

The Texas Commission on Environmental Quality (commission) proposes the repeal of §114.452 and §114.459; and corresponding revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEALS

The Houston/Galveston (HGA) ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act Amendments of 1990 (as codified in 42 United States Code (USC), §§7401 *et seq.*), and therefore, is required to attain the one-hour ozone standard of 0.12 parts per million (125 parts per billion) by November 15, 2007. The HGA area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and has been working to develop a demonstration of attainment in accordance with 42 USC, §7410 *et seq.*. The most relevant HGA SIP revisions to date are the December 2000 one-hour ozone standard attainment demonstration, the September 2001 follow-up revision, and the December 2002 nitrogen oxides (NO_x)/highly-reactive volatile organic compound (HRVOC) revision.

This process has proven to be extremely challenging due to the magnitude of reductions needed for attainment. The emission reduction requirements included as part of the December 2000 SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area, in partnership with the commission, to address ozone. These coalitions, which include local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the United States Environmental Protection Agency (EPA) and the commission, worked diligently to identify and quantify control strategy measures for the HGA attainment demonstration area.

December 2000

The December 2000 SIP revision contained rules and photochemical modeling analyses in support of the HGA ozone attainment demonstration area. The majority of the emissions reductions identified in this revision were from a 90% reduction in point source NO_x. The modeling analysis also indicated a shortfall in necessary NO_x emission reductions, such that an additional 91 tons per day (tpd) of NO_x reductions were necessary for an approvable attainment demonstration. In addition, the revision contained post-1999 rate-of-progress (ROP) plans for the milestone years 2002 and 2005 and for the attainment year 2007, and transportation conformity motor vehicle emissions budgets (MVEB) for NO_x and volatile organic compound (VOC) emissions. The SIP also contained enforceable commitments to implement further measures in support of the HGA attainment demonstration area, as well as a commitment to perform and submit a midcourse review.

September 2001

The September 2001 SIP revision for the HGA ozone nonattainment area included the following elements: 1) corrections to the ROP table/budget for the years 2002, 2005, and 2007 due to a mathematical inconsistency; 2) incorporation of a change to the idling restriction control strategy to clarify that the operator of a rented or leased vehicle is responsible for compliance with the requirements in situations where the operator of a leased or rented vehicle is not employed by the owner of the vehicle (The commission committed to making this change when the rule was adopted in December 2000.); 3) incorporation of revisions to the clean diesel fuel rules to provide greater flexibility for compliance with the requirements of the rule while preserving the emission reductions necessary to demonstrate attainment in the HGA area; 4) incorporation of a stationary diesel engine rule

that was developed as a result of the state's analysis of EPA's reasonably available control measures; 5) incorporation of revisions to the point source NO_x rules; 6) incorporation of revisions to the emissions cap and trade rules; 7) the removal of the construction equipment operating restriction and the accelerated purchase requirement for Tier 2/3 heavy-duty equipment; 8) the replacement of these rules with the Texas Emission Reduction Plan (TERP) program; 9) the layout of the midcourse review process that details how the state will fulfill the commitment to obtain the additional emission reductions necessary to demonstrate attainment of the one-hour ozone standard in the HGA area; and 10) replacement of 2007 ROP MVEBs to be consistent with the attainment MVEBs.

As was discussed in the December 2000 revision, the modeling resulted in a 141 parts per billion peak ozone level which correlated to a shortfall calculation of 91 tpd NO_x equivalent. An additional five tpd was added to the shortfall, because the state could not take credit for the NO_x reductions associated with the diesel pull-ahead strategy. The excess emissions from this strategy were not included in the original emissions inventory. The gap control measures adopted in December 2000, along with the stationary diesel engine rules included in the September 2001 revision, resulted in NO_x reductions of 40 tpd, which left a total remaining shortfall of 56 tpd. The state committed to address this shortfall through the midcourse review process.

December 2002

In January 2001, the Business Coalition for Clean Air - Appeal Group (BCCA-AG) and several regulated companies challenged the December 2000 HGA SIP and some of the associated rules. Specifically, the BCCA-AG challenged the 90% NO_x reduction requirement from stationary sources in

the HGA area. In May 2001, the parties agreed to a stay in the case, and Judge Margaret Cooper, Travis County District Court, signed a consent order, effective June 8, 2001, requiring the commission to perform an independent, thorough analysis of the causes of rapid ozone formation events and identify potential mitigating measures not yet identified in the HGA attainment demonstration area, according to the milestones and procedures in Exhibit C (Scientific Evaluation) of the order.

