

The Texas Commission on Environmental Quality (commission) adopts the repeal of §§114.500, 114.502, 114.507, and 114.509. Sections 114.500, 114.502, 114.507, and 114.509 are adopted *without changes* as published in the June 11, 2004, issue of the *Texas Register* (29 TexReg 5741).

Repealed §§114.500, 114.502, 114.507, and 114.509 and the corresponding revisions to the state implementation plan (SIP) will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS

The Houston/Galveston/Brazoria (HGB) 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 national ambient air quality standard (NAAQS) one-hour standard for ozone of 0.12 parts per million (125 parts per billion (ppb)) by November 15, 2007. The HGB area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and the commission has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. The most relevant HGB 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 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 HGB area, in partnership with the commission, to address ozone. These coalitions include local governmental entities, elected

officials, environmental groups, industry, consultants, and the public, as well as EPA and the commission, and worked diligently to identify and quantify control strategy measures for the HGB area attainment demonstration.

December 2000

The December 2000 SIP revision contained rules and photochemical modeling analyses in support of the HGB area ozone attainment demonstration. 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 budget (MVEB) for NO_x and volatile organic compound (VOC) emissions. The SIP also contained enforceable commitments to implement further measures in support of the HGB area attainment demonstration, as well as a commitment to perform and submit a midcourse review.

September 2001

The September 2001 SIP revision for the HGB 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 HGB 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 HGB area; and 10) replacement of the 2007 ROP MVEBs to be consistent with the attainment MVEBs.

As was discussed in the December 2000 revision, the modeling resulted in a 141ppb peak ozone level that correlated to a shortfall calculation of 91 tpd NO_x equivalent emissions. 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 HGB SIP and some of the associated rules. Specifically, the BCCA-AG challenged the 90% NO_x reduction requirement from stationary sources in the HGB area. In May 2001, the parties agreed to a stay in the case, and the Honorable Margaret Cooper, Travis County District Court Judge, 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 HGB area attainment demonstration, 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 HGB area and East Texas regions. The study revealed that the ambient concentration of NO_x and certain VOCs (terminal olefins) were not consistent with the industrial emission estimates. Specifically, the ratio of terminal olefins to NO_x did not correlate to the ambient ratio of these VOCs to NO_x. Because of the greater certainty associated with NO_x emissions, the commission concluded that industrial emissions of terminal olefins were likely understated in earlier emissions inventories.

To address findings from TexAQS, 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 photochemical grid modeling results and analysis indicated that the HGB area can achieve the same air quality benefits with industrial VOC emission reductions, combined with 80% industrial NO_x emissions reductions, as would be realized with a 90% industrial NO_x emission reduction. An analysis of automated gas chromatograph data revealed that four compounds were frequently responsible for high reactivity days: ethylene, propylene, 1,3-butadiene, and butenes. As such, these compounds were selected as the best candidates for HRVOC emission controls.

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 contained 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 2002 SIP revision describes modeling and ambient data analyses that demonstrate that reductions in HRVOC emissions can replace the last 10% of industrial NO_x controls.

Current Revision

The commission committed in 2000 to perform a midcourse review to ensure attainment of the one-hour ozone standard. The midcourse review process provides the opportunity to update emissions inventory data, to use current modeling tools, such as MOBILE6, and to enhance the photochemical grid modeling. The data gathered from the TexAQS continues to improve photochemical modeling of the HGB area. The collection of these technical improvements give a more comprehensive understanding of the ozone challenge in the HGB 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 suggest that ozone formation in the HGB area stems from a combination of two different types of emissions. The first is the daily routine emissions of a large industrial base located in an urban core with on-road and non-road emissions

typical of a city of four million people. These emissions can be thought of as the base of emissions that could be expected at any given time in the HGB area. The second type of emissions can be characterized as the fluctuations that occur daily, even hourly in the HGB area resulting from sudden sharp increases in short-term HRVOC releases. While these emission fluctuations can occur in any industrial area, the dense concentration of chemical and refinery sites makes this a particular concern in the HGB area.

