

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for State Implementation Plan Revision Adoption

AGENDA REQUESTED: January 25, 2012

DATE OF REQUEST: January 6, 2012

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

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

The 2001 MOA with the City of El Paso has been revised to reflect the respective responsibilities of the City of El Paso and the TCEQ under the State Implementation Plan (SIP) for particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀) and the alternative control measures revised in a concurrent rulemaking for 30 Texas Administrative Code (TAC) Section 111.147 (Rule Project No. 2010-046-111-EN). The revised MOA and rule revision are being incorporated as a revision of the SIP (Non-Rule Project No. 2011-010-SIP-NR). (Shelley Naik, Terry Salem) (Non-Rule Project No. 2011-026-MIS-NR)

Susana M. Hildebrand, P.E.

Chief Engineer

Kim Herndon for David Brymer

Division Director

Joyce Spencer

Agenda Coordinator

Copy to CCC Secretary? NO X YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** January 6, 2012

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

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

Docket No.: 2011-0899-MIS

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

Background and reason(s) for the MOA:

The City of El Paso (El Paso area) was designated nonattainment under Federal Clean Air Act (FCAA), §107(d)(4)(B) for National Ambient Air Quality Standard (NAAQS) for particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀) and subsequently classified as a moderate nonattainment area. In November 1991, the Texas Air Control Board (TACB), a predecessor agency of the Texas Commission on Environmental Quality (TCEQ), submitted an attainment demonstration SIP revision. The SIP revision included particulate matter (PM) control measures in 30 Texas Administrative Code (TAC) Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter, Subchapter A, Division 4, Materials Handling, Construction, Roads, Streets, Alleys, and Parking Lots. The control measures adopted in §111.147 required paving as a method of dust control in the El Paso area for specified roads and added a requirement that alleys be paved at the rate of 15 miles per year. Section 111.147 also set frequencies for street sweeping in designated sections of the El Paso area.

On November 5, 1991, a Memorandum of Understanding (MOU) between the City of El Paso local government (the City) and the TACB was signed to outline the responsibilities and regulatory requirements for both parties. This MOU was submitted to the United States Environmental Protection Agency (EPA) as Appendix Q of the 1991 El Paso PM₁₀ attainment demonstration SIP revision. The EPA approved the MOU as part of the El Paso PM₁₀ SIP on January 18, 1994.

On October 9, 2001, the 1991 MOU was replaced with a Memorandum of Agreement (MOA) since MOUs are typically used only for agreements between two state agencies and this agreement was between an agency and a city. Although the MOA was submitted to the EPA in a letter dated February 19, 2002, it did not go before the commission, and was not adopted as a SIP revision. Furthermore, the 2001 MOA is not included in the listed SIP documents in the Code of Federal Regulations (CFR). This MOA would replace the 2001 MOA and be incorporated into the El Paso PM₁₀ SIP as a SIP revision.

A separate rulemaking (Rule Project No. 2010-046-111-EN) amends §111.147(1)(E) to remove the requirement for the City to pave alleys at the rate of 15 miles per year and replace it with the following requirements: 1) all new alleys shall be paved; 2) unpaved

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alleys may not be used for residential garbage and recycling collection; and 3) reclaimed asphalt pavement (RAP) may be used as an alternate means of PM control for alleys. The rulemaking also amends §111.147(2) to change the sweeping frequency requirement from four times per year to three times per year in the city limits and from six times per week to four times per week in the central business district. The City has demonstrated that the unpaved alley inventory will not increase due to a city ordinance that requires developers to pave any new alleys. Furthermore, alleys have not been used for garbage collection since 1997, so the traffic in alleys has been dramatically reduced. Finally, RAP has been used to cover some unpaved alleys, which has proven to be as effective as paving. In addition, the City continues to include paving and sweeping in its annual budget. The TCEQ staff believes that the combination of these actions demonstrates that the EPA anti-backsliding provisions in FCAA, §110(l) are met.

The 2001 MOA with the City has been revised to reflect these changes to §111.147.

Scope of the MOA:

A.) Summary of what the MOA will do:

The 2001 MOA with the City has been revised to reflect the alternative control measures in the revisions to §111.147 and the respective responsibilities of the City and TCEQ under the SIP.

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

The rule revision and revised MOA will be incorporated into the El Paso PM₁₀ SIP.

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

None

Statutory authority:

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

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Effect on the:

A.) Regulated community:

The rule revision and revised MOA will update the PM controls required to attain and maintain the PM₁₀ NAAQS in the El Paso area. The City will have greater flexibility in the implementation of the PM control requirements in §111.147.

B.) Public:

Implementation of the revised rules and MOA will continue protection of public health through continued control of PM₁₀ in the El Paso area.

C.) Agency programs:

There is no anticipated impact on agency programs.

Stakeholder meetings:

No stakeholder meetings were held.

Public comment:

The commission offered a public hearing for the proposed MOA in El Paso on September 27, 2011. A question and answer session was held 30 minutes prior to the meeting. The hearing was not officially opened, because no party indicated a desire to give comment.

The public comment period opened on September 2, 2011, and closed on October 3, 2011. Two comment letters were received from the City of El Paso. The City of El Paso suggested language to be added to the §111.147 rule amendments and non-substantive edits to the MOA.

Significant changes from proposal:

The City of El Paso recommended adding the terms “unpaved” and “residential” to proposed §111.147(1)(E) because some trash pick-up routes do occur in paved alleys. The TCEQ has made the suggested changes to §111.147(1)(E) and these changes are also reflected in the MOA.

