

The Texas Commission on Environmental Quality (commission) adopts new §§114.80 - 114.87.

Sections 114.80 - 114.82, 114.84, and 114.87 are adopted *with changes* to the proposed text as published in the July 30, 2004 issue of the *Texas Register* (29 TexReg 7259). Sections 114.83, 114.85, and 114.86 are adopted *without changes* to the proposed text and will not be republished.

Sections 114.80 - 114.87 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Texas has a history of proactive air quality initiatives. Since 1996, the Texas Legislature has provided funding to the near-nonattainment areas (i.e., San Antonio, Austin, Northeast Texas, Corpus Christi, and Victoria) for use in performing planning functions related to the reduction of ozone concentrations in each area. The areas have conducted ambient air monitoring, following EPA guidelines, that is beyond that performed by the commission, including installing and maintaining supplementary monitors. The areas developed emissions inventories and photochemical modeling episodes, and the modeling episode results have been used for air quality planning and to develop clean air action plans. In response to the promulgation of the new eight-hour ozone national ambient air quality standard, the local elected officials and air quality planners in Central Texas proposed an “accelerated attainment area” concept to the commission and to the EPA. This concept, which was designed to help voluntarily achieve the eight-hour ozone standard, eventually developed into an “early implementation plan.” Neither concept was endorsed by EPA, although in 2001, EPA proposed an “ozone flex” program to allow areas to create voluntary plans to address the one-hour ozone standard. The state was among the

first in the nation to adopt an “ozone flex agreement.” A precursor to the early action compact (EAC) program, “ozone flex agreements” were designed to help maintain compliance with the one-hour ozone standard.

The commission continued to be committed to the concept of voluntary, early action toward the eight-hour standard, however, and continued to work with EPA and members of the environmental community toward that end. In March 2002, the commission approached EPA for approval of the concept of an “early action plan” to be established through a compact between local, state, and EPA officials for areas that are in attainment (including no monitored violations) of the one-hour ozone standard, but that are approaching or monitoring exceedances of the eight-hour standard.

This concept of an early, voluntary eight-hour air quality plan, or EAC, was endorsed by EPA Region 6 in June 2002, then slightly modified and made available nationally in November 2002. The EACs include all the necessary elements of a comprehensive air quality plan, but are tailored to local needs and driven by local decisions. An EAC is designed to develop and implement control strategies, account for growth, and achieve and maintain the eight-hour ozone standard. This approach offers a more expeditious timeline to achieve emission reductions earlier than the EPA’s eight-hour implementation rulemaking, while providing “fail-safe” provisions for the area to revert to the traditional SIP process if specific milestones are not met.

The principles of a tri-party EAC, to be executed by local, state, and EPA officials are: 1) early planning, implementation, and emission reductions leading to expeditious attainment and maintenance

of the eight-hour ozone standard; 2) local control of the measures to be employed, with broad-based public input; 3) state support to ensure technical integrity of the EAC; 4) formal incorporation of the EAC into the SIP; 5) deferral of the effective date of nonattainment designation and related requirements provided all EAC terms and milestones are met; and 6) safeguards to return areas to traditional SIP requirements should EAC terms and/or milestones be unfulfilled, with appropriate credit given for emission reduction measures implemented. A key point of an EAC is the flexibility afforded areas to select emission reduction measures. Based on quality science, signatories may choose the combination of measures that meet both local needs and emission reduction targets. Each EAC recognizes that not every entity within the EAC will implement every measure. Should an EAC area miss a milestone at any time during the agreement, including attaining the eight-hour standard by 2007, the area would forfeit its participation and rejoin the eight-hour implementation process in progress. The EAC area would then be subject to the same requirements and deadlines that would have been effective had it not participated in this program, with no delays or exemptions from EPA rules.