Ozone forms rapidly when these variable emissions occur in the immediate presence of NO_x , under the right atmospheric conditions. The design value in the HGB area is driven by a combination of these two types of emissions. To address ozone formation in the HGB area, a dual strategy is needed to reduce the base of emissions existing continuously in the HGB area, as well as restrictions on a short-term basis to address short-term variations. To address the “base” emissions, control strategies are needed that resemble those used by other metropolitan areas with a combination of a large urban population and a significant industrial base. These strategies include motor vehicle inspection and maintenance, cleaner fuels, cleaner technology for construction equipment, industrial-based controls for routine NO_x and VOC emissions, and a long-term cap on HRVOCs. To address the short-term variable emissions, a restriction of the maximum hourly rate of HRVOCs is necessary. This restriction would apply to both unauthorized emissions, as well as to permitted emissions that may fluctuate on an hourly basis.

To achieve the necessary HRVOC reductions, the commission developed a dual approach that addresses variable short-term emissions through a not-to-exceed hourly emission limit, and that addresses steady-state and routine emissions through an annual cap. The annual HRVOC cap and fugitive emission rules

will reduce the overall reactivity in the air shed by removing the compounds that are most prevalent and most likely to react rapidly enough to cause one-hour ozone exceedances. The annual HRVOC cap in Harris County will be reduced from the existing HRVOC cap to support the attainment demonstration modeling. The annual HRVOC cap in the seven-county surrounding area is equivalent to the total emissions limits established in the December 2002 SIP revision, but represented on an annual basis instead of a 24-hour rolling average. The commission will continue to evaluate the necessity to require short-term and annual reductions from those sites subject to 30 TAC Chapter 115, Subchapter H, Divisions 1 and 2, that are located within the seven-county surrounding area. If the evaluation demonstrates that reductions from these counties have little impact on attainment of the one-hour ozone standard, the short-term and annual limits for those other seven counties may no longer be required. The commission also solicited comments on possible ways to mitigate violations of the short-term emissions cap.

The annual HRVOC cap emissions would be distributed and enforced through an HRVOC emissions cap and trade program under 30 TAC Chapter 101, Subchapter H, new Division 6 (Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program) being adopted in concurrent rulemaking. This program would establish a mandatory annual HRVOC emissions cap on all sites located in the HGB area that emit or have the potential to emit more than ten tons per year of HRVOC, and that are subject to the HRVOC control requirements of Chapter 115, Subchapter H, Division 1 or Division 2. The cap would be enforced by the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap is established at a level demonstrated as necessary to allow the HGB area to attain the one-hour ozone standard along with a 5% reduction to safeguard against potential emissions variations. The adopted cap would initially be

implemented on January 1, 2007. The adopted HRVOC cap and trade program would also require all sites with new or modified HRVOC sources in the HGB area to obtain unused allowances from other sites already participating under the cap to offset any increased HRVOC emissions. For sites that have the potential to emit ten tons per year or less of HRVOCs from sources subject to the HRVOC control requirements of Chapter 115, Subchapter H, Division 1 or 2, the total aggregate HRVOC emissions from those sources would be limited to ten tons per year. Sites that are exempt from the HRVOC emissions cap and trade program would be extended an opportunity to opt-in, receive an HRVOC allocation, and thereby not be restricted to the ten tons per year limit.

The HGB area SIP no longer relies primarily on new reductions from NO_x-based strategies. A combination of point source HRVOC controls and NO_x reductions is the most effective means of reducing ozone in the HGB area. Under this revision, there is no longer a NO_x shortfall in the HGB 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 repealing the commercial lawn and garden equipment restrictions and the heavy-duty vehicle idling restrictions, and removing the motor vehicle inspection and maintenance program requirements from Chambers, Liberty, and Waller Counties. In addition, this SIP 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 speed limits 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 SIP removes the reinstatement of the 55 mph speed limit on May 1, 2005, and maintains 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 adopting new statewide portable fuel container rules. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies, and these adopted 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 SIP demonstrates attainment of the one-hour ozone standard in the HGB area in 2007 and provides a preliminary analysis of the HGB 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 maintains that 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.

The commission originally adopted rules in §§114.500, 114.502, 114.507, and 114.509 on December 6, 2000 as a control strategy to reduce NO_x emissions in the HGB ozone nonattainment area by limiting the engine idling time of motor vehicles with a gross vehicle weight rating of greater than 14,000 pounds to five consecutive minutes while the vehicle is operating in the affected area from April 1 to October 31 each year. These idling restriction rules went into effect on April 1, 2001. The commission also adopted revisions to the HGB attainment SIP in December 2000 that contained provisions to claim the anticipated NO_x emission reductions from the implementation of the idling restriction rules.

