

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §114.512 and §114.517 *without change* to the proposed text as published in the February 11, 2011, issue of the *Texas Register* (36 TexReg 707). The text will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

Chapter 114, Subchapter J, Division 2, Locally Enforced Motor Vehicle Idling Limitations, was adopted on November 17, 2004, at the request of the local air quality planning organization in the Austin Early Action Compact (EAC) area (Bastrop, Caldwell, Hays, Travis, and Williamson Counties) for use as a control strategy in its EAC agreement to maintain attainment with the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS), as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11347). The adopted idling limitations rules provided all local governments the option of applying the rules when additional control measures are needed to achieve or maintain attainment of the federal 1997 eight-hour ozone standards.

The concept of an early, voluntary 1997 eight-hour air quality plan, also known as an

EAC, was endorsed by the EPA Region 6 in June 2002. It was slightly modified and made available nationally in November 2002. A key point of an EAC was the flexibility afforded areas to select emission reduction measures, such as limiting vehicle idling. On August 1, 2005, members of the Austin EAC and the commission signed the locally enforced idling restrictions memorandum of agreement (MOA). This MOA allowed participating counties and cities to enforce the idling restriction rule in their jurisdictions. Members of the Austin EAC area signing the MOA included the counties of Bastrop, Caldwell, Hays, Travis, and Williamson, and the cities of Austin, Bastrop, Georgetown, Hutto, Lockhart, Luling, Round Rock, and San Marcos. Idling restrictions are also a commitment for the Austin-Round Rock 1997 Eight-Hour Ozone Flex Plan signed in September 2008.

An additional three counties, twenty cities, and two towns in the Dallas-Fort Worth (DFW) area have also signed agreements to enforce the idling restriction rule in their jurisdictions including the counties of Collin, Kaufman, and Tarrant; the cities of Arlington, Benbrook, Cedar Hill, Celina, Colleyville, Dallas, Eules, Hurst, Keene, Lake Worth, Lancaster, Mabank, McKinney, Mesquite, North Richland Hills, Pecan Hill, Richardson, Rowlett, University Park, and Venus; and the towns of Little Elm and Westlake. Idling restrictions are a commitment for the DFW 1997 Eight-Hour Ozone Attainment Demonstration SIP revision adopted May 23, 2007, as a Voluntary Mobile Emissions Reductions Program (VMEP).

This adopted rulemaking amends the rule on idling limits for gasoline and diesel-powered engines in motor vehicles within the jurisdiction of any local government in the state that has signed an MOA with the commission to delegate enforcement to that local government. Local enforcement is crucial to the effective implementation of rules to reduce the extended idling of gasoline and diesel-powered heavy-duty vehicles and will help to ensure the reduction of nitrogen oxides (NO_x) and volatile organic compounds (VOC), which is needed by local governments to achieve or maintain attainment of the NAAQS for ozone. These adopted idling restrictions will continue to lower NO_x emissions and other pollutants from fuel combustion. Because NO_x is a precursor to ground-level ozone formation, reduced emissions of NO_x will result in ground-level ozone reductions.

The adopted rulemaking amends the current enforcement period of April 1 through October 31 to allow local governments to enforce idling limits year-round. The enforcement dates were included when the rule was originally adopted at the request of the local air quality planning organization in the Austin EAC area for use as a control strategy in its EAC agreement to maintain attainment with the 1997 eight-hour ozone NAAQS. This rulemaking also provided local governments in other areas of the state the option of applying these rules in their areas when additional control measures are needed to achieve or maintain attainment of the NAAQS for ozone in the future. When

the rule was adopted in 2004, there were no federal regulations governing idle time for heavy-duty motor vehicles. Therefore, the state had the authority to control motor vehicle idling. The requirements developed by the commission for this NO_x emissions reduction strategy resulted in restrictions on the time allowed for heavy-duty motor vehicle idling. The 79th Legislature, 2005, enacted House Bill (HB) 1540, establishing Texas Health and Safety Code (THSC), §382.0191, Idling of Motor Vehicle While Using Sleeper Berth, which prohibited the commission from restricting the idling of a motor vehicle while a driver is using the vehicle's sleeper berth for a government-mandated rest period. HB 1540 also restricted drivers using the vehicle's sleeper berth from idling in a school zone or within 1,000 feet of a public school during its hours of operation, and it defined the penalty for an offense as a fine not to exceed \$500. HB 1540 did not specify an enforcement period, but it set a September 1, 2007, expiration date on the section. The commission adopted the revision on April 26, 2006, to the locally enforced motor vehicle idling rule as published in the May 12, 2006, issue of the *Texas Register* (31 TexReg 3900).