On December 9, 2002, the cities of Floresville, New Braunfels, San Antonio, and Seguin; the counties of Bexar, Comal, Guadalupe, and Wilson; the commission; and EPA entered into an EAC for the San Antonio metropolitan statistical area (MSA). The San Antonio EAC area applies to Bexar, Comal, Guadalupe, and Wilson Counties. The EPA default assumption in defining nonattainment area boundaries is the MSA boundaries; therefore, the San Antonio EAC elected to use the MSA at the time of the agreement for the EAC and the clean air action plan. In accordance with the commitments made in the San Antonio EAC, the area prepared and submitted by March 2004 a clean air action plan that demonstrates attainment of the eight-hour standard in the area by 2007 and maintenance of the standard

until at least 2012. On April 15, 2004, EPA designated as nonattainment the San Antonio EAC area counties of Bexar, Comal, and Guadalupe based on the 2001 - 2003 design value of 89 parts per billion. Wilson County was designated attainment.

On December 18, 2002, the cities of Austin, Bastrop, Elgin, Lockhart, Luling, Round Rock, and San Marcos; the counties of Bastrop, Caldwell, Hays, Travis, and Williamson; the commission; and EPA entered into an EAC for the MSA. The Austin EAC area applies to the five counties included in the MSA, which are Bastrop, Caldwell, Hays, Travis, and Williamson Counties. The EPA default assumption in defining nonattainment area boundaries is the MSA boundaries; therefore, the Austin EAC elected to use the MSA for the EAC and the clean air action plan. In accordance with the commitments made in the Austin EAC, the area prepared and submitted in March 2004 a clean air action plan that demonstrates attainment of the eight-hour standard in the area by 2007 and maintenance of the standard until at least 2012. On April 15, 2004, EPA promulgated nonattainment designations under the eight-hour ozone standard. Based on the 2001 - 2003 design value of 84 parts per billion, the Austin EAC area was designated attainment. Monitoring data from the 2004 ozone season, which has not yet been validated, indicates that the 2002 - 2004 average will result in a design value indicative of nonattainment for the area. Once the 2004 ozone season data is validated, the monitoring data could form the basis for EPA to designate the Austin area as nonattainment. However, for areas such as the Austin EAC area, EPA has committed to not revise the April 2004 attainment designation to nonattainment if the EAC area continues to meet EAC milestones and obligations.

On December 20, 2002, the cities of Gilmer, Henderson, Kilgore, Longview, Marshall, and Tyler; the counties of Gregg, Harrison, Rusk, Smith, and Upshur; the commission; and EPA entered into an EAC for the Northeast Texas area. The Northeast Texas area applies to the five counties of Gregg, Harrison, Rusk, Smith, and Upshur. In accordance with the commitments made in the Northeast Texas area EAC, the area prepared and submitted in March 2004 a clean air action plan that demonstrates attainment of the eight-hour standard in the area by 2007 and maintenance of the standard until at least 2012. On April 15, 2004, EPA promulgated nonattainment designations under the eight-hour ozone standard. Based on the 2001 - 2003 design value of 84 parts per billion, the Northeast Texas EAC area was designated attainment.

This rulemaking implements a measure in the Austin area EAC plan only. This measure is not part of the San Antonio area EAC plan or the Northeast Texas area EAC plan; therefore, no further mention will be made of the San Antonio and Northeast Texas areas in this preamble.

Senate Bill 1159, 78th Legislature, 2003 added new Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), Subchapter H, relating to Vehicle Emission Programs in Certain Counties. This rulemaking establishes new rules relating to the implementation of the state's EAC plan authorized by Senate Bill 1159, and implements a motor vehicle inspection and maintenance (I/M) program for Travis and Williamson Counties.

The statute defines "Early Action Compact" as an agreement entered into before January 1, 2003, by the EPA, the commission, the governing body of a county that is in attainment of the one-hour national

ambient air quality standard for ozone but that has incidents approaching, or monitors incidents that exceed, the eight-hour national ambient air quality standard for ozone, and the governing body of the most populous municipality in that county that results in the submission of: 1) an early action plan to the commission that the commission finds to be adequate; and 2) a SIP revision to the EPA on or before December 31, 2004, that provides for attainment of the eight-hour national ambient air quality standard for ozone on or before December 31, 2007. "Early Action Compact," "early action plan," and "participating counties," are currently defined in Texas Health and Safety Code, §382.301.