In compliance with the consent order, the commission conducted a scientific evaluation based in large part on aircraft data collected by the Texas 2000 Air Quality Study (TexAQS). The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40 research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGA area and East Texas regions. The study revealed that while industrial source NO_x emissions were generally correctly accounted for, industrial source VOC emissions were likely significantly understated in earlier emissions inventories. The study also showed that surface monitors were insufficient to capture the phenomenon of ozone plumes downwind of industrial facilities. On four separate days, aircraft instruments recorded ozone levels exceeding 125 parts per billion that were missed by surface monitoring equipment. The findings from the study are constantly evolving and have raised questions about the formation of high ozone levels in the HGA area.

To address these findings and to fulfill obligations in the consent order, the commission adopted a SIP revision in December 2002 that focused on replacing the most stringent 10% industrial NO_x reductions with VOC controls. In light of the TexAQS study, the commission conducted further modeling analysis of ambient VOC data. The results of photochemical grid modeling and analysis indicated that the same

level of air quality benefits achieved with a 90% industrial NO_x emissions reduction could be achieved with an overall 80% industrial NO_x emissions reduction when combined with an industrial VOC emissions reduction. This conclusion was based on results from several studies, including photochemical grid modeling of the August - September 2000 episode using a top-down emissions inventory adjustment to point source HRVOC emissions, and analyses of ambient HRVOC measurements made by commission automated gas chromatographs and airborne canisters using the maximum incremental reactivity and hydroxyl reactivity scales. Four HRVOCs (ethylene, propylene, 1,3-butadiene, and butenes) clearly play important roles in the HGA ozone formation area, and these four seemed to be the best candidates for the first round of HRVOC controls.

In order to address these scientific findings, the commission adopted revisions to the industrial source control requirements, one of the control strategies within the existing federally approved SIP. The December 2002 revision contains new rules to reduce HRVOC emissions from four key industrial sources: fugitives, flares, process vents, and cooling towers. The adopted rules target HRVOCs while maintaining the integrity of the SIP. Analysis showed that limiting emissions of ethylene, propylene, 1,3-butadiene, and butenes in conjunction with an 80% reduction in NO_x is equivalent in terms of air quality benefit to that resulting from a 90% point source NO_x reduction requirement. As such, the HRVOC rules are performance-based, emphasizing monitoring, recordkeeping, reporting, and enforcement, rather than establishing individual unit emission rates.

The technical support documentation accompanying the revision contains the supporting analysis for early results from ongoing analysis examining whether reductions in HRVOC emissions could replace

the last 10% of industrial NO_x controls with a reduction of approximately 64% in industrial HRVOC emissions, while ensuring that the air quality specified in the approved December 2000 HGA SIP is met.

Current SIP Revision

As mentioned previously, the commission committed to perform a midcourse review to ensure attainment of the one-hour ozone standard. The midcourse review process provides the ability to update emissions inventory data, utilize current modeling tools, such as MOBILE6, and enhance the photochemical grid modeling. The data gathered from the TexAQS continues to improve photochemical modeling of the HGA area. The collection of these technical improvements give a more comprehensive understanding of the ozone challenge in the HGA area that is necessary to develop an attainment plan. In the early part of 2003, the commission was preparing to move forward with the midcourse review; however, during the same time period EPA announced its plans to begin implementation of the eight-hour ozone standard. The EPA published proposed rules for implementation of the eight-hour ozone standard in the June 2, 2003 issue of the *Federal Register* (68 FR 32802). In the same time frame, EPA also formalized its intentions to designate areas for the eight-hour ozone standard by April 15, 2004, meaning states would need to reassess their efforts and control strategies to address this new standard by 2007. Recognizing that existing one-hour nonattainment areas would soon be subject to the eight-hour ozone standard, and in an effort to efficiently manage the state's limited resources, the commission decided to develop an approach that addresses the outstanding obligations under the one-hour ozone standard while beginning to analyze eight-hour ozone issues.

The commission's one-hour ozone SIP commitments include: 1) completing a one-hour ozone midcourse review; 2) performing modeling; 3) adopting measures sufficient to fill the NO_x shortfall; 4) adopting measures sufficient to demonstrate attainment; and 5) revising the MVEB using MOBILE6.