In the same rulemaking, the commission adopted revisions to the idling rule to conform to legislation passed in 2005. To be consistent with HB 1540, §114.512 and §114.517 were amended to include §114.512(b) and §114.517(12) with a September 1, 2007, expiration date. In May 2007, the 80th Legislature, 2007, enacted Senate Bill (SB) 12, which in part amended THSC, §382.0191 to extend the prohibition on the commission

from adopting rules restricting certain idling activities from September 1, 2007, to September 1, 2009, as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1345). Local governments can enforce idling restrictions on drivers who were previously exempt under §114.517(12), because the exemption expired on September 1, 2009. This adopted rulemaking removes the September 1, 2009, expiration date from the relevant portions of §114.517 to continue the exemption. As of September 1, 2009, the prohibition in §114.512(b) of certain vehicles from idling within 1,000 feet of a school or hospital expired. Therefore, this subsection is deleted in the adopted rulemaking.

During the rulemaking in 2007, to implement the requirements of SB 12, the commission adopted §114.517(2), the intent of which was to provide an exemption for all vehicles with gross vehicle weight rating of 14,000 pounds or less until September 1, 2009, and thereafter only to such vehicles that do not have a sleeper berth. This adopted rulemaking amends §114.517(2) to remove the duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, after September 1, 2009.

The National Armored Car Association submitted a petition for rulemaking on May 22, 2008, requesting that armored vehicles be added to the current list of idling restriction exemptions under §114.517. Staff received approval from the commission on July 9,

2008, to move forward with initiating rulemaking regarding the armored vehicle petition; however, following a stakeholder meeting held on October 6, 2008, action on a rulemaking proposal to implement the petition was deferred in anticipation of potential legislative changes from the 81st Legislature, 2009. This adopted rulemaking addresses the armored vehicle petition by adding armored vehicles to the current list of idling restriction exemptions under §114.517 to be consistent with the EPA's Model State Idling Law guidance. According to the EPA's guidance, armored vehicles are exempt when a person remains inside the vehicle to guard the contents or while the vehicle is being loaded or unloaded.

On April 9, 2010, the EPA published its approval of revisions to the SIP regarding the idling rule that the TCEQ submitted on February 28, 2008 (75 FR 18061). In that approval, the EPA did not address the previous revisions to §114.512(b) prohibiting idling of a vehicle within a school zone or within 1,000 feet of a public school during operating hours and §114.517(12) exempting the idling of the primary propulsion engine of a vehicle to provide air conditioning and heating for the vehicle's sleeper berth for a government-mandated rest period, because these provisions of the rule had already expired.

Federal Clean Air Act, §110(l) Demonstration

Some increases in emissions may be expected due to the addition of an idling exemption

for armored vehicles. However, the exemption will not interfere with attainment or reasonable further progress in the SIP, because the adopted year-round enforcement will offset these relatively small increases. Extending the enforcement period to year-round enforcement should provide more emissions reductions in the months that are currently not subject to enforcement. Thus, any potential increases resulting from an exemption for armored vehicles should be offset by these reductions. Additionally, by authorizing the enforcement to year-round, the state hopes to increase enforcement in the current ozone period by eliminating any drop off in enforcement that may occur due to the seasonal nature of the ozone enforcement period. An exemption for armored vehicles is necessary for the health and safety of the employees and the public.

Adding the armored car exemption and retaining the sleeper berth exemption will not interfere with attainment or reasonable further progress in the SIP, because the DFW area achieved an excess of NO_x and VOC emission reductions through the VMEP commitments. The excess emissions reductions achieved was greater than the 0.12 tons per day (tpd) NO_x and 0.004 tpd VOC emission reduction shortfall estimated in the North Central Texas Council of Governments (NCTCOG) VMEP accounting for the Locally Enforced Idling Restrictions. Furthermore, the 0.86 tpd NO_x and 3.66 tpd VOC excess emission reductions achieved for the overall VMEP, as estimated in the NCTCOG's VMEP accounting, were greater than the emission reduction commitments for the Locally Enforced Idling Restrictions component of the VMEP.