Potential controversial concerns and legislative interest:

The separate rulemaking (Rule Project No. 2010-046-111-EN) includes a demonstration to comply with the EPA anti-backsliding provisions in §110(l) of the FCAA. The §110(l) demonstration includes the substitution of the alley paving and street sweeping measures as stated in §111.147(1)(E) and (2) with alternate control measures currently in place in the El Paso area that have resulted in PM₁₀ emissions reductions equivalent to, or greater than, what would have been achieved if the City had complied with the prior version of §111.147(1)(E) and (2). These control measures include reduced alley traffic, city ordinances requiring developers to pave any new alleys they create, and the use of RAP on

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existing alleys. The EPA did not submit comments on the proposed rulemaking or §110(l) demonstration.

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

No

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

The commission could decide not to adopt the proposed amendments to Chapter 111, and the revised MOA would not be needed. The City of El Paso would be obligated to comply with existing rules and MOA requirements limiting the City's fiscal and technical flexibility to control PM₁₀ in the El Paso area and comply with the SIP.

Agency contacts:

Shelley Naik, 239-1536, Air Quality Division
Terry Salem, 239-0469, Environmental Law Division
Joyce Spencer, 239-5017, Air Quality Division

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Shelley Naik
Joyce Spencer

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MEMORANDUM OF AGREEMENT

I. PARTIES

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

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

II. INTENT AND PURPOSE

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

The intent of the Parties by and through this MOA is to memorialize the agreement between the Parties to provide the City with alternative methods of particulate matter (PM) control consistent with attainment and maintenance of the National Ambient Air Quality Standard (NAAQS) for PM with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀).

III. DEFINITIONS

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

1. "EPA" shall mean the United States Environmental Protection Agency.
2. "TCEQ" shall mean the Texas Commission on Environmental Quality, and all predecessor agencies.
3. "the City" shall mean the City of El Paso, Texas local government.
4. "El Paso area" shall mean the City of El Paso PM₁₀ nonattainment area.
5. "SIP" shall refer to the State Implementation Plan.

IV. BACKGROUND

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

interfere with any applicable requirement concerning attainment and reasonable further progress or any other requirement of the FCAA, as required by §110(l) of the FCAA.

3. Under the 1990 FCAA Amendments, the El Paso area was designated nonattainment under FCAA § 107(d)(4)(B) for the PM₁₀ NAAQS and subsequently classified as a moderate PM₁₀ nonattainment area.
4. In November 1991, the Texas Air Control Board (TACB), a predecessor agency of the TCEQ, submitted an attainment demonstration SIP revision. The SIP revision included PM control measures in 30 Texas Administrative Code (TAC) Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter, Subchapter A, Division 4, Materials Handling, Construction, Roads, Streets, Alleys, and Parking Lots.
5. The control measures adopted in 30 TAC § 111.147 required paving as a method of dust control in the El Paso area for specified roads and added a requirement that alleys be paved at the rate of 15 miles per year. Section 111.147 also set frequencies for street sweeping for public thoroughfares in the El Paso area.
6. In 1991, a Memorandum of Understanding (MOU) between the City and the TACB was approved to outline the responsibilities and regulatory requirements for both Parties.
7. The 1991 MOU was replaced with a MOA with the City in 2001.
8. This MOA replaces the 2001 MOA with the City. This MOA is being revised to reflect changes to the control measures in 30 TAC §111.147.

V. UNDERSTANDING

1. The City agrees to maintain annual program funds in the City's capital improvement budget and in the City Department(s) operation budget(s) to comply with environmental regulations;
2. The Parties agree that the continued enforcement of no-burning periods may contribute to improvement in air quality in the El Paso area. The City will continue to enforce the regulations regarding burning contained in Chapter 9.38 of the El Paso City Code, and will continue to notify the local office of TCEQ of violations of Chapter 9.38 and 30 TAC § 111.111.
3. The TCEQ agrees to submit this agreement to the EPA as an appendix to the El Paso PM₁₀ SIP revision.

VI. TERM, RENEWAL, TERMINATION, AND MODIFICATION

This MOA will become effective upon signature by all Parties and shall remain in effect for ten years or until superseded. Following this ten year period, the MOA shall automatically be renewed for successive one-year renewal terms, without the necessity of formal action on the part of either Party, unless one of the Parties provides written

notice of non-renewal 90 days prior to the end of the renewal term, whereupon the MOA shall terminate at the end of the renewal term, as applicable. Representatives of the Parties will have by no later than the last day of March each year during the renewal term to consider whether any revisions or modifications to the MOA may be necessary or desirable. Any revision, modification, or amendment of the terms of the MOA must be made in writing by agreement of the Parties.

VII. MISCELLANEOUS

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

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

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

AGREED to by the undersigned Parties, this 29th day of November, 2011.

ATTEST

By: *Richarda Momsen*
Richarda Momsen
El Paso City Clerk
Date: 11/29/2011

CITY OF EL PASO, TEXAS
By: *Joyce Wilson*
Joyce Wilson
City Manager
Date: 11/29/2011

APPROVED AS TO FORM:

By: *Elizabeth M. Ruhmann*
Elizabeth M. Ruhmann
Assistant City Attorney
Date: 11-23-11

APPROVED AS TO CONTENT:

By: *Daryl W. Cole*
Daryl W. Cole
Director, Department of Transportation
Date: 11-21-11

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
By: *Mark R. Vickery*
Mark R. Vickery, P.G.
Executive Director
Date: 1-31-2012

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