Results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure in reducing ozone in the HGA area. The commission is proposing to reduce HRVOC emissions to reach attainment of the one-hour ozone standard. The photochemical modeling of the August - September 2000 episode coupled with a weight-of-evidence argument demonstrates attainment of the one-hour ozone standard. To achieve the necessary HRVOC reductions, the commission is proposing a two-pronged approach that would address short-term emission events through a not-to-exceed limit, and would address steady state and routine emissions through an annual cap. The annual HRVOC cap would be reduced from the existing HRVOC cap in order to support the attainment demonstration modeling.

The HGA SIP no longer relies as heavily on NO_x based strategies. A combination of point source HRVOC controls and NO_x reductions appear to be the most effective means of reducing ozone in the HGA area, and there is no longer a NO_x shortfall in the HGA SIP. The commission also evaluated a number of the existing control strategies that were put in place in the December 2000 revision. The photochemical modeling shows that some of these strategies are no longer necessary to attain the one-hour ozone standard. This SIP revision is proposing the repeal of the commercial lawn and garden equipment operating restrictions, the repeal of the heavy-duty vehicle idling restrictions, and the removal of the motor vehicle inspection and maintenance (I/M) program requirements from Chambers,

Liberty, and Waller Counties. In addition, this SIP proposal includes revisions to the environmental speed limit strategy. In September 2002, the commission revised the existing speed limit strategy to suspend the 55 mile per hour (mph) speed limit until May 1, 2005, and, where posted speeds were 65 mph or higher before May 1, 2002, to increase speeds to five mph below what was posted. The 78th Legislature, 2003, removed the commission's authority to determine speed limits for environmental purposes; therefore, this proposal would remove the reinstatement of the 55 mph speed limit on May 1, 2005, and would maintain the currently posted speed limits at five mph below the posted limit before May 1, 2002. Also, as part of this SIP revision, the commission is proposing new statewide portable fuel container rules. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies, and these proposed changes embody that philosophy.

Through this revision, the commission is fulfilling its outstanding one-hour ozone SIP obligations and beginning to plan for the upcoming eight-hour ozone standard. This proposal demonstrates attainment of the one-hour ozone standard in HGA in 2007 and provides a preliminary analysis of the HGA area in terms of the eight-hour ozone standard in 2007 and 2010. EPA's proposed eight-hour implementation rules provide flexibility to the states in transitioning from the one-hour to the eight-hour ozone standard, and the commission believes the steps taken in this proposal and the technical work performed to date will be invaluable through the transition period. Upon EPA's finalization of the eight-hour implementation and the transportation conformity rules, the commission expects to begin developing eight-hour ozone SIPs.

Sections 114.452 and 114.459 were originally adopted on December 6, 2000, as part of the SIP control strategy for the HGA ozone nonattainment area to achieve attainment with the national ambient air quality standard (NAAQS) for ozone. The purpose of the rules was to establish a restriction on the use of commercial lawn and garden equipment (non-road, spark-ignition equipment rated at 25 horsepower (hp) and less) as an air pollution control strategy to delay the emissions of nitrogen oxides (NO_x), a key ozone precursor, until later in the day, thus limiting ozone formation. By delaying the hours of operation during the effective time period, the NO_x emissions will not mix in the atmosphere with other ozone-causing compounds until later in the day. The critical time for the mixing (chemical reactions) of NO_x and volatile organic compounds (VOC) is early in the day, thus higher ozone levels occur most frequently on hot summer afternoons. By delaying the operation of the affected equipment, the NO_x emissions are less likely to mix in the atmosphere with other ozone-forming compounds until after the critical mixing time has passed. Therefore, production of ozone will be stalled until later in the day when optimum ozone formation conditions no longer exist, ultimately minimizing the peak level of ozone produced.

Historically, the commission expressed a preference to implement technology-based strategies over behavior-altering strategies such as the lawn and garden equipment operating restrictions. The commission delayed the implementation of these rules until 2005 in order to research other methods of achieving the same amount of NO_x and VOC reductions. The commission reevaluated a number of the existing control strategies, including lawn and garden equipment operating restrictions, that were put in place in the December 2000 revision. Results from the Texas 2000 AQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure in reducing

ozone in the HGA area and that this strategy is no longer necessary to attain the one-hour ozone standard. Therefore, the commission is proposing the repeal of Chapter 114, Subchapter I, Division 6.

