controls are necessary or appropriate to meet the NAAQS, and provided for the ability of states and the public to collaborate on the best methods for attaining the NAAQS within a particular state. However, this flexibility does not relieve a state from developing and submitting a SIP that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410 and must develop programs to assure that the nonattainment areas of the state will 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 Legislative Session, 1999. 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 delegation 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 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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC, §§7401 *et seq.* does not require specific programs, methods, or reductions in order to meet the NAAQS; thus states must develop programs for each nonattainment area to ensure that the area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, 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 a 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 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 Legislative Budget Board, 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 may have broad impacts, those impacts are no greater than necessary or appropriate to meet the requirements of the FCAA, 42 USC, §§7401 *et seq.* For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable and 42 USC, §7511a(c), requires states to submit attainment demonstration SIPs for ozone nonattainment areas, such as the DFW area. The proposed rules, which will reduce ozone in the DFW area, will be submitted to the EPA as one of several measures in the federally required SIP. By reducing emissions of VOCs, these controls will result in reductions in ozone formation in the DFW area and help bring the DFW area into compliance with the air quality standards established under federal law as NAAQS for ozone. Therefore, the proposed rulemaking is a necessary component of, and consistent with, the eight-hour ozone attainment demonstration Dallas/Fort Worth SIP required by 42 USC, §7410.

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. The commission presumes 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); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *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).

As discussed earlier in this preamble, this rulemaking action implements requirements of 42 USC, §§7401 *et seq.* There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §382.012 and §382.208. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The specific purposes of this rulemaking are to achieve reductions of VOC emissions to reduce ozone formation in the DFW area and help bring the DFW area into compliance with the air quality standards established under federal law as NAAQS for ozone. If adopted, motor vehicle fuel dispensing facilities in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties that dispense at least 10,000 but less than 125,000 gallons of gasoline per month will be subject to Stage I vapor recovery requirements and surface coating control requirements in Chapter 115 will be extended to the same counties. The

Stage I gasoline vapor recovery portion of these requirements could conceivably place a burden on private, real property to the extent that they require the installation of permanent equipment at fuel dispensing facilities.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this proposed rulemaking action, because it is reasonably taken to fulfill an obligation mandated by federal law. The emission limitations and control requirements within this rulemaking action were developed in order to meet the eight-hour ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. Attainment of the eight-hour ozone standard may require further reductions in NO_x emissions as well as VOC emissions. This rulemaking is one step toward meeting the state's obligations under the FCAA.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to the DFW area exceeding the federal eight-hour ozone NAAQS, that adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ozone levels in the DFW area. Consequently, these proposed rules meet the exemption in Texas Government Code, §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the proposed rules do not constitute a takings under Chapter 2007.

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) 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. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking will not affect any coastal natural resource areas because the rules only affect counties outside the CMP area and is, therefore, consistent with 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 115 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; therefore, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permit to include the revised Chapter 115 requirements at their sites affected by the revisions to Chapter 115.

ANNOUNCEMENT OF HEARINGS

Public hearings on this proposal will be held on January 3, 2005, at 5:30 p.m. at the North Central Texas Council of Governments, 616 Six Flags Drive, Transportation Board Room, 3rd Floor, Arlington, Texas; January 4, 2005, at 10:00 a.m. at the Texas Commission on Environmental Quality, 12100 North I-35, Building F, Room 2210, Austin, Texas; and January 5, 2005 at 2:30 p.m. at the Houston-Galveston Area Council, Conference Room A, 3555 Timmons Lane, Houston, Texas. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes before each hearing and will answer questions before and after each hearing.

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

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-4808; or emailed to sjprules@tceq.state.tx.us with Rule Project Number 2005-005-115-AI in the subject line. All comments should reference Rule Project Number 2005-005-115-AI. Comments must be received by 5:00 p.m., January 6, 2005. For further information, please contact Teresa Hurley of the Environmental Planning and Implementation Division at (512) 239-5316 or Emily Barrett of the Policy and Regulations Division at (512) 239-3546.

SUBCHAPTER A. DEFINITIONS

30 TAC §115.10

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under Texas Health and Safety Code, §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; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a

general, comprehensive plan for the proper control of the state's air.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; and Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

§115.10. Definitions.

Unless specifically defined in the Texas Clean Air Act or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the Texas Clean Air Act, the following terms, when used in this chapter (relating to Control of Air Pollution from Volatile Organic Compounds), shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this chapter are found in §3.2 and §101.1 of this title (relating to Definitions).

(1) - (8) (No change.)

(9) Covered attainment counties--For purposes of Subchapter C, Volatile Organic Compound Transfer Operations, Division 2, Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities, 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, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Karnes, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Polk, Rains, Red River, Refugio, Robertson, 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. For all other divisions, 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 Counties.

(10) Dallas/Fort Worth area--For purposes of Subchapter C, Volatile Organic Compound Transfer Operations, Division 2, Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities, and Subchapter E, Solvent-Using Processes, Division 2, Surface Coating Processes, Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties. For all other divisions, Collin, Dallas, Denton, and Tarrant Counties.

(11) - (47) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348



SUBCHAPTER C. VOLATILE ORGANIC
COMPOUND TRANSFER OPERATIONS
DIVISION 2. FILLING OF GASOLINE
STORAGE VESSELS (STAGE I) FOR MOTOR
VEHICLE FUEL DISPENSING FACILITIES

30 TAC §115.229

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; §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; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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; and §382.208, concerning 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 Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017 and 382.208.

§115.229. *Counties and Compliance Schedules.*

(a) - (c) (No change.)

(d) The owner or operator of each motor vehicle fuel dispensing facility in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties that has dispensed at least 10,000 gallons of gasoline but less than 125,000 gallons of gasoline in any calendar month after April 30, 2005, shall comply with this division as soon as practicable, but no later than June 15, 2007.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. SOLVENT-USING
PROCESSES
DIVISION 2. SURFACE COATING PROCESSES
30 TAC §115.429

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; §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; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §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.

The proposed amendment implements Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

§115.429. *Counties and Compliance Schedules.*

(a) The owner or operator of each surface coating operation in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Montgomery, Nueces, Orange, Tarrant, Victoria, and Waller Counties shall continue to comply with this division (relating to Surface Coating Processes) as required by §115.930 of this title (relating to Compliance Dates).

(b) The owner or operator of each surface coating operation in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than June 15, 2007.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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**TITLE 31. NATURAL RESOURCES AND
CONSERVATION**

PART 1. GENERAL LAND OFFICE