

The Texas Commission on Environmental Quality (commission) proposes an amendment to §114.50, Vehicle Inspection and Maintenance, and corresponding revisions to the Texas Inspection and Maintenance State Implementation Plan (Texas I/M SIP). The amendment is being proposed in Subchapter C, Vehicle Inspection and Maintenance and Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program; Division 1, Vehicle Inspection and Maintenance. The amendment and associated Texas I/M SIP will be submitted to the United States Environmental Protection Agency (EPA). The amendment and SIP revision are being proposed to revise the El Paso I/M program to make on-board diagnostic (OBD) testing a contingency measure of the El Paso ozone SIP in support of the maintenance of the ozone national ambient air quality standard (NAAQS).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The federal I/M regulations for ozone nonattainment areas ranked as serious, require that OBD testing be implemented beginning January 1, 2002. Those regulations also provide an option for an extension, up to 12 months, if a state can show good cause. In a prior I/M rulemaking effective November 20, 2001, the commission submitted a request for a one-year extension for the implementation of OBD testing requirements in the El Paso ozone nonattainment area. This action was taken based on the El Paso area having experienced five years with no monitored violations of the ozone standard. At the time, the commission revised the I/M rule to delay implementation of the OBD testing requirement in the El Paso program area until January 1, 2003, to allow the commission time to explore any viable options and to take into consideration any changes in El Paso's attainment status.

The current rule requires El Paso to continue two-speed idle (TSI) testing through December 31, 2002. The current rule also requires, beginning January 1, 2003, that all 1996 and newer model year vehicles equipped with OBD systems be tested using EPA-approved OBD test procedures and all pre-1996 model year vehicles be tested using TSI test procedures. In addition, the current rule requires all inspection stations to offer both TSI and OBD tests beginning January 1, 2003.

Based on ambient air monitoring data that shows that El Paso has experienced five years with no violations of the ozone standard, the commission is proposing amendments to the I/M rule to exclude the El Paso program area from OBD testing requirements. The five-year period with no ozone violations has been achieved through the implementation of a volatile organic compound control strategy which includes the TSI vehicle emissions testing program for all 2 - 24 year old gasoline-powered vehicles. Because El Paso, through monitoring, has demonstrated attainment prior to the EPA January 2002 deadline to commence OBD testing as part of the I/M program, and because OBD testing has not already been implemented, the commission concludes that the OBD testing program is not necessary for the El Paso area to maintain attainment of the ozone standard. Therefore, the commission proposes to remove the current requirement in the I/M rule for OBD testing to begin in the El Paso program area on January 1, 2003. The OBD requirement will be converted to a contingency measure in the maintenance plan being developed for the area. This plan will be submitted along with the request for redesignation to attainment for ozone.

In the event that the commission determines that implementation of the OBD program is necessary to maintain attainment of the ozone standard, for example if the El Paso area violates the ozone standard,

either before the submittal of the redesignation request and the maintenance plan for El Paso or after redesignation takes place, the commission will publish notification in the *Texas Register* of its determination that the contingency measure will be implemented. The OBD testing will be required to begin 12 months after the notice is published in the *Texas Register*.

The amendments proposed in this rulemaking include the continuation of TSI testing in the El Paso program area; the removal of the requirements for OBD testing; the addition of a contingency measure that the El Paso program area will implement should the commission publish notice in the *Texas Register*; and the deletion of the requirement that all emissions inspection stations offer both TSI and OBD tests until the contingency measured is triggered. In addition, the proposed rule amendment includes a few editorial corrections to conform to *Texas Register* formatting and style requirements.

SECTION DISCUSSION

Section 114.50(a) is proposed to be amended by adding a reference to the location of the I/M program area definition. Section 114.50(a)(1) is proposed to be amended by deleting the requirement that El Paso continue TSI testing through December 31, 2002 because TSI testing is proposed to be continued past the date in the El Paso program area. Section 114.50(a)(5) would be amended by deleting subparagraphs (A), (B), and (C), which pertain to the initiation of OBD testing in the El Paso program area on January 1, 2003, and adding new subparagraphs (A) and (B). New subparagraph (A) will require all vehicles in the El Paso program area to be tested using the TSI test. New subparagraph (B) would be the OBD contingency measure for the El Paso program area that would become effective 12 months after the commission publishes notice in the *Texas Register* of its determination that this

contingency measure is necessary in order to maintain attainment of the ozone NAAQS. The contingency measure, if triggered, would require that: all 1996 and newer model year vehicles equipped with OBD systems be tested using EPA-approved OBD test procedures; all pre-1996 model year vehicles be tested using TSI test procedures; and all vehicle emissions inspection stations in the El Paso program area offer both TSI and OBD testing.