Senate Bill 1159 authorizes an EAC county vehicle I/M program and provides that a participating county, whose early action plan contains provisions for a motor vehicle emissions I/M program and has been found adequate by the commission, may formally request the commission to adopt motor vehicle emissions I/M program requirements for the county. The request must be made by a resolution adopted by the governing body of the participating county and the governing body of the most populous municipality in the county. Following the approval of the request, the commission resolution may request the Texas Department of Public Safety (DPS) to establish an I/M program in the requesting county. An EAC I/M program may include testing exhaust emissions, examining emission control devices and systems, or alternative testing methods that meet or exceed EPA requirements. These requirements may apply to all or a subset of vehicles as described in Texas Health and Safety Code, §382.203(a), relating to gasoline-powered vehicles subject to the I/M program.

Additionally, the commission may assess fees for the vehicle inspections performed in amounts necessary to recover the costs of developing, administering, evaluating, and enforcing the program. A

portion of the fee as determined by the commission may be kept by inspection station owners, contractors, or operators to cover costs of the test and to provide a reasonable profit. EAC counties are eligible for incentives for voluntary participation established in Texas Health and Safety Code, §382.216, and are also eligible to participate in the Low Income Vehicle Repair, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP).

Overall, the legislation allows flexibility specifically for EAC counties (i.e., counties that have already entered into the EAC agreement by December 31, 2002), if they need it in the design and implementation of an I/M program. In March 2004, Travis and Williamson Counties along with their largest municipalities (Austin and Round Rock) approved the EAC I/M program being adopted.

The commission anticipates that the DPS will adopt these rules by reference once they become effective.

SECTION BY SECTION DISCUSSION

Chapter 114, Subchapter C

The commission adopts the addition of “Early Action Compact Counties” to the title of Subchapter C, in order to correctly reflect the modified content of the subchapter. The commission also adopts new Division 3, Early Action Compact Counties.

Section 114.80, Applicability

In accordance with Senate Bill 1159, the commission adopts new §114.80 that includes certain program requirements. Affected vehicles are required to comply with the air pollution emission control-related requirements included in the annual vehicle safety inspection administered by DPS.

New §114.80(a) requires participating counties that have adopted an EAC clean air action plan and the largest municipality in each county to submit to the commission a resolution requesting implementation of a vehicle I/M program in that county. New §114.80(b) specifies that this program applies to Travis and Williamson Counties. New §114.80(c) requires all gasoline-powered motor vehicles 2 - 24 years old, which are registered and primarily operated in Travis and Williamson Counties, to undergo an annual emissions inspection, beginning with the first safety inspection. Military tactical vehicles, motorcycles, diesel-powered vehicles, dual-fueled vehicles that 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 DPS shall inspect all subject vehicles. The word “Currently” was deleted from the second sentence of subsection (c), from proposal, because it was unnecessary.

Section 114.81, Vehicle Emissions Inspection Requirements

The commission adopts new §114.81 that specifies and identifies the requirements for testing methods in the affected counties. The clause “as defined in §114.2 of this title (relating to Inspection and Maintenance (I/M) Definitions)” was added, from proposal, after the term “primarily operated” to specify the meaning of the term. New paragraph (1) specifies the program start date and defines model

year vehicles to be tested using on-board diagnostic (OBD) in EAC I/M program counties utilizing EPA-approved OBD test procedures. New paragraph (2) specifies the program start date and defines model year vehicles to be tested using the two-speed idle test (TSI) in EAC I/M program counties utilizing EPA-approved TSI test procedures. New paragraph (3) specifies that all vehicle emissions testing stations must offer both OBD and TSI tests.

Section 114.82, Control Requirements

The commission adopts new §114.82 that establishes control requirements for motorists and certain federal employees. The affected vehicles are required to comply with the air pollution emission control-related requirements included in the annual vehicle safety inspection administered by DPS, the vehicle emissions I/M requirements contained in the Austin Area Early Action Compact Ozone State Implementation Plan Revision (Austin area EAC SIP), and the on-road emissions test requirements. A motorist whose vehicle has failed the emissions test requirement must pass a subsequent retest in order to receive a vehicle safety inspection sticker. Waiver provisions and time extensions defer the need for full compliance with the vehicle emissions standards of the vehicle emissions I/M program for a specified period of time after the vehicle fails an emissions test.

New §114.82(a) specifies that no person or entity may operate, or allow the operation of, a motor vehicle registered in the affected EAC counties that does not comply with all applicable air pollution emissions control-related requirements included in the annual vehicle safety inspection requirements administered by DPS.

