

The Texas Natural Resource Conservation Commission (commission) proposes new §115.741, Emissions Specifications, and corresponding revision to the state implementation plan (SIP). This proposed new section in Chapter 115, new Subchapter H, Division 2, and corresponding revision to the SIP will be submitted to the United States Environmental Protection Agency (EPA).

The commission also is withdrawing, concurrently in this issue, the proposed new §115.741 which was published in the June 21, 2002, issue of the *Texas Register* (27 TexReg 5394).

The commission proposes this change to Chapter 115 and revision to the SIP as essential components of, and consistent with, the SIP that Texas is required to develop under the Federal Clean Air Act (FCAA) Amendments of 1990 as codified in 42 United States Code (USC), §7410, to demonstrate attainment of the national ambient air quality standard (NAAQS) for ozone. In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as Houston/Galveston (HGA).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission is withdrawing the proposed new §115.741, Emission Specifications, concurrently in this issue, which was published in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5394). A computational error was discovered which inaccurately reflected an emission rate of 0.6 pounds per hour for all highly-reactive volatile organic compounds (VOC) from each flare at an account. In order to correct this inaccuracy, the commission is proposing to establish an emission rate of 7.4 pounds per hour for all highly-reactive VOC from each flare at an account. Therefore, any references in other rules to §115.741 are intended to reference the 7.4 pounds-per-hour limit. For additional background information

on this proposal, please refer to the Proposed Rules section of the June 21, 2002 issue of the *Texas Register*.

As discussed in Chapter 7 of the HGA SIP, this revision is another phase in the process of continued analysis and review of the science. The data collected as a result of these revisions will further assist the commission as it develops its full reassessment of the attainment demonstration at the mid-course review.

By the adoption date, the commission intends to have better data and greater confidence in the exact emissions reductions requirements required to control highly-reactive VOC while maintaining the integrity of the SIP.

#### SECTION BY SECTION DISCUSSION

The proposed new §115.741 specifies that the total highly-reactive VOC emission rate for each flare at an account shall not exceed 7.4 pounds per hour. If this emission rate is exceeded and exemption is claimed under 30 TAC §101.222, concerning Demonstrations, the owner or operator must use the records that are required to be retained under 30 TAC §115.746, concerning Recordkeeping Requirements, in the calculation and justification of those excess emissions in order to demonstrate compliance with that section. Section 101.222 was proposed in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3475) and, if adopted, will replace the current 30 TAC §101.11, concerning Demonstrations.

The highly-reactive VOC emission rate of 7.4 pounds per hour represents the amount that each flare can emit into the HGA airshed and still demonstrate compliance with the one-hour ozone attainment standard. In such instances that this rate is exceeded, the owner or operator must use actual monitoring data to show

that the exceedance was not preventable based on the most current operating history. Use of actual site specific monitoring data in determining compliance with §101.222, will produce results that more accurately represent hourly activity of the flare. The commission expects that industry will use best management practices in order to ensure compliance with the emission specification within this division. In addition, the commission solicits comment on the concept of establishing an emission rate cap for all highly-reactive VOC emitted from all flares at an account or on the concept of establishing an emission rate cap for all highly-reactive VOC emitted from all flares, vents, and cooling tower heat exchange systems at an account.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Analyst with Strategic Planning and Appropriations, has determined that there will be no fiscal implications for any other unit of state or local government due to administration or enforcement of the proposed rule, because none of the sources which would be required to comply with the proposed Chapter 115 requirement are owned or operated by units of state and local government.

This proposed amendment to the commission's VOC rules is intended to improve implementation of the existing Chapter 115 by adding requirements to achieve reductions in emissions of highly-reactive VOCs in HGA.

#### PUBLIC BENEFITS AND COSTS

Mr. Davis determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed rule will be potentially

increased environmental protection due to reductions of public exposure to VOCs emitted from affected stationary sources, and reduction of ground-level ozone in ozone nonattainment areas.