The commission proposes an editorial change to §114.50(b)(1)(B) to replace the term “inspection and maintenance” with the acronym “I/M” because the acronym has been used previously in the section. The commission proposes an editorial change to §114.50(b)(2) to replace Federal Clean Air Act with the acronym FCAA because it is defined in 30 TAC Chapter 3, and to clarify that the FCAA is codified in 42 United States Code (USC), §§7401 *et seq.*, by adding §§7401 to the citation. In addition, the commission proposes an editorial change to §114.50(b)(7) to add the correct citation to the reference to the Texas Motor Vehicle Commission Code.” The correct citation should be “Texas Motor Vehicle Commission Code, Article 4413(36), §1.03. However, the 77th Legislature, 2001, repealed this code and moved the article into the Texas Occupations Code, §2301.002. These changes will be effective June 1, 2003. Finally, the commission proposes an editorial change to §114.50(d)(4) to delete the parentheses around the phrase “(as designated by DPS)” because the phrase is already set off by commas.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed rule is in effect, there will be no significant fiscal implications for

the agency or any other unit of state or local government due to administration and enforcement of the proposed amendments.

The proposed rulemaking is intended to revise the state's existing vehicle emission testing program in the El Paso program area by making OBD testing a contingency measure of the El Paso ozone SIP in support of the maintenance of the ozone NAAQS. This decision is based on the El Paso ozone nonattainment area having experienced five years with no monitored violations of the ozone standard. The current TSI vehicle emission testing will continue in the El Paso program area unless the ozone standard is violated in the region. If a violation occurs, the proposed amendments would require the agency to implement a contingency measure to require OBD testing of all 1996 and newer vehicles and TSI testing of all pre-1996 vehicles in El Paso within one year after the commission publishes notice of the violation in the *Texas Register*. The proposed rulemaking would also change the requirement, that all vehicle emissions inspection stations in the El Paso program area offer both TSI and OBD tests, into a contingency requirement.

The proposed amendments would affect all units of state and local government, individuals, and businesses that either conduct vehicle emission testing, or that have vehicles that are required to submit to vehicle emissions tests.

The proposed amendments are not anticipated to result in significant fiscal implications for units of state and local government in the El Paso program area, because the current OBD requirements would not have affected units of government until January 1, 2003. The commission estimates there have been no

expenditures by affected units of government to upgrade existing equipment or purchase new equipment in order to incorporate the OBD testing. The deletion of the OBD requirement would eliminate a potential cost of \$7,000 to \$16,000 for each new or upgraded emission test analyzer.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be continued environmental protection using existing TSI testing in the El Paso program area, without having to broaden the scope of vehicle emissions testing by incorporating OBD testing.

The proposed rulemaking would modify the state's existing vehicle emission testing program in the El Paso program area by changing the requirement for OBD testing of all 1996 and newer model year vehicles, which was to begin January 1, 2003, into a contingency requirement. The proposed rulemaking would also change the requirement, that all vehicle emissions inspection stations in the El Paso program area offer both TSI and OBD tests, into a contingency requirement.

The proposed amendments are not anticipated to result in significant fiscal implications for individuals and businesses in the El Paso program area, because the current OBD requirements would not have become effective until January 1, 2003. The commission estimates there have been no expenditures by affected individuals and businesses to upgrade existing equipment or purchase new equipment in order to incorporate the OBD testing. The deletion of the OBD requirement would eliminate a potential cost of \$7,000 to \$16,000 for each new or upgraded emission test analyzer.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications to small and micro-businesses as a result of implementing the proposed amendments, which are intended to modify the state's existing vehicle emission testing program in El Paso by changing the requirement for OBD testing of all 1996 and newer model year vehicles, which was to begin January 1, 2003, into a contingency requirement. The proposed rulemaking would also change the requirement, that all vehicle emissions inspection stations in El Paso offer both TSI and OBD tests, into a contingency requirement.