New §114.82(b) states that 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 an affected EAC county to comply with all vehicle emissions I/M requirements contained in the Austin area EAC SIP. Additionally, subsection (b) specifies that this requirement would not apply to visiting agency, employee, or military personnel vehicles as long as such visits do not exceed 60 calendar days per year.

New §114.82(c) requires a motorist in an affected EAC county who has received a notice from an emissions inspection station that there are recall items unresolved on the motor vehicle, to furnish proof of compliance with the recall notice prior to the next vehicle emissions inspection. The motorist may present a written statement from the dealership or leasing agency indicating that emissions repairs have been completed as proof of compliance. The phrase “should furnish proof of compliance” was changed, from proposal, to “shall furnish proof of compliance” because the motorist is required to furnish proof that a recall item has been completed before the next vehicle emissions inspection.

New §114.82(d) states that a motorist whose vehicle has failed an emissions test may request a challenge retest through DPS. If the retest is conducted within 15 days of the initial inspection, the retest is free.

New §114.82(e) specifies that a motorist shall have emissions-related repairs performed if the vehicle has failed an emissions test and the motorist has not requested a challenge retest, or if the vehicle has failed a challenge retest. After the repairs, the motorist shall submit a properly completed vehicle

repair form (VRF) in order to receive a retest. Additionally, in order to receive a waiver or time extension, the motorist shall submit a VRF or applicable documentation as considered necessary by DPS. The word “deemed” was changed, from proposal, to the word “considered” to conform to the style of the *Texas Legislative Council Drafting Manual* (November 20, 2002).

New §114.82(f) requires that a motorist whose vehicle is registered in an affected EAC county, or in any county adjacent to an affected EAC county, and has failed an on-road test administered by DPS shall submit the vehicle for an out-of-cycle vehicle emissions inspection within 30 days of written notice by DPS, and satisfy all inspection, extension, or waiver requirements of the vehicle emissions I/M program contained in the Austin area EAC SIP.

New §114.82(g) requires that a vehicle registered in a county without an I/M program that meets the applicability criteria of §114.80(c), 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 an affected EAC program 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 required evidence of proof may be in the form of the vehicle inspection report (VIR) or another proof of 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 subsection. In addition, as stated in §114.80(c), military tactical vehicles, motorcycles, diesel-powered vehicles, dual-fueled vehicles that

cannot operate using gasoline, and antique vehicles registered with the Texas Department of Transportation are excluded from the test-on-resale requirement.

New §114.82(h) establishes the requirements that state, governmental, and quasi-governmental agencies that fall outside the normal registration or inspection process shall comply with all vehicle emissions I/M requirements contained in the Austin area EAC SIP for vehicles primarily operated in EAC I/M program areas.

Section 114.83, Waivers and Extensions

The commission adopts new §114.83 that states that a motorist may apply to the DPS for a waiver or an extension as specified in 37 TAC §23.93 (relating to Vehicle Emissions Inspection Requirements), which defers the need for full compliance with vehicle emissions standards for a specified period of time after failing a vehicle emissions inspection. DPS is responsible for the issuance and enforcement of waivers and extensions.

Section 114.84, Prohibitions

The commission adopts new §114.84 that specifically prohibits persons, organizations, businesses, or other entities from activities related to the misrepresentation, misuse, or mishandling of vehicle emissions testing documents or certifications. This section establishes the certification requirements for inspection stations and the requirements for repair technicians allowed in the program.

New §114.84(a) states that no person may issue or allow the issuance of a VIR, unless all applicable air pollution emissions control-related requirements of the annual vehicle safety inspection and the vehicle emissions I/M requirements are completely and properly performed in accordance with the rules and regulations adopted by DPS and the commission. Prior to taking any enforcement action regarding this provision, the commission shall consult with DPS.

New §114.84(b) specifies that no person may allow or participate in the preparation, duplication, sale, distribution, or use of false, counterfeit, or stolen safety inspection certificates, VIRs, VRFs, vehicle emissions repair documentation, or other documents that may be used to circumvent the vehicle emissions I/M requirements and procedures.