The idling restriction rules were expected to lower NO_x emissions from both gasoline-powered and diesel-powered motor vehicles in the affected areas. Because NO_x emissions are precursors to ground-level ozone formation, reduced emissions of NO_x will result in ground-level ozone reductions. Emissions modeling performed for the original rulemaking indicated that, by 2007, the idling restriction rules would reduce NO_x emissions in the affected areas by 0.48 tpd. In addition, the idling restriction rules were estimated to reduce VOC emissions by 0.19 tpd.

The commission has reevaluated a number of the existing control strategies, including motor vehicle idling restrictions, that were put in place in the December 2000 revision. As stated previously, results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure in reducing ozone in the HGB area, and that this strategy is no longer the most effective means to attain the one-hour ozone standard. Therefore, the commission is adopting the repeal of Chapter 114, Subchapter J, Division 1, concerning Motor Vehicle Idling Limitations. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies such as the idling restrictions. The repeal of these rules is consistent with that philosophy.

Additionally, this repeal will allow for funding under the TERP program for idling projects to reduce NO_x emissions. The 77th Legislature, 2001, passed Senate Bill (SB) 5 establishing the TERP program to provide financial incentives for the voluntary reduction of NO_x emissions from diesel vehicles and equipment in 38 counties, which included the HGB ozone nonattainment area counties affected by the idling restriction rules. The 78th Legislature, 2003, passed House Bill 1365 to revise the TERP program and expand the coverage area to 41 counties.

Projects for on-vehicle idle reduction technologies and truck stop electrification infrastructure may be considered by the commission for incentive grant funding through the TERP program. However, the commission is prohibited under Texas Health and Safety Code, §386.102, from using TERP funding for technology and projects that are required by federal or state regulations. Since the current idling restriction rules limit the engine idling time of motor vehicles with a gross vehicle weight rating of greater than 14,000 pounds to five consecutive minutes while the vehicle is operating in the HGB ozone nonattainment area counties, the commission cannot use TERP funds for any idle reduction projects in these areas. Therefore, the repeals will allow the commission to make TERP grant funding available for idle reduction projects within the HGB nonattainment area counties.

SECTION-BY-SECTION DISCUSSION

The adopted repeal of §§114.500, 114.502, 114.507, and 114.509 allows the commission to achieve NO_x emission reductions more effectively through the use of TERP grant funding made available for idle reduction projects within the HGB nonattainment area counties.

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 rulemaking 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 adopted revisions to Chapter 114 and to the SIP repeal idling restrictions within the HGB nonattainment area counties. The repeals 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 adopted repeals 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 repeals 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 was amended by SB 633 during the 75th legislative session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded “based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application.” The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeded 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 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. 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 SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 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 the HGB area. The adopted repeals will remove Chapter 114, Subchapter J, Division 1, which imposes idling restrictions on certain vehicles in the HGB ozone nonattainment area. Historically, the commission expressed a preference to implement technology-based strategies over behavior-altering strategies and the adopted repeals embody that philosophy. A combination of point source HRVOC controls and NO_x reductions appears to be the most effective means of reducing ozone in the HGB area. Consequently, the commission reevaluated a number of the existing control strategies, including motor

vehicle idling 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 adopting the repeal of this control strategy. Therefore, the adopted repeals are consistent with the ozone attainment demonstration SIP for the HGB 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 the requirements of 42 USC. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Therefore, the adopted repeals 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 the repeals adopted solely under the general powers of the agency. In addition, the repeals are adopted 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 invited public comment on this determination; no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the adopted rulemaking action under Texas Government Code, §2007.043. The specific purpose of these revisions is to repeal idling restrictions in the HGB nonattainment counties.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this adopted rulemaking 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 motor vehicle idling restriction was submitted in the HGB December 2000 SIP revision as a control strategy to reduce NO_x in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. However, the commission adopts the repeal of the motor vehicle idling restriction because photochemical modeling shows that this strategy is no longer necessary to attain the one-hour ozone standard, and the combination of point source HRVOC controls and NO_x reductions appears to be the most effective means of reducing ozone in the HGB area. Therefore, the overall goal of this rulemaking 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 repeals 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 HGB area exceeding the federal ozone NAAQS, which adversely affects public health, primarily through irritation of the lungs. The motor vehicle idling restriction was submitted as a control strategy in the HGB December 2000 SIP revision. A combination of point source HRVOC controls and NO_x reductions appears to be the most effective means of reducing ozone in the HGB area. Consequently, 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 adopting the repeal of Chapter 114, Subchapter J, Division 1. The action does not specifically advance the health and safety purpose by reducing ozone levels in the HGB nonattainment area. However, the repeal of this control strategy is part of a larger scheme to reduce ozone in the HGB area through the most effective means and strategies determined by the commission. Consequently, these adopted repeals meet the exemption in §2007.003(b)(13). This rulemaking therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the adopted repeals do not constitute a takings under Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §505.11, and therefore required 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 adopted repeals under 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking 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 is the policy that commission rules comply with regulations in 40 Code of Federal Regulations, adopted in accordance with the Federal Clean Air Act, 42 USC, §7401, *et seq.*, to protect and enhance air quality in the coastal area so as to protect coastal natural resource areas and promote public health, safety, and welfare (31 TAC §501.14(q)). This rulemaking complies with 40 Code of Federal Regulations, adopted in accordance with the Federal Clean Air Act.

Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies. The commission invited public comment on this determination; no comments were received.

PUBLIC COMMENTS

Public hearings on this proposal were held in Houston on August 2, 2004; Beaumont on August 3, 2004; and Austin on August 5, 2004. The comment period closed on August 9, 2004. Written comments were submitted by the Sierra Club, Houston Regional Group (Sierra Club); EPA;

Environmental Defense; Galveston-Houston Association for Smog Prevention (GHASP); Houston-Galveston Area Council (HGAC); Transportation Policy Council (TPC); the Honorable Bill White, Mayor, City of Houston, the Honorable Robert Eckels, County Judge, Harris County provided joint comments (Houston/Harris County); and four individuals. Sierra Club, Environmental Defense, GHASP, and four individuals opposed the repeal of the rules. HGAC, TPC, and Houston/Harris County supported the repeal of the rules. EPA neither supported nor opposed the rules but requested that the commission provide a detailed, substantive analysis of how these measures will advance attainment.

RESPONSE TO COMMENTS

HGAC, TPC, and Houston/Harris County commented that they support the repeal of the rules and that the reduction of emissions from diesel trucks during idling should be a regional priority and that reductions could be achieved through other means.

The commission appreciates support of the repeal of these rules.

One individual asked why the rules were adopted and are now being repealed.

The commission responds that it reevaluated a number of the existing control strategies, including motor vehicle idling restrictions, that were put in place in the December 2000 SIP revision.

Results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure in reducing ozone in the HGB area, and that the motor vehicle idling restrictions are no longer necessary to attain the one-hour ozone standard.

The commission is also concerned about the effectiveness of these rules because the commission does not have enough enforcement personnel to adequately enforce the idling limitation in the HGB area, even if the rule applied only at truck stops. Local governments, on the other hand, have law enforcement personnel already patrolling the streets and areas which would be frequented by idling vehicles subject to the restriction. Local governments have the ability to determine whether they wish to dedicate the personnel and time required to enforce such a regulation. The commission has proposed locally-enforced motor vehicle idling limitation rules (§§114.510 - 114.512, 114.517) that would allow local governmental entities to enforce heavy-duty diesel idling restrictions within their jurisdictions if they sign a memorandum of agreement with the commission. Finally, for areas that choose not to adopt locally-enforced idling restrictions, the TERP program is an appropriate mechanism to help deploy technologies such as truck stop electrification for qualifying projects. No changes were made to the rules in response to this comment.

One individual commented that there should be a way for trucking companies to buy newer, cleaner diesel trucks.

The commission responds that a major initiative to reduce pollution from diesel trucks is the TERP program. The TERP program provides grants to eligible projects in affected counties to offset the incremental costs associated with the activities that reduce emissions of NO_x from high-emitting mobile diesel sources. No changes were made to the rules in response to this comment.

Environmental Defense commented that there should be a limited repeal of the rules and recommended that the commission require electrification of truck stops and retain the idling restriction at truck stops .

The commission does not agree that there should be a limited repeal of the rules and this rulemaking cannot require the electrification of truck stops because the scope of this rulemaking is limited to the repeal of the motor vehicle idling restrictions in the HGB nonattainment area. In order to change the rules in a way that would regulate new entities, the commission would have to initiate another rulemaking to satisfy the public notice and comment procedures of the Administrative Procedure Act. Thus, regulations requiring electrification would require an additional rulemaking. The commission may consider requiring electrification in a future in another rulemaking.