Likewise, the amendments removing the expired prohibitions against drivers using sleeper berths idling near residential areas, school zones, and near hospitals will not result in backsliding. The prohibitions that have expired were never adopted into the SIP. Therefore, removal of these expired provisions cannot result in backsliding. Additionally, as mentioned previously, even if the provisions were part of the SIP, there are excess emissions achieved under the VMEP program that have exceeded the emission reduction commitments.

Section by Section Discussion

§114.512, Control Requirements for Motor Vehicle Idling

The adoption amends §114.512 to remove the enforcement period of April 1 through October 31 of each calendar year in subsection (a) to allow enforcement year-round. The adoption will also remove the prohibition for drivers using sleeper berths to idle in residential areas, school zones, and near hospitals and the expiration date in subsection (b) because it has expired. Additionally, the revisions remove the designation (a) for subsection (a) to conform to the *Texas Register* formatting requirements.

§114.517, Exemptions

The adoption amends §114.517 to remove the exemption in paragraph (2) for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, for consistency

with other revisions in the section and to add a new exemption in paragraph (2) for armored vehicles to implement the petition approved by the commission on July 9, 2008. The adoption will also retain the exemption in paragraph (12), which expired on September 1, 2009, regarding idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or air conditioning.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the adopted rulemaking does not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that 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, 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." Furthermore, while the adopted rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis is not required, because the adopted rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule which, "(1) exceeds a standard set by federal law, unless the rule is

specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law."

The adopted rulemaking implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally 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, otherwise known as 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. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. Participation in the idling program is voluntary, and currently only the local governments in the Central Texas Area and the North Central Texas Area have signed agreements to implement vehicle idling rules. The affected idling limitations rules provide all local governments the option of applying the rules when additional control measures are needed to achieve or maintain attainment of the federal ozone standards.

The specific intent of the adopted rulemaking is to make the idling enforcement period year-round; to remove the existing duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less; to exempt armored vehicles from motor vehicle idling requirements; and to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or air conditioning, which expired on September 1, 2009.

The adopted rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because the specific intent of the adopted rulemaking is to protect the environment or reduce risks to human health from

environmental exposure, as discussed previously in the FISCAL NOTE, PUBLIC BENEFITS AND COSTS, SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS, and the LOCAL EMPLOYMENT IMPACT STATEMENT sections of the proposal preamble as published in the February 11, 2011, issue of the *Texas Register* (36 TexReg 707). The adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor will the adopted rulemaking adversely affect in a material way the environment or the public health and safety of the state or a sector of the state. The idling restrictions are applicable throughout the state, but are effective only in certain areas of the state where an MOA between the TCEQ and a local government is in effect and only in certain defined areas within those limited areas. The adopted rulemaking is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225, because it is not a major environmental rule.

While the adopted rulemaking does not constitute a major environmental law, even if it did, it would not be subject to a regulatory impact analysis under Texas Government Code, §2001.0225. The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These 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 TCEQ. 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 rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal

impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules 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 required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially 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, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

Even if the adopted rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law - the NAAQS. The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Env'tl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent

of the adopted rulemaking is to make the current idling enforcement period year-round; to remove the existing duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less and does not have a sleeper berth; to exempt armored vehicles from motor vehicle idling requirements; and to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or air conditioning, which expired on September 1, 2009. This adoption, therefore, does not exceed an express requirement of federal law. The amendments are needed to implement state law but do not exceed those new requirements. The adopted rulemaking does involve a compact (in particular, the Austin EAC), which is an agreement between the state and federal government to implement a state and federal program; however, the adopted amendments do not exceed the requirements of that compact. Finally, this adopted rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §382.012 and §382.019. Because this adopted rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply, and a regulatory impact analysis is not required.