New §114.84(c) states that no organization, business, person, or other entity may represent itself as an emissions inspector certified by DPS, unless the certification has been issued under the certification requirements and procedures contained in Texas Transportation Code, §§548.401 - 548.404. The words “such certification” were changed, from proposal, to “the certification” to conform to the style of the *Texas Legislative Council Drafting Manual* (November 20, 2002).

New §114.84(d) states that 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. Requirements to become a DPS Recognized Emission Repair Technician are contained in 37 TAC §23.93.

Section 114.85, Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers

The commission adopts new §114.85 that specifies application, certification, maintenance, and service requirements for manufacturers or distributors of vehicle emissions testing equipment seeking approval of an exhaust gas analyzer or analyzer system for use in the Texas I/M program. Guidelines for approval of an exhaust gas analyzer or analyzer system for use in the Texas I/M program are contained in §114.51, Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.

Section 114.86, Low Income Repair Assistance Program (LIRAP) for Participating Early Action

Compact Counties

The commission adopts new §114.86 that specifies that affected EAC counties must meet the provisions of §114.7 (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program Definitions) and Division 2 of this subchapter (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program). Division 2 specifies the minimum requirements for a LIRAP implemented by an EAC county that implements a vehicle I/M program and has elected to implement LIRAP provisions.

New §114.86(a) establishes the applicability of EAC counties opting to implement the LIRAP as authorized by Senate Bill 1159.

New §114.86(b) states that the LIRAP will be funded from emissions test fees collected by DPS under §114.87, or other designated and available funds.

Section 114.87, Inspection and Maintenance Fees

The commission adopts new §114.87 that establishes fee schedules for EAC I/M counties.

New §114.87(a) states that the motorist shall receive one free retest should the vehicle fail the emissions inspection, provided that the motorist has the retest performed at the same station where the vehicle originally failed; the motorist submits, prior to the retest, a properly completed VRF showing that emissions-related repairs were performed; and the retest is conducted within 15 days of the initial emissions test. The second sentence of this subsection was changed, from proposal, to correctly list the three conditions for a free retest as a series of conditions. New subsection (a) also states that beginning September 1, 2005, emissions stations required to conduct a TSI and OBD test in Travis and Williamson Counties will collect \$16 per emissions test and remit \$4.50 of the test fee to the DPS (\$2.00 for LIRAP, \$2.00 to DPS for program administration, and \$.50 to the commission for program administration).

New §114.87(b) states that the per-vehicle fee and the amount the inspection station remits to the DPS for a challenge test at an inspection station designated by the DPS shall be the same as the amounts specified in §114.87(a). The challenge fee shall not be charged if the vehicle is retested within 15 days of the initial test. The term “set forth” was changed, from proposal, to the word “specified” to conform to the style of the *Texas Legislative Council Drafting Manual* (November 20, 2002).

New §114.87(c) requires that inspection stations performing out-of-cycle vehicle emissions inspections resulting from written notification that the subject vehicle failed on-road testing (remote sensing) shall

charge a motorist for an out-of-cycle emissions inspection in the amount specified in §114.87(a). If the vehicle passes the vehicle emissions inspection, the vehicle owner may request reimbursement from DPS.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action does not meet the definition of a “major environmental rule” as defined in that statute. A “major environmental rule” is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

While the I/M program, taken as a whole, is intended to protect the environment and reduce risks to human health from environmental exposure, §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.

States are primarily responsible to ensure attainment and maintenance of national ambient air quality standards once established by EPA. Under 42 United States Code (USC), §7412, states must submit,

for EPA approval, SIPs that provide for the attainment and maintenance of national ambient air quality standards through control programs directed to sources of the pollutants involved. This rulemaking action does not exceed a standard set by federal law, and does not exceed an express requirement of state law, but was developed to aid in the maintenance of federal air quality standards. This rulemaking action is intended to help keep the Austin EAC area from going into nonattainment of the eight-hour ozone standard. This rulemaking action does involve a compact, which is an agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; however, this action does not exceed the requirements of the compact. This rulemaking action helps the Austin EAC area continue to meet the milestones of the compact and demonstrate continuing attainment of the ozone standard. This rulemaking action was not developed solely under the general powers of the commission, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 and Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, 382.017, 382.019, 382.201 - 382.216, 382.301, and 382.302. Because this rulemaking action does not meet any of the four applicability requirements, §2001.0225 does not apply, and a regulatory impact analysis is not required.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action to determine whether Texas Government Code, Chapter 2007 is applicable. The commission determined that this action is reasonably being taken to fulfill an obligation mandated by federal law, and therefore is exempt under Texas Government Code, §2007.003(b)(4). States are primarily responsible to ensure attainment and maintenance of the national