The commission has attempted to identify all additional costs to industry due to implementation of the proposed rule. The proposed rule affects industrial VOC sources and is intended to reduce emissions of highly-reactive VOC from flares. Current inventory indicates that approximately 30% of the highly-reactive VOC come from flares. These types of VOC emissions occur at a wide variety of industrial sites, including petroleum refineries; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing processes; and miscellaneous chemical processing and handling operations in HGA. It is also possible that natural gas/gasoline processing operations include emissions of highly-reactive VOC, but the commission expects that any such emissions would be well below the exemption levels.

The commission estimates that approximately 337 privately-owned and operated flares in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties would be required to comply with the proposed rule. This proposal would require a temperature gauge, pressure gauge, continuous flow monitor, and an on-line gas analyzer (used for sampling purposes). The temperature and pressure gauges shall be used for detecting the exit velocity from the flare and the on-line analyzer shall be used to sample the gas stream at least once every 15 minutes for the purposes of detecting all highly-reactive VOC concentrations in the gas stream. Based on cost estimates from various vendors that sell temperature gauges, pressure gauges, continuous flow monitors, and on-line gas analyzers, the initial capital cost and any associated annual operating expenses for the first year shall be approximately \$90,000 for each flare in highly-reactive VOC service within the HGA area. For subsequent years and thereafter, the annual operating cost shall be approximately \$20,000 for each flare in highly-reactive VOC

service within the HGA area. The total annual costs to affected industrial sites with flares in VOC service where highly-reactive VOC are present in the gas stream is estimated to be \$30,330,000 for the first year and \$6,740,000 for each year thereafter.

In addition, the owner or operator of the flare shall comply with the proposed recordkeeping and reporting requirements to claim an exemption. The recordkeeping and reporting requirements were proposed in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5394). The cost to comply with the proposed recordkeeping and reporting requirements is estimated not to exceed \$500 a year. Included in the compliance cost is the purchase of filing space and administrative supplies, printing of records, and the initial training of persons responsible for maintaining the records. Although the commission has identified significant costs to industry to implement the proposed rule, concurrent rulemaking that proposes the revisions of nitrogen oxides (NO<sub>x</sub>) emission specifications for attainment demonstration in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5454) is estimated to save industry considerable capital and annual operating expenses.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The commission has been unable to identify any small or micro-businesses which would be affected by the proposed rule. The majority of sites affected by the proposed rule are large petrochemical and industrial businesses. If there are affected small or micro-businesses, the estimated capital and annualized cost in this fiscal note would appear to be a reasonable cost estimate for small or micro-businesses.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking meets 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed rule and revision to the SIP would improve implementation of the existing Chapter 115 by adding requirements to achieve reductions in emissions from flares of highly-reactive VOC in the HGA ozone nonattainment area. The proposed rule is intended to protect the environment and reduce risks to human health and safety from environmental exposure and may have adverse effects on owners and operators of flares. Many of these sources are owned or operated by petrochemical plants, refineries, and other industrial, commercial, or institutional groups, and each group could be considered a sector of the economy. This is based on the analysis provided elsewhere in this preamble, including the discussion in the PUBLIC BENEFITS AND COSTS section of this proposal, and in the proposal to amend Chapter 115 published in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5394).

The proposed rule does not meet any of the four applicability criteria of a “major environmental rule” as defined in the Texas Government Code. Section 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 rule implements requirements of the FCAA. Under 42 USC, §7410, states are required to adopt a SIP which 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 Chapter 85, Air Pollution Prevention and Control). It is true that the FCAA does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of the FCAA. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. 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. The intent of SB 633 was to require agencies to conduct an regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the 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 discussed earlier in this preamble, the FCAA 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 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 the full RIA 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 RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as HGA. The proposed rule, which will reduce ambient highly-reactive VOC and ozone in HGA, will be submitted to the EPA as one of several measures in the federally approved SIP. As discussed earlier in this preamble, controls on upsets and routine industrial VOC emissions are necessary to address some of the elevated ozone levels observed in HGA; these controls will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. As discussed in Chapter 7 of the HGA SIP, this revision is another phase in the process of continued analysis and review of the science, and the data collected as a result of these revisions will further assist the commission as it develops its full reassessment of the attainment demonstration at the mid-course review. Therefore, the proposed rule is a necessary component of and consistent with the ozone attainment demonstration SIP for HGA, 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. 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); *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 implements requirements of the FCAA. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Therefore, the proposed rule 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 adopted solely under the general powers of the agency. In addition, the rule is proposed under the Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.014, 382.016, 382.017, 382.021, 382.034 and 382.051(d). The commission invites public comment on the draft RIA.

#### TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed rule under Texas Government Code, §2007.043. The specific purposes of this proposed rule are to achieve reductions in highly-reactive

VOC emissions and ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. If adopted, certain sources located in HGA will be required to install equipment to monitor emissions and achieve reductions in emissions of highly-reactive VOC in the HGA ozone nonattainment area, and implement new reporting and recordkeeping requirements. Installation of the necessary equipment could conceivably place a burden on private, real property.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to the proposed rule, because it is reasonably taken to fulfill an obligation mandated by federal law. The emission limitations and control requirements within this rulemaking were developed in order to meet the NAAQS for ozone 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 ozone standard will eventually require reductions of highly-reactive VOC emissions, as well as substantial reductions in NO<sub>x</sub> emissions. Any VOC reductions resulting from the current rulemaking are no greater than what scientific research indicates is necessary to achieve the desired ozone levels. However, this rulemaking is only one step among many necessary for attaining the ozone standard.

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 proposed rule does not directly prevent a nuisance or prevent an immediate threat to life or property, it does 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 HGA area exceeding the federal ambient air quality standard for ground-level ozone, which 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 HGA nonattainment area. Consequently, the proposed rule meets the exemption in §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 rule does not constitute a takings under Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and therefore will require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission prepared a preliminary consistency determination for the proposed rule under 31 TAC §505.22 and found that the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a

result of the proposed rule. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122; therefore, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the new requirements in §115.741 for each emission unit affected at their sites.

#### ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking have been scheduled for the following times and locations: July 18, 2002, 2:00 p.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin; July 22, 2002, 10:00 a.m., City of Houston, City Council Chambers, 2nd Floor, 901 Bagby, Houston; July 22, 2002, 7:00 p.m., Flukinger Community Center, 16003 Lorenzo, Channelview; as well as August 6, 2002, 10:00 a.m., City of Houston, City Council Chambers, 2nd Floor, 901 Bagby; Houston. 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 four-minute time limit may be established at the hearings 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 the hearings and will answer questions before and after the hearings.

Persons planning to attend the hearings who have special communication or other accommodation needs, 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

Written comments may be submitted to Kelly Keel, MC 206, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to [siprules@tceq.state.tx.us](mailto:siprules@tceq.state.tx.us). All comments should reference Rule Log Number 2002-046-115-AI. Comments must be received by 5:00 p.m., August 6, 2002. For further information, please contact Brad Oehler of the Strategic Assessment Division at (512) 239-0599 or Eddie Mack, also of the Strategic Assessment Division, at (512) 239-1488.

**SUBCHAPTER H: HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUNDS**

**DIVISION 2: FLARES**

**§115.741**

STATUTORY AUTHORITY

This new section is proposed under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, TCAA, §382.017, concerning Rules, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The new section is proposed under TCAA, §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; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; §382.034, concerning Research and Investigations, which authorizes the commission to require any research it considers advisable and necessary to perform its duties; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Chapter 382; and FCAA, 42 USC, §§7401 *et seq.*

The proposed new section implements TCAA, §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.016, concerning Monitoring Requirements;

Examination of Records; §382.017, relating to Rules; and §382.051(d), concerning Permitting Authority of Commission; Rules; and TWC, §5.103, relating to Rules.

**§115.741. Emission Specifications.**

The total highly-reactive volatile organic compound emission rate for each flare at an account shall not exceed 7.4 pounds per hour. If this emission rate is exceeded and exemption is claimed under §101.222 of this title (relating to Demonstrations), the owner or operator must use the records that are required to be retained under §115.746 of this title (relating to Recordkeeping Requirements) in the calculation and justification of those excess emissions in order to demonstrate compliance with §101.222 of this title.