This adopted rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), for the following reasons. The adopted rulemaking

is not a major environmental law, because while the specific intent of the adopted rules are to protect the environment or reduce risks to human health from environmental exposure, the adopted rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would it adversely affect in a material way the environment or the public health and safety of the state or a sector of the state. Furthermore, even if the adopted rulemaking was a major environmental rule, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225, because: 1) the adopted rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the adopted rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this adopted rulemaking; or 4) the adopted rulemaking is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period, and no comments were received.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rulemaking constitutes a taking under Texas Government Code,

Chapter 2007. The commission's assessment shows Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

Promulgation and enforcement of the adopted rulemaking is neither a statutory nor a constitutional taking of private real property. These adopted rules are not burdensome, restrictive, or limiting of rights to private real property, because the adopted rulemaking regulates vehicle idling in certain limited areas. Furthermore, the adopted rulemaking

benefits the public by providing all local governments the option of applying the idling rules when additional control measures are needed to achieve or maintain attainment of the federal ozone standards. The adopted rulemaking does not affect a landowner's rights in private real property, because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code §§33.201 *et seq.*, and therefore, must be consistent with all applicable CMP goals and policies. The commission reviewed this adopted rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the adopted rulemaking does not affect any coastal natural resource areas. The CMP goals applicable to the adopted rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. No new sources of air contaminants are authorized in those affected counties. The CMP policy applicable to this adopted rulemaking action is the policy that

commission rules comply with regulations in the Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal area (40 CFR §501.32). This rulemaking adoption does not have a detrimental effect on SIP emissions reduction obligations relating to maintenance of the ozone NAAQS. This adopted rulemaking action complies with the CFR. Therefore, in compliance with 40 CFR §505.22(e), this adopted rulemaking action is consistent with CMP goals and policies. Promulgation and enforcement of these adopted rules does not violate or exceed any standards identified in the applicable CMP goals and policies, because the adopted rulemaking is consistent with these CMP goals and policies, and because these adopted rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

The commission invited public comment regarding the consistency with the CMP during the public comment period and no comments were received.

Public Comment

Public hearings on the proposal were held in Austin on March 1, 2011 and in Fort Worth on March 3, 2011. Oral comments regarding Chapter 114 were presented by the Capital Area Council of Governments (CAPCOG), FFE Transportation, the NCTCOG, and the Texas Motor Transportation Association (TMTA). The CAPCOG's oral comments were a summary of a written comments submitted by the Central Texas Clean Air Coalition (CAC); therefore, any reference to CAC in the comments and responses below also

includes CAPCOG. The public comment period was from February 11, 2011, to March 11, 2011.

Written comments regarding Chapter 114 were provided by A Better Tripp Moving and Storage Co., Inc.; Acme Truck Line; Ahrens Bros. Trucking (HPI); Alamo Relocation & Storage, Inc.; All Ways Trucking; AllTrans Medical Solutions; ARB Transport; Averitt Express; B&D Owens Co.; B.I.B. Trucking; Baldwin Distribution Services, Ltd; Bamm Express Transport, LLC; BigFoot's Hotshot Transport; Bobby Lehmann, Inc.; BPI; Brookshire's Food & Pharmacy; C. Lawless Trucking, LLC; Canal Cartage Company; CAC; Cargil Meat Logistics Solutions; Celanon; Charlie Slusser's Hauling Service; Creekside Nursery; Crete Carrier; CRST International; C-T Trucking; Cullen Trucking; City of Dallas; Dart Transit; Dist-Tech; Dorsey Trans; E.L. Farmer & Company; EPA; Excargo Services; Fikes Truck Line; Fremont Contract Carriers; Gandy & Son's, Inc.; Glenn Broussard Trucking; Guy M. Turner; H & H Logistical Services, Inc.; Hirschfield Transportation; Hot Shot Express; Housley Communication, Inc.; Hyden Highway Hauling L.L.C.; Johnsrud Transport, Inc.; Klaus Leinenbach Trucking; Ladybug Freight LLC; Landstar; Lanstar; Mayberry Express; McClatchy Bros., Inc.; MLC, LLC; Morse Trucking; Nabors Well Services Co.; NCTCOG; Oklahoma Tank Lines; OOIDA; Panel Truss; Pappas Restaurants; Parkway Transport, Inc.; Payan Express Transportation Services, Inc.; Phagan Express of Texas LLC; Phil Brewer Trucking; Plunkett Trucking; Pressinon, Inc.; Queen Moving & Storage Co.; Randy Bundy Trucking; RCL Trucking;

Reed's Sand & Gravel, LLC; Refrigerated Transport, Inc.; Rex Long Transport Company; Skinner Transportation, Inc.; Specialized Transport Service, Inc., aka STS Heavy Hauling; Star Fleet Trucking; Sterling's Vacuum Service; Stevens Worldwide Van Lines, Inc.; Swift Transportation; Texas Hot Oilers, Inc.; TMTA; Texas Moving Co., Inc.; Tom Taylor Trucking; Transwood, Inc.; Tri Dal, Ltd.; Turner Bros., LLC; Two Ts Trucking; USA Truck, Inc.; USFW; W. M. Dewey & Son, Inc.; Werner Enterprises, Inc.; and 31 individuals.