ambient air quality standards once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit for EPA approval, SIPs that provide for the attainment and maintenance of the ozone standard through control programs directed to sources of ozone. Therefore, one purpose of this rulemaking action is to ensure that the Austin EAC area will continue to meet and maintain the ozone standard established under federal law. Emissions reductions obtained from this control measure will help the Austin EAC area meet its compact milestones.

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 adopted rules 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. The action significantly advances the health and safety purpose by controlling ozone levels in the Austin EAC area. Consequently, these adopted rules meet the exemption in §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). Additionally, the adopted rules would be neither a statutory nor a constitutional taking because they do not impact private real property. Specifically, the adopted rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. For all these reasons, the adopted rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

The commission determined that under 31 TAC §505.22, the rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of this rulemaking action. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

PUBLIC COMMENT

Public hearings for this rulemaking proposal were held on August 23, 2004, in Austin; on August 24, 2004, in Longview; and August 26, 2004, in San Antonio. The comment period closed on August 30, 2004. The Honorable Will Wynn, Mayor of the City of Austin, on behalf of the Central Texas Clean Air Coalition (CAC) and two individuals provided written comment regarding these rules. No persons presented oral comment regarding these rules.

RESPONSE TO COMMENTS

CAC expressed general support of the rule proposal. One individual expressed opposition to the I/M program and one individual suggested changes.

CAC expressed a belief that implementation of an I/M program in Travis and Williamson Counties is an important component in the region's air quality plan. CAC stated that emission reductions from the proposed I/M rules are included in the photochemical modeling that supports the plan and that these reductions are needed to ensure a successful plan for the region. CAC also supported the commission's conclusions that the proposed I/M rules do not exceed standards set by federal law.

The commission appreciates the support of the I/M rules for the Austin EAC area.

One individual stated that the I/M program is selective enforcement unless all cars are required to do the same inspection. The individual also stated that cars over 24 years old should not be excluded from the I/M program because they are the biggest polluters along with the diesel trucks.

Vehicles 2 - 24 years old account for the vast majority of vehicles on the road and the vehicle miles traveled, which have a direct correlation to the impact on air quality. Vehicles that are 25 years and older make up approximately 2% of the total fleet in Travis and Williamson Counties, and are driven fewer miles per year, making their overall emissions impact relatively small. Many of the vehicles in this age group are registered as classics or antique vehicles and are meticulously well maintained mechanically by the owner.

Currently, the state does not test diesel trucks; however, the Texas Emission Reduction Program is a major initiative the commission is using to reduce pollution from diesel trucks. The program provides grants to eligible projects in affected counties to offset the incremental cost associated with the activities to reduce emissions of nitrogen oxides from high-emitting mobile diesel sources in nonattainment areas and other affected counties of the state. The commission made no changes to the rules in response to these comments.

One individual questioned the need to spend \$40 on inspection stickers for less than effective smog tests on vehicles. The individual stated that having lived in the Dallas/Fort Worth area for 22 years, smog inspections had almost zero effect on the number of ozone nonattainment days.

The emission test fee will be \$16 combined with the safety inspection fee of \$12.50 for a combined fee of \$28.50 paid by motorists in Travis and Williamson Counties. From the \$16 emissions test fee, \$2.00 goes toward funding the LIRAP. The emission test fee also covers the cost of purchasing new vehicle emissions test equipment and associated expenses, including labor, training, warranties, insurance, and consumable items (such as calibration gases) used in conducting emissions tests.

Vehicle emissions, among other factors, contribute to the number of ozone nonattainment days in the Dallas/Fort Worth ozone nonattainment area. Even though vehicle manufacturers are required to install emissions controls on all vehicles, if the vehicles are not being properly maintained, the emissions control devices will be less effective. The I/M program helps to ensure

that motorists maintain the emissions systems in their vehicles. The amount of emission reduction benefits results from repairing failed vehicles, as well as vehicles being properly maintained, because they are subject to emissions testing in the Dallas/Fort Worth area. In vehicles repaired after failing an emissions test, harmful emissions have been reduced by more than 75% on average. The commission made no changes to the rules in response to these comments.