Idling restrictions and truck stop electrification are not required to demonstrate attainment of the one-hour ozone standard in the HGB area. The commission reevaluated a number of the existing control strategies, including motor vehicle idling restrictions, that were put in place in the December 2000 SIP revision. As a result of that reevaluation, the commission is submitting a SIP revision that demonstrates attainment without reductions from the idling limitation rule.

The commission is also concerned about the effectiveness of these rules because the commission does not have enough enforcement personnel to adequately enforce the idling limitation in the HGB area, even if the rules applied only at truck stops. Local governments, on the other hand, have law enforcement personnel already patrolling the streets and areas which would be frequented by idling vehicles subject to the restriction. Local governments have the ability to

determine whether they wish to dedicate the personnel and time required to enforce such a regulation. The commission has proposed locally-enforced motor vehicle idling limitation rules (§§114.510 - 114.512, 114.517) that would allow local governmental entities to enforce heavy-duty diesel idling restrictions within their jurisdictions if they sign a memorandum of agreement with the commission. Finally, for areas that choose not to adopt locally-enforced idling restrictions, the TERP program is an appropriate mechanism to help deploy technologies such as truck stop electrification for qualifying projects.

No changes were made to the rules in response to this comment.

Environmental Defense commented that it believes that the commission has not shown that the strategy is no longer necessary to attain the one-hour ozone standard.

The commission disagrees that the rules are necessary to attain the one-hour ozone standard. The commission reevaluated a number of the existing control strategies, including motor vehicle idling restrictions, that were put in place in the December 2000 SIP revision. The idling limitation rule effective in the HGB area was initially proposed when the SIP was focused primarily on new NO_x emission reduction strategies. The idling limitation rule was adopted in support of the December 2000 ozone attainment demonstration SIP. The majority of the emission reductions identified in the December 2000 SIP 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 tpd of NO_x reductions were necessary for an approvable attainment demonstration. Hence, rules such as the idling limitation were adopted. The commission soon thereafter conducted a scientific

evaluation based in large part on aircraft data collected by the 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 HGB area and East Texas regions. The study revealed that the ambient concentration of NO_x and certain VOCs (terminal olefins) were not consistent with the industrial emission estimates. Specifically, the ratio of terminal olefins to NO_x did not correlate to the ambient ratio of these VOCs to NO_x. Because of the greater certainty associated with NO_x emissions, the commission concluded that industrial emissions of terminal olefins were likely understated in earlier emissions inventories.

To address findings from TexAQS, 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 photochemical grid modeling results and analysis indicated that the HGB area can achieve the same air quality benefits with industrial VOC emission reductions, combined with 80% industrial NO_x emissions reductions, as would be realized with a 90% industrial NO_x emission reduction. An analysis of automated gas chromatograph data revealed that four compounds were frequently responsible for high reactivity days: ethylene, propylene, 1,3-butadiene, and butenes. As such, these compounds were selected as the best candidates for HRVOC emission controls.

The December 2002 SIP revision contained new rules to reduce HRVOC emissions from four key industrial sources: fugitives, flares, process vents, and cooling towers. The HGB SIP no longer

relies primarily on new reductions from NO_x-based strategies. A combination of point source HRVOC controls and NO_x reductions is the most effective means of reducing ozone in the HGB area and there is no longer a NO_x shortfall in the HGB SIP. Therefore, the commission is submitting a SIP that relies on HRVOC controls and NO_x reductions to achieve attainment and is no longer relying on reductions from behavior-altering strategies such as the idling limitation rule. No changes were made to the rules in response to this comment.

Environmental Defense commented that it does not believe that allowing TERP grant funding for truck stop electrification infrastructure justifies the repeal of the rules. Environmental Defense also commented that the state should invest its limited TERP funds in projects that would not otherwise occur without state funding and that public funding should be limited to loans, and/or partnerships between electric utilities and the commission. Finally, Environmental Defense commented that truck stop electrification is a commercially viable technology that generates revenues that will more than recoup the initial capital cost.

As discussed previously, the commission is repealing this idling rule because a combination of point source HRVOC controls and NO_x reductions is the most effective means of reducing ozone in the HGB nonattainment area. The idling rule is not required to demonstrate attainment of the one-hour ozone standard in the HGB area.