Response to Comments

General Comments

Comment

The following entities and 24 individuals supported the proposed motor vehicle idling rule revision: A Better Tripp Moving and Storage Co., Inc.; Acme Truck Line; HPI; Alamo Relocation & Storage, Inc.; AllTrans Medical Solutions; ARB Transport; B&D Owens Co.; B.I.B. Trucking; Baldwin Distribution Services, Ltd; Bamm Express Transport, LLC; BigFoot's Hotshot Transport; Bobby Lehmann, Inc.; BPI; Brookshire's Food & Pharmacy; C. Lawless Trucking, LLC; Canal Cartage Company; Cargil Meat Logistics Solutions; Charlie Slusser's Hauling Service; Creekside Nursery; Crete Carrier; C-T Trucking; Cullen Trucking; City of Dallas; Dart Transit; Dist-Tech; Dorsey Trans; E.L. Farmer & Company; FFE Transportation Services; EPA; Excargo Services; Fremont Contract Carriers; Gandy & Son's Inc.; Glenn Broussard Trucking; Guy M. Turner; H &

H Logistical Services, Inc.; Hirschfield Transportation; Hot Shot Express; Housley Communication, Inc.; Hyden Highway Hauling L.L.C.; Johnsrud Transport, Inc.; Klaus Leinenbach Trucking; Ladybug Freight LLC; Landstar; Lanstar; Mayberry Express; McClatchy Bros., Inc.; MLC, LLC; Morse Trucking; Nabors Well Services Co.; Oklahoma Tank Lines; OOIDA; Panel Truss; Pappas Restaurants; Parkway Transport, Inc.; Payan Express Transportation Services, Inc.; Phil Brewer Trucking; Plunkett Trucking; Pressinon, Inc.; Queen Moving & Storage Co.; Randy Bundy Trucking; RCL Trucking; Refrigerated Transport, Inc.; Skinner Transportation, Inc.; Specialized Transport Service, Inc., aka STS Heavy Hauling; Star Fleet Trucking; Sterling's Vacuum Service; Stevens Worldwide Van Lines, Inc.; Swift Transportation; Texas Hot Oilers, Inc.; TMTA; Texas Moving Co., Inc.; Tom Taylor Trucking; Transwood, Inc.; Tri Dal, Ltd.; Turner Bros., LLC; Two Ts Trucking; USFW; W. M. Dewey & Son, Inc.; and Werner Enterprises, Inc.

Response

The commission appreciates the support for the proposed revisions to the rules. No changes were made to the rules based on these comments.

Comment

All Ways Trucking, Averitt Express, Plunkett Trucking, and three individuals commented generally regarding idling regulation's effects on the health and safety of

drivers and economic effects on drivers. All Ways Trucking commented that the argument against idling large trucks is understood, but the commission should consider how well someone could sleep with no electricity. Averitt Express commented against idling restrictions and that prohibiting idling will not accomplish anything. Plunkett Trucking commented that drivers must sleep in their vehicle when they reach their federally mandated rest period. CRST International commented generally against idling restrictions. An individual commented that drivers generally should not idle if not necessary; however, driver safety and economic hardships should be considered as well. Another individual commented that American truck drivers already have numerous rules and regulations placed on them. Another individual asked the commission to please consider the cause and effect of the commission's decision and long-term consequences.

Response

The commission acknowledges the comments and the concerns associated with health and safety of drivers. This rulemaking adds only a year-round idling enforcement period while eliminating certain idling prohibitions, retaining several exemptions, and adding a new exemption for armored cars. The commission has made no changes in response to these comments.

Comment

Celanon commented that the commission has removed safe parking but enforces the 14-hour rule.

Response

The commission acknowledges this comment. However, the commission does not enforce the hours-of-service regulations that put limits in place for when and how long commercial motor vehicle drivers may drive. The commission has made no changes in response to this comment.

Comment

Fikes Truck Line commented that most trucks and equipment have been updated, along with auxiliary power units for hotel loads, and the updated equipment is self-contained. This independence does not exist for other industries.

Response

The commission appreciates the comment. The commission has made no changes in response to the comment.