SECTION BY SECTION DISCUSSION

Sections 114.452 and 114.459 are proposed to be repealed because the commission determined that this strategy is no longer necessary to attain the one-hour ozone standard.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Analyst, Strategic Planning and Appropriations Section, determined that for the first five-year period the proposed repeals are in effect, no fiscal implications are expected for the agency or other units of state and local government as a result of administration or enforcement of the proposed repeals.

This proposed rulemaking would repeal the commission rules in Subchapter I, Non-Road Engines; Division 6, Lawn Service Equipment Operating Restrictions, and make corresponding changes to the SIP. The lawn service equipment operating restriction rules were intended to establish a restriction on the use of commercial lawn and garden equipment as an air pollution control strategy. However, implementation of the rules was delayed until 2005 in order to research alternative pollution reduction methods. Implementation of the proposed repeals is not expected to result in any fiscal implications for units of state and local government because the original rules were never implemented.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from the enforcement of and compliance with the proposed repeals would be the elimination of a pollution control strategy that the agency determined is no longer necessary to attain the one-hour ozone standard.

The proposed repeals are not expected to result in any fiscal implications for individuals or businesses because the original rules were never implemented.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated as a result of implementation of the proposed repeals for small or micro-businesses. The proposed repeals are not expected to result in any fiscal implications for small or micro-businesses because the original rules were never implemented.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does not meet the definition of a “major environmental rule” as defined in that statute. A “major environmental rule” is a rule the specific intent of which is to protect the environment or reduce risks to

human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed amendments to Chapter 114 and revisions to the SIP would repeal operating restrictions on commercial lawn and garden equipment operators. The amendments are not expected to 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 amendments do 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 amendments implement requirements of 42 USC. Under 42 USC, §7410, *et seq.*, 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, *et seq.*, 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 42 USC does require some specific measures for SIP purposes, such as the I/M program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC 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 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410, *et seq.*. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410, *et seq.*, 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 were amended by Senate Bill 633 during the 75th legislative session. The intent of Senate Bill 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 Senate Bill 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, 42 USC 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 the full RIA contemplated by Senate Bill 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. Because 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 Senate Bill 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 42 USC. 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 §7511(a)(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as HGA area. The proposed repeal will remove operating restrictions on commercial lawn and garden equipment operators in the Houston nonattainment area. Historically, the commission expressed

a preference to implement technology-based strategies over behavior-altering strategies and the proposed repeal embodies that philosophy. The commission also evaluated a number of the existing control strategies, including lawn and garden equipment operating restrictions, that were put in place in the December 2000 revision. The photochemical modeling shows that this strategy is no longer necessary to attain the one-hour ozone standard and therefore, the commission is proposing repeal of Chapter 114, Control of Air Pollution from Motor Vehicles, Subchapter I, Non-road Engines, Division 6, Lawn Service Equipment Operating Restrictions Lawn Service Equipment. Therefore, the proposed repeal is consistent with the ozone attainment demonstration SIP for HGA area, required by 42 USC, §7410, *et seq.*

The commission consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App.–Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App.–Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884 (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).

As discussed earlier in this preamble, this rulemaking implements requirements of 42 USC. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking.

Therefore, the proposed rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor are adopted solely under the general powers of the agency. In addition, the rules are proposed under Texas Health and Safety Code (also known as the Texas Clean Air Act), §§382.011, 382.012, 382.017, 382.019, and 382.208.

The commission invites public comment on the draft RIA.

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 these amendments are to repeal operating restrictions on commercial lawn and garden equipment operators.

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.

States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, *et seq.*, 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. The commercial lawn and garden operating restriction was submitted in the HGA December 2000 SIP revision as a control strategy to reduce Nox in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. The commission expressed a preference for technology-based strategies over behavior-altering strategies. The commission proposes the repeal of commercial lawn and garden operating restrictions because photochemical

modeling shows that this strategy is no longer necessary to attain the one-hour ozone standard and combination of point source HRVOC controls and NO_x reductions appear to be the most effective means of reducing ozone in the HGA area. Therefore, the overall goal of this rulemaking action is to meet the air quality standards established under federal law as NAAQS.

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 rule amendments 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 HGA area exceeding the federal ozone NAAQS, which adversely affects public health, primarily through irritation of the lungs. The commercial lawn and garden operating restriction was submitted as a control strategy in the HGA December 2000 revision.