For local government entities that want to enforce idling limitations, the commission has proposed locally-enforced motor vehicle idling limitation rules (§§114.510 - 114.512, 114.517) that would

allow local governmental entities to enforce heavy-duty diesel idling restrictions within their jurisdictions if they sign a memorandum of agreement with the commission.

Making TERP funding available for idle reduction projects could accelerate emission reductions by influencing implementation of idle reduction projects to the areas where they are needed most. TERP funds are disbursed only to those projects that meet the standards and criteria of the program. Several factors, such as cost-effectiveness and the amount of emission reductions to be achieved by the project, are taken into account before applicants are awarded TERP grant funding. Emission reductions occurring through TERP projects will have contractual enforcement mechanisms that will include reporting requirements demonstrating compliance. TERP specifically provides for funding for infrastructure projects such as truck stop electrification. The commission exercises considerable discretion in managing TERP funds and overseeing the program.

The commission recognizes that some non-TERP funded idle reduction projects are operating in the state. In those instances, business decisions were made based on the viability of idle reduction technologies in a competitive market. However, partnering with electric utilities to fund electrification infrastructure is beyond the scope of this rulemaking.

This rulemaking cannot require truck stop electrification because the scope of this rulemaking is limited to the repeal of the motor vehicle idling restrictions in the HGB nonattainment area. In order to change the rule in a way that would regulate new entities, the commission would have to initiate another rulemaking to satisfy the public notice and comment procedures of the

Administrative Procedure Act. Thus, regulations requiring electrification would require an additional rulemaking. The commission may consider requiring truck stop electrification in a future rulemaking.

No changes were made to the rules in response to this comment.

Environmental Defense and GHASP commented that there should be electrification at any “commercial truck stop, travel center or public rest area with 25 or more parking spaces where commercial motor vehicles can park for more than 60 minutes” by June 1, 2006, since electrification is a “commercially viable technology” which quickly recoups capital costs. GHASP commented that those who do not comply with the rule should be ineligible for any state environmental license or permit. GHASP also commented that those who operate a public rest area should establish enforcement policies and identify suitable resources for the truck stop electrification operations.

This rulemaking cannot require truck stop electrification because the scope of this rulemaking is limited to the repeal of the motor vehicle idling restrictions in the HGB nonattainment area. In order to change the rule in a way that would regulate new entities, the commission would have to initiate another rulemaking to satisfy the public notice and comment procedures of the Administrative Procedure Act. Thus, regulations requiring electrification would require an additional rulemaking. The commission may consider requiring truck stop electrification in a future rulemaking.

The idling rule is not required to demonstrate attainment of the one-hour ozone standard in the HGB area. Therefore, additional enforcement mechanisms are not being considered at this time.

The commission will consider these enforcement suggestions should a mandatory idling restriction rule be considered in the future.

No changes were made in response to this comment.

Environmental Defense and GHASP commented that the idling rule could be improved if owners of public fleets (e.g., school bus fleets, local government fleets, etc.) were asked to implement and enforce anti-idling policies. GHASP commented that the commission should identify best practices for idling for publicly owned diesel fleets and aggressively market those practices. GHASP recommended that the commission then schedule an audit to determine the program's effectiveness and require anti-idling practices and enforcement if public agencies prove to be unreasonably resistant.

The commission responds that allowing local governments to enforce an idling limitation regulation is the most logical strategy to reduce emissions from heavy-duty truck idling. Local governments have the ability to determine whether they wish to dedicate the personnel and time required to enforce such a regulation and may do so if they take part in the proposed heavy-duty diesel idling opt-in rule. That proposed rulemaking would allow local governmental entities to enforce heavy-duty diesel idling restrictions within their jurisdictions if they sign a memorandum of agreement with the commission.

Additionally, the scope of this rulemaking is limited to the repeal of the motor vehicle idling restrictions in the HGB nonattainment area. In order to change the rule in a way that would regulate new entities, the commission would have to initiate another rulemaking to satisfy the public notice and comment procedures of the Administrative Procedure Act. Thus, regulations requiring electrification would require an additional rulemaking. The commission may consider requiring electrification in the future in another rulemaking. No changes were made to the rules in response to this comment.