Comment

The CAC and the NCTCOG suggested that the commission take action to permit Texas Emissions Reduction Plan funding for idle reduction technology independent to whether

idling occurs within a local jurisdiction that has adopted idling rules.

Response

The commission appreciates the comment. The suggested change is beyond the scope of this rulemaking. The commission has made no changes in response to these comments.

Comment

The CAC suggested the commission make the effective date of any rule change at the end of the current ozone season to avoid any disruption to implementation of the existing rules in this ozone season.

Response

The commission appreciates the comment. In order to ensure the health and safety of drivers, the implementation of the rules will need to occur immediately. The commission has made no changes in response to this comment.

§114.512, Control Requirements for Motor Vehicle Idling

Comment

The CAC, the EPA, and the NCTCOG supported extending the enforcement period to

year-round to make enforcement consistent and provide additional protection from ozone pollutants. The NCTCOG supported allowing an exemption for armored vehicles due to idling when necessary to provide comfort and safety to employees.

Response

The commission appreciates the support. The commission has made no changes in response to these comments.

Comment

The CAC, the EPA, and the NCTCOG suggested the commission should retain the prohibition for drivers using sleeper berths to idle in a school zone, within 1,000 feet of a hospital, or within 1,000 feet of a public school during its hours of operation to help reduce the amount of emissions from idling in these sensitive areas. If the sleeper berth exemption is reinstated, the health of persons in these areas must continue to be protected.

Response

While the commission acknowledges the potential health benefits of the prohibition of idling within 1,000 feet of a public school or hospital and appreciates the commenters' concerns, at this time the commission does not have sufficient technical analysis specific to idling near schools and

hospitals to support such a regionally specific prohibition beyond the original legislative mandate. As discussed elsewhere in the RESPONSE TO COMMENTS section of this preamble, the commission is electing to retain the exemption in §114.517(12) regarding sleeper berths even though the statute has expired, because the commission considers this exemption to be appropriate and necessary for driver safety and considering federal requirements for mandatory rest periods. The commission has made no changes in response to these comments.

Comment

The CAC and the NCTCOG suggested specifying that enforcement can occur as a class C misdemeanor, as opposed to a class B misdemeanor, which is currently stipulated for counties, because no fine is associated with violating the rule.

Response

Texas Water Code, §7.177 sets a fine for criminal violations of the rule. The commission does not have authority to set criminal fines that differ from a statute. The change requested by the counties would require a legislative change. The commission has made no changes in response to these comments.

Comment

The NCTCOG suggested extending the idling restriction to include additional vehicle classes of commercial medium-duty vehicles in the 6,000- to 14,000-pound gross vehicle weight rating.

Response

The commission appreciates the comment. The commission did not propose the suggested restriction or consider the restriction in the initial rule proposal. Affected individuals, companies, and other interested parties would not be provided adequate opportunity to comment on the suggested idling control requirement. The commission has made no changes in response to this comment.

Comment

The NCTCOG commented that a local government in North Central Texas suggested that the commission consider prohibiting idling at railroad crossings as part of the idling limitations rule as an additional way to curb idling emissions.

Response

The commission appreciates the comment. The suggested change is beyond the scope of this rulemaking. The commission cannot include the

additional idling restriction as suggested because it was not included in the initial rule proposal. Affected individuals, companies, and other interested parties would not be provided adequate opportunity to comment on this suggested idling restriction. The commission has made no changes in response to this comment.

§114.517, Exemptions

Comment

The EPA recommended that a technical analysis or modeling demonstration be provided to show that the proposed year-round enforcement of the idling rule would offset the emissions increase resulting from the new proposed exemption for armored vehicles.

Response

Some increases in emissions may be expected due to the addition of an idling exemption for armored vehicles. However, the exemption will not interfere with attainment or reasonable further progress in the SIP, because the proposed year-round enforcement will offset these relatively small increases. Extending the enforcement period to year-round enforcement should provide more emissions reductions in the months that are currently not subject to enforcement. Thus, any potential increases resulting from an exemption for armored vehicles should be offset by these

reductions. Furthermore, the DFW area exceeded the NO_x and VOC emission reductions required through the VMEP commitments. The excess emissions reductions were greater than the 0.12 tpd NO_x and 0.004 tpd VOC emission reduction shortfall estimated in the NCTCOG's VMEP accounting for the Locally Enforced Idling Restrictions. In addition, the 0.86 tpd NO_x and 3.66 tpd VOC excess emission reductions accomplished for the overall VMEP, as estimated in the NCTCOG's VMEP accounting, were greater than the emission reduction commitments for the Locally Enforced Idling Restrictions component of the VMEP. Finally, the exemption for armored vehicles is consistent with EPA's Model State Idling Law guidance document. The commission has made no changes in response to this comment.