The proposed amendments are not anticipated to result in significant fiscal implications for small and micro-businesses in the El Paso program area, because the current OBD requirements would not have become effective until January 1, 2003. The commission estimates there have been no expenditures by affected small and micro-businesses to upgrade existing equipment or purchase new equipment in order to incorporate the OBD testing. The deletion of the OBD requirement would eliminate a potential cost of \$7,000 to \$16,000 for each new or upgraded emission test analyzer.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the action is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. “Major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, 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. The proposed amendment to Chapter 114 is intended to protect the environment or reduce risks to human health from environmental exposure to ozone. The proposed amendment is intended to change the OBD testing portion of the vehicle emission testing program in El Paso County into a contingency measure as part of the control strategy to maintain the ozone NAAQS in El Paso. While the OBD portion of the I/M program is mandatory for nonattainment counties, it may be a contingency measure for attainment counties. This change would delay or eliminate the need for inspection stations to invest in OBD testing equipment and therefore should provide a positive financial benefit to the regulated community. Additionally, the environment should not be negatively impacted because the contingency measure will be in place to ensure that the El Paso area maintains attainment of the NAAQS. Therefore, the proposed rule does not 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. As defined in Texas Government Code, §2001.0225 only applies 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. This rulemaking does not meet any of these four applicability requirements. Specifically, the emission testing program within this proposal was developed in order to meet the NAAQS for ozone set by the EPA under 42 USC, §7409, and therefore meets a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once EPA has established those standards. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. This proposal is not an express requirement of state law, but was developed specifically in order to maintain the air quality standards established under federal law as NAAQS. This proposal is intended to help the El Paso ozone nonattainment area maintain compliance with the ozone NAAQS without requiring more financial investment than necessary. The proposed amendment does not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by federal law, nor exceed a requirement of a delegation agreement. The proposed amendment was not developed solely under the general powers of the agency, but was specifically developed under Texas Health and Safety Code (THSC), §§382.011, 382.012, 382.017, 382.019, 382.037, 382.039, and Subchapter G, §§382.201 - 382.216 to maintain the air quality standards established under federal law as NAAQS. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rule in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to implement a revised I/M program in the El Paso ozone nonattainment area as part of the strategy to maintain attainment of the ozone NAAQS. Promulgation and enforcement of the proposed rule will not burden private, real property because this proposed rulemaking action does not require the installation of permanent equipment. This proposed rule amendment should temporarily or permanently reduce the amount of emission testing equipment required at a testing station. Although the proposed rule amendment does not directly prevent a nuisance or prevent an immediate threat to life or property, it does prevent a real and substantial threat to public health and safety and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within this proposal were developed in order to maintain the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a revised I/M program which is necessary for the El Paso ozone nonattainment area to maintain the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to this proposed rule is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this revision will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission's rules in 30 TAC Chapter 281, Subchapter B (Consistency with the Texas Coastal Management Program). As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this proposed action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the proposed action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal in 31 TAC §501.12(l) to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to this rulemaking action is the policy in 31 TAC §501.14(q) that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal area. This rulemaking proposal will not have a detrimental effect on SIP emission reduction obligations relating to maintenance of the ozone NAAQS by continuing the existing TSI testing portion of the I/M program and making the OBD testing requirements a contingency measure. Further, no new air contaminants will be authorized by the rule revisions. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal on October 16, 2002, at 2:00 p.m. and 7:00 p.m., at the commission's regional office at 401 East Franklin Avenue, 5th floor conference room, Suite 570, El Paso. Hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, agency staff members will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-068-114-AI. Comments must be received by 5:00 p.m., October 16, 2002, although written comments will be accepted at the 7:00 p.m. hearing in El

Paso. For further information, please contact Alan Henderson, Policy and Regulations Division, at (512) 239-1510 or Hazel Barbour, Technical Analysis Division, (512) 239-1440.

**SUBCHAPTER C: VEHICLE INSPECTION AND MAINTENANCE AND LOW INCOME
VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE
RETIREMENT PROGRAM**

DIVISION 1: VEHICLE INSPECTION AND MAINTENANCE

§114.50

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act (TCAA). The amendment is also proposed under THSC, §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 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 air; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of the FCAA; §382.039, which provides the commission the authority to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of NAAQS and to

protect the public from exposure to hazardous air contaminants from motor vehicles; and Subchapter G, §§382.201 - 382.216, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of the FCAA.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.019, 382.037, 382.039, and 382.201 - 382.216.

§114.50. Vehicle Emissions Inspection Requirements.

(a) Applicability. The requirements of this section and those contained in the revised Texas Inspection and Maintenance (I/M) State Implementation Plan (SIP) shall be applied to all gasoline-powered motor vehicles 2-24 years old and subject to an annual emissions inspection, beginning with the first safety inspection. Currently, military tactical vehicles, motorcycles, diesel-powered vehicles, dual-fueled vehicles which cannot operate using gasoline, and antique vehicles registered with the Texas Department of Transportation are excluded from the program. Safety inspection facilities and inspectors certified by the Texas Department of Public Safety (DPS) shall inspect all subject vehicles, in the following program areas, as defined in §114.2 of this title (relating to Inspection and Maintenance (I/M) Definitions), in accordance with the following schedule.

(1) All vehicles registered and primarily operated in Dallas, Tarrant, and Harris Counties shall be tested using a two-speed idle (TSI) test through April 30, 2002. [All vehicles

registered and primarily operated in El Paso County shall be tested using a TSI test through December 31, 2002.]

(2) - (3) (No change.)

(4) This paragraph applies to all vehicles registered and primarily operated in the Houston/Galveston (HGA) program area.

(A) - (G) (No change.)

(H) If Chambers, Liberty, and Waller Counties and their respective largest municipality submit by May 1, 2002, individually or collectively, a resolution that is approved by the commission and EPA as an alternative air control plan, then subparagraphs (F) and (G) [(F) - (G)] of this paragraph are not required. The resolution should provide a control plan that will provide modeled reductions of volatile organic compounds and nitrogen oxides equivalent to the reductions that have been modeled for these counties through the implementation of the I/M program. In determining approvability of a plan, the commission will consider federal I/M program requirements.

(5) This paragraph applies to all vehicles registered and primarily operated in the El Paso program area.

(A) All [Beginning January 1, 2003, all 1996 and newer model year] vehicles [equipped with OBD systems] shall be tested using a TSI test, except as provided by subparagraph (B) of this paragraph [EPA-approved OBD test procedures].

(B) In the event that the commission publishes notification in the *Texas Register* of a determination that contingency measures are necessary in order to maintain attainment of the ozone national ambient air quality standard in the El Paso area, the following contingency measures will become effective 12 months after the notice is published.

(i) All 1996 and newer model year vehicles equipped with OBD systems shall be tested using EPA-approved OBD test procedures.

(ii) All pre-1996 model year vehicles shall be tested using a TSI test.

(iii) All vehicle emissions inspection stations in the El Paso program area shall offer both the TSI test and the OBD test.

[(B) Beginning January 1, 2003, all pre-1996 vehicles shall be tested using a TSI test.]

[(C) Beginning January 1, 2003, all vehicle emissions inspection stations in the El Paso program area shall offer both the TSI test and OBD test.]

(b) Control requirements.

(1) No person or entity may operate, or allow the operation of, a motor vehicle registered in the DFW, EDFW, HGA, and El Paso program areas which does not comply with:

(A) (No change.)

(B) the vehicle emissions I/M [inspection and maintenance] requirements contained in this subchapter.

(2) All federal government agencies shall require a motor vehicle operated by any federal government agency employee on any property or facility under the jurisdiction of the agency and located in a program area to comply with all vehicle emissions I/M requirements contained in the revised Texas I/M SIP. Commanding officers or directors of federal facilities shall certify annually to the executive director, or appointed designee, that all subject vehicles have been tested and are in compliance with the FCAA [Federal Clean Air Act] (42 United States Code, §§7401 et seq. [et seq.]). This requirement shall not apply to visiting agency, employee, or military personnel vehicles as long as such visits do not exceed 60 calendar days per year.

(3) - (4) (No change.)

(5) A motorist whose vehicle has failed an emissions test and has not requested a challenge retest or has failed a challenge retest must have emissions-related repairs performed and must submit a properly completed vehicle repair form [Vehicle Repair Form] (VRF) in order to receive a retest. In order to receive a waiver or time extension, the motorist must submit a VRF or applicable documentation as deemed necessary by DPS.

(6) (No change.)

(7) A subject vehicle registered in a county without an I/M program which meets the applicability criteria of subsection (a) of this section and the ownership of which has changed through a retail sale as defined by Texas Motor Vehicle Commission Code, Article 4413(36), §1.03, (moved to Texas Occupations Code, §2301.002, effective June 1, 2003) is not eligible for title receipt or registration in a county with an I/M program unless proof is presented that the vehicle has passed an approved vehicle emissions inspection within 90 days before the title transfer. The evidence of proof required may be in the form of the vehicle inspection report [Vehicle Inspection Report] (VIR) or another proof of the program compliance as authorized by DPS. All 1996 and newer model year vehicles with less than 50,000 miles are exempt from the test-on-resale requirements of this paragraph.

(8) (No change.)

(c) (No change.)

(d) Prohibitions.

(1) - (2) (No change.)

(3) No organization, business, person, or other entity may represent itself as an emissions inspector certified by the DPS, unless such certification has been issued under the certification requirements and procedures contained in [the] Texas Transportation Code, §§548.401 - 548.404.

(4) No person may act as or offer to perform services as a Recognized Emissions Repair Technician of Texas, [(as designated by DPS)], without first obtaining and maintaining DPS recognition.