Historically, the commission expressed a preference to implement technology-based strategies over behavior-altering strategies such as the lawn/garden operating restrictions and the proposed repeal embodies that philosophy. The commission reexamined this strategy and photochemical modeling shows that this strategy is no longer necessary to attain the one-hour ozone standard and therefore, the commission is proposing the repeal of Chapter 114, Control of Air Pollution from Motor Vehicles, Subchapter I, Non-road Engines, Division 6, Lawn Service Equipment Operating Restrictions Lawn Service Equipment. The action does not specifically advance the health and safety purpose by reducing ozone levels in the HGA nonattainment area. However, the repeal of this control strategy is part of a larger scheme to reduce ozone in the HGA area through the most effective means and strategies

determined by the commission. Consequently, these proposed rules meet 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 rules do not constitute a takings under Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking action and found that the proposal is an action 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 consistency determination for the proposed rules under 31 TAC §505.22 and found that the proposed rulemaking action 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)). The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations. 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 rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking have been scheduled for the following times: August 2, 2004, 1:30 p.m. and 5:30 p.m., City of Houston, City Council Chambers, 2nd Floor, 901 Bagby, Houston; and August 3, 2004, 10:30 a.m., John Gray Institute, 855 Florida Avenue, Beaumont; and August 5, 2004, 9:30 a.m., Texas Commission on Environmental Quality, 12100 North I-35, Building F, Room 2210, Austin. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each hearing. Individuals may present oral statements when called upon in order of registration. A 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 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 a hearing, 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 Patricia Durón, 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 siprules@tceq.state.tx.us. Comments must be received by 5:00 p.m., August 9, 2004, and should reference Rule Project Number 2004-034-114-AI. For further information, please contact Kelly Keel of the Environmental Planning and

Implementation Division at (512) 239-3607 or Debra Barber, Policy and Regulations Division at (512) 239-0412.

SUBCHAPTER I: NON-ROAD ENGINES

DIVISION 2: LAWN SERVICE EQUIPMENT OPERATING RESTRICTIONS

§114.452, §114.459

STATUTORY AUTHORITY

The repeals are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These repeals are also proposed under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and 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; and §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles.

The proposed repeals implement Texas Health and Safety Code, §§382.017, 382.011, 382.012, and 382.019.

[114.452. Control Requirements.]

[(a) No handheld or non-handheld, lawn and garden service equipment powered by spark-ignition engines of 25 horsepower (hp) and below shall be started or operated between the hours of 6:00 a.m. and noon, during the time period from April 1 to October 31, in the counties listed in §114.459 of this title (relating to Affected Counties and Compliance Dates), except as specified in subsections (b) and (c) of this section.]

[(b) The following uses of lawn and garden service equipment powered by spark-ignition engines of 25 hp and below are exempt from the requirements of this division:]

[(1) any use at a domestic residence by the owner of, or a resident at, that domestic residence;]

[(2) any use by a non-commercial operator; or]

[(3) any use that is exclusively for emergency operations to protect human health and safety or the environment, including equipment being used in the repair of facilities, devices, systems, or infrastructure that have failed, or are in danger of failing, in order to prevent immediate harm to public health, safety, or the environment.]

[(c) Commercial operators or persons not exempt under subsection (b) of this section who submit an emissions reduction plan by May 31, 2004, (which is approved by the executive director and

the EPA no later than March 31, 2005) are exempt from operating hour restrictions upon implementation of these rules in 2005, and are permitted to operate during the restricted hours. In any event, a plan must be approved prior to the use of that plan for compliance with the requirements of this division. In order to be approved, the plan must demonstrate nitrogen oxide and volatile organic compound reductions equivalent to those required by the rules being requested for exemption, and must contain adequate enforcement provisions.]

[(d) Commercial operator is defined as any person who receives payment or compensation in exchange for operating lawn and garden service equipment powered by spark-ignition engines of 25 hp or below where the payment or compensation is required to be reported as income by the United States Internal Revenue Code. This term also includes any employees or contractors of any person as defined in the Texas Health and Safety Code, §382.003(10).]

[§114.459. Affected Counties and Compliance Dates.]

[Effective April 1, 2005, persons in the following counties shall be in compliance with §114.452 of this title (relating to Control Requirements). These include Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties in the Houston/Galveston ozone nonattainment area.]