Comment

The CAC commented it does not support adoption of the sleeper berth exemption, because it will make the rule difficult to enforce, diminish incentives for installation of idle reduction measures, and discourage jurisdictions from participation in the MOAs. The CAC commented that retaining the exemption is not consistent with the legislative intent to allow the exemption to expire. The CAC recommended that the sleeper berth exemption should be limited if the commission adopts the exemption such as: prohibit sleeper berth idling in sensitive areas; or to restrict heavy-duty vehicles only; allow the

exemption for no longer than a two-year period; modify the geographic applicability to no idling within 30 miles of a facility offering external heating or air conditioning. The CAC suggested the commission should focus on what modifications would make the rule more effective at reducing emissions from idling, rather than trying to discern the legislature's intent in expired statutes.

Response

The commission acknowledges this comment; however, the commission must balance the health and safety of drivers with the benefits of idling restrictions. The commission has made no changes in response to this comment.

Comment

The EPA commented that it would not be able to approve the proposed idling restriction sleeper berth exemption in the SIP unless the commission can provide substitute reductions or modeling to show that attainment can be met without the credits affected by the exemption.

Response

In response to the EPA's comments, the commission has added to the FCAA, §110(I) demonstration that retaining the sleeper berth exemption will not

interfere with attainment or reasonable further progress in the SIP because the DFW area achieved an excess of NO_x and VOC emission reductions through the VMEP commitments. Additionally, the excess emissions reductions were greater than the 0.12 tpd NO_x and 0.004 tpd VOC emission reduction shortfall estimated in the NCTCOG's VMEP accounting for the Locally Enforced Idling Restrictions. Furthermore, the 0.86 tpd NO_x and 3.66 tpd VOC excess emission reductions accomplished for the overall VMEP, as estimated in the NCTCOG's VMEP accounting, were greater than the emission reduction commitments for the Locally Enforced Idling Restrictions component of the VMEP. Finally, on April 9, 2010, the EPA published its approval of revisions to the SIP regarding the idling rule that the TCEQ submitted on February 28, 2008 (75 FR 18061). In that approval, the EPA did not address the previous revisions to §114.517(12) exempting the idling of the primary propulsion engine of a vehicle to provide air conditioning and heating for the vehicle's sleeper berth for a government-mandated rest period, because these provisions of the rule had already expired.

Comment

The NCTCOG commented that it is not opposed to reinstating the sleeper berth exemption for idling during a government-mandated rest period so long as no idling is

allowed in sensitive areas.

Response

The commission appreciates the support. The rule change was made to be consistent with the federal requirement mandating rest stops to protect the health and safety of drivers. The commission has made no changes in response to this comment.

Comment

Phagan Express of Texas LLC commented that the idling rule places an additional burden on drivers that is not needed. Reed's Sand & Gravel, LLC, commented that the trucking industry is being forced into extinction. With high fuel prices troubling truckers, the rulemaking is adding the burden of being unable to rest comfortably. Rex Long Transport Company commented this rulemaking would be harmful for drivers who cannot afford external power plants at a cost of approximately \$10,000. Citing that temperatures in Texas range from lows in the teens and as high as 100 plus degrees Fahrenheit, no driver should be forced into that situation. USA Truck, Inc. commented on its concerns that the idling rule would prevent truckers from receiving quality sleep. An individual commented that drivers need to make their own decisions on the issue of idling and are aware of when they need to use air conditioning and heating for rest periods and sleep. Another individual commented that the idling rule must take into

consideration the hardship it places on the driver who cannot make it to a truck stop that has facilities with external heating and air conditioning connections. The individual asked that the commission consider that a driver cannot get proper rest if the driver is too hot or too cold. The anti-idling regulations place undue hardship on the drivers. Another individual commented that truck drivers should be allowed to idle their engines in order to keep the temperature close to what they are used to so they can get rest while on breaks or waiting to pick up or deliver. The individual commented that the distance to external temperature control should not matter because it is not possible to wait in line for availability unless on shipper or receiver property. Another individual commented that it is these laws, which prevent truck drivers from running the air conditioner and getting enough sleep, make drivers dangerous for families on highways.