GHASP commented that as a first step toward voluntary, grant, or regulatory programs to reduce truck idling, Texas Department of Transportation (TxDOT) should establish a "registration program" of private and public sites where more than five diesel trucks may idle at one time.

The idling rule is not required to demonstrate attainment of the one-hour ozone standard in the HGB area. Therefore, additional enforcement mechanisms are not being considered at this time. The commission will consider a truck stop registration program should a mandatory idling restriction rule be considered in the future. No changes were made to the rules in response to this comment.

Sierra Club commented that the rule was never enforced, and in fact, the commission discouraged local air pollution control programs from enforcing the rule.

The commission responds that it did not discourage local air pollution control programs from enforcing the idling limitations, but no large-scale enforcement activities have been conducted by

the commission since the rule became effective. Enforcement is a major concern when it comes to regulating behavior. The time and effort necessary to consistently and effectively enforce such rules as the idling restrictions and the lawn and garden restrictions are one of the reasons why they are being repealed and replaced with strategies such as the HRVOC rules and voluntary incentive-based programs such as the TERP program. Results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure in reducing ozone in the HGB area. No changes were made to the rules in response to this comment.

Sierra Club recommended that the commission determine what it would take to enforce the rule effectively and implement a pilot enforcement program.

The commission responds that it knows that local involvement is a necessary element for proper enforcement of many regulations. In repealing the Houston idling rules the commission allows the local governmental entities to decide the most appropriate approach to controlling excessive idling. The commission has expressed a preference to implement voluntary technology-based strategies over mandatory behavior-altering strategies, and the repeals embody that philosophy. The commission has a proposed “locally enforced motor vehicle idling limitations” rule (Rule Project Number 2004-072-114-AI) that will incorporate the same idling restrictions as the current Houston idling rule, but would allow the local governmental entities to decide if and how to implement it. This leaves the option for the local governmental entity to decide if other options, such as TERP-funded idling projects, will be better suited for their air quality situation. No changes were made to the rules in response to this comment.

Sierra Club questioned whether the commission approved this rule based on avoiding SIP disapproval and sanctions, and whether or not the commission ever intended to implement the rule.

The commission responds that it did approve the rule based on avoiding SIP disapproval and sanctions and that the commission has already implemented the rule. The idling limitations became effective on April 1, 2001. No changes were made to the rules in response to this comment.

EPA commented that “necessary to attain” is not the reasonably available control measures (RACM) standard; instead it is whether the rules would advance the attainment date. EPA asked that the commission provide a RACM analysis that includes “a detailed, substantive consideration of whether these measures {are} reasonable and would advance attainment.”

The commission recognizes that a RACM analysis is a SIP requirement and will document SIP requirements in the accompanying one-hour attainment demonstration scheduled for the commission’s consideration on December 1, 2004.

By the year 2007, the idling limits would reduce NO_x emissions in the affected area by 0.48 tpd. The commission estimates the daily cost savings benefit of this strategy to be approximately \$51,900 per ton of NO_x reduced. This figure was calculated from the estimated NO_x reductions from this strategy of 0.48 tpd, the estimated reduction in fuel consumption per hour, and the current price per gallon of fuel sold in the affected area. On June 23, 2004, the commission

proposed a one-hour ozone midcourse review attainment demonstration for the HGB area. The recently proposed SIP addresses emission of both NO_x and HRVOCs. The current proposal models six of ten days below 125 ppb, with the remaining four days demonstrating attainment using a weight-of-evidence analysis. Additional enhancements to the modeling since the SIP was proposed in June replicate peak ozone at or below 125 ppb on eight of ten days. The repeal of the idling restriction does not significantly impact modeled ozone concentrations.

Given the minimal emission reductions and the development of a more robust attainment demonstration, the commission maintains that the inclusion of the repeal of the motor vehicle idling restriction rules is not a reasonable measure. These factors indicate that this measure does not advance the one-hour ozone attainment date of the HGB area, and therefore, is not a RACM. No changes were made to the rules in response to this comment.

SUBCHAPTER J: OPERATIONAL CONTROLS FOR MOTOR VEHICLES

DIVISION 1: MOTOR VEHICLE IDLING LIMITATIONS

§§114.500, 114.502, 114.507, 114.509

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code (TWC), §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act). The repeals are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles.

§114.500. Definitions.

§114.502. Control Requirements for Motor Vehicle Idling.

§114.507. Exemptions.

§114.509. Affected Counties and Compliance Dates.