**SUBCHAPTER C: VEHICLE INSPECTION AND MAINTENANCE;
[AND] LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT,
AND ACCELERATED VEHICLE RETIREMENT PROGRAM; AND EARLY ACTION
COMPACT COUNTIES**

DIVISION 3: EARLY ACTION COMPACT COUNTIES
§§114.80 - 114.87

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §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 Texas Water Code; 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 new sections 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; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; Subchapter G, §§382.201 - 382.216, which authorize the commission 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 42 USC, §7401 *et seq.*; and Subchapter H,

§382.301 and §382.302, which authorize the commission to adopt an I/M program for participating EAC counties.

§114.80. Applicability.

(a) The requirements of this section apply only to counties that have adopted an early action compact (EAC) clean air action plan, and that along with the largest municipality in each county have submitted to the commission a resolution requesting implementation of a vehicle inspection and maintenance (I/M) program in that county.

(b) Travis and Williamson Counties are the only counties in the Austin/Round Rock metropolitan statistical area affected by subsections (a) and (c) of this section.

(c) The EAC I/M program requires all gasoline-powered motor vehicles 2 - 24 years old **that are** registered and primarily operated in Travis and Williamson Counties to undergo an annual emissions inspection, beginning with the first safety inspection. **Military** ~~Currently, military~~ tactical vehicles, motorcycles, diesel-powered vehicles, dual-fueled vehicles that 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 shall inspect all subject vehicles.

§114.81. Vehicle Emissions Inspection Requirements.

This section applies to all vehicles registered and primarily operated, as defined in §114.2 of this title (relating to Inspection and Maintenance (I/M) Definitions), in the affected early action compact (EAC) program counties, except as provided in §114.80 of this title (relating to Applicability).

(1) Beginning September 1, 2005, all 1996 and newer model year vehicles registered and primarily operated in affected EAC counties equipped with on-board diagnostic (OBD) systems must be tested using United States Environmental Protection Agency (EPA)-approved OBD test procedures.

(2) Beginning September 1, 2005, all pre-1996 model year vehicles registered and primarily operated in affected EAC counties must be tested using a two-speed idle (TSI) test, or a vehicle emissions test that meets state implementation plan emissions reduction requirements and is approved by the EPA.

(3) All vehicle emissions inspection stations in affected EAC program counties shall offer both the OBD test and the TSI test.

§114.82. Control Requirements.

(a) No person or entity may operate, or allow the operation of, a motor vehicle registered in the affected early action compact (EAC) counties that does not comply with:

(1) all applicable air pollution emissions control-related requirements included in the annual vehicle safety inspection requirements administered by the Texas Department of Public Safety (DPS), as evidenced by a current valid inspection certificate affixed to the vehicle windshield; and

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

(b) 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 an affected EAC county to comply with all vehicle emissions I/M requirements contained in the Austin Area Early Action Compact Ozone State Implementation Plan Revision. 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 Federal Clean Air Act (42 United States Code, §§7401 *et seq.*). This requirement does not apply to visiting agency, employee, or military personnel vehicles as long as such visits do not exceed 60 calendar days per year.

(c) A motorist in an affected EAC county who has received a notice from an emissions inspection station that there are unresolved recall items on the motor vehicle, shall ~~should~~ furnish proof of compliance with the recall notice prior to the next vehicle emissions inspection. The motorist may present a written statement from the dealership or leasing agency indicating that emissions repairs have been completed as proof of compliance.

(d) A motorist whose vehicle has failed an emissions test may request a challenge retest through DPS. If the retest is conducted within 15 days of the initial inspection, the cost of the retest is free.

(e) A motorist whose vehicle has failed an emissions test and has not requested a challenge retest or has failed a challenge retest shall have emissions-related repairs performed and shall submit a properly completed vehicle repair form in order to receive a retest. In order to receive a waiver or time extension, the motorist shall submit a vehicle repair form or applicable documentation as ~~deemed~~ **considered** necessary by DPS.

(f) A motorist whose