Response

The commission acknowledges the comments and the concerns associated with the health and safety of drivers. The anti-idling rules are an ozone reduction program that helps areas that are nonattainment and near nonattainment reduce pollution. In addition, this rulemaking adds only a year-round idling enforcement period while eliminating certain idling prohibitions, retaining several exemptions to allow truck drivers to use air conditioner or heating, and adding a new exemption for armored cars. The commission has made no changes in response to these comments.

Comment

The NCTCOG suggested including an exemption for vehicles powered by "Certified Clean Idle" engines, because these engines pollute less than many idle-reduction options currently allowed under the rule and would eliminate the demand on drivers to have duplicative technology to comply with various state's idling rules.

Response

The commission appreciates the comment. The commission did not propose the suggested exemption or consider the exemption in the FCAA, §110(l) demonstration for this rulemaking. The commission may consider the suggested exemption in a later rulemaking with additional analysis. The commission has made no changes in response to this comment.

SUBCHAPTER J: OPERATIONAL CONTROLS FOR MOTOR VEHICLES

DIVISION 2: LOCALLY ENFORCED MOTOR VEHICLE IDLING

LIMITATIONS

§114.512 AND §114.517

Statutory Authority

These amendments are adopted under the authority of Texas Government Code, §2001.021, Petition for the Adoption of Rules, which authorizes an interested person to petition a state agency for the adoption of a rule. The amendments are adopted under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rulemaking necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendments are also adopted under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to adopt rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendments are also adopted under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the

commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; and THSC, §382.208, 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 adopted amendments implement THSC, §§382.011, 382.012, 382.019, and 382.208.

§114.512. Control Requirements for Motor Vehicle Idling.

[(a)] No person shall cause, suffer, allow, or permit the primary propulsion engine of a motor vehicle to idle for more than five consecutive minutes when the motor vehicle, as defined in §114.510 of this title (relating to Definitions), is not in motion [during the period of April 1 through October 31 of each calendar year].

[(b)] No driver using the vehicle's sleeper berth may idle the vehicle: in a residential area as defined by Local Government Code, §244.001, in a school zone,

within 1,000 feet of a hospital, or within 1,000 feet of a public school during its hours of operation. An offense under this subsection may be punishable by a fine not to exceed \$500. This subsection expires September 1, 2009.]

§114.517. Exemptions.

The provisions of §114.512 of this title (relating to Control Requirements for Motor Vehicle Idling) do not apply to:

(1) a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less [and does not have a sleeper berth];

(2) the primary propulsion engine of a motor vehicle being used to provide air conditioning or heating necessary for employee health or safety in an armored vehicle while the employee remains inside the vehicle to guard the contents or while the vehicle is being loaded or unloaded; [a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, after September 1, 2009]

(3) a motor vehicle forced to remain motionless because of traffic conditions over which the operator has no control;

(4) a motor vehicle being used by the United States military, national guard, or reserve forces, or as an emergency or law enforcement motor vehicle;

(5) the primary propulsion engine of a motor vehicle providing a power source necessary for mechanical operation, other than propulsion, and/or passenger compartment heating, or air conditioning;

(6) the primary propulsion engine of a motor vehicle being operated for maintenance or diagnostic purposes;

(7) the primary propulsion engine of a motor vehicle being operated solely to defrost a windshield;

(8) the primary propulsion engine of a motor vehicle that is being used to supply heat or air conditioning necessary for passenger comfort and safety in vehicles intended for commercial or public passenger transportation, or passenger transit operations, in which case idling up to a maximum of 30 minutes is allowed;

(9) the primary propulsion engine of a motor vehicle being used to provide air conditioning or heating necessary for employee health or safety while the employee is using the vehicle to perform an essential job function related to

roadway construction or maintenance;

(10) the primary propulsion engine of a motor vehicle being used as airport ground support equipment;

(11) the owner of a motor vehicle rented or leased to a person that operates the vehicle and is not employed by the owner; or

(12) a motor vehicle when idling is necessary to power a heater or air conditioner while a driver is using the vehicle's sleeper berth for a government-mandated rest period and is not within two miles of a facility offering external heating and air conditioning connections at a time when those connections are available. [This subsection expires September 1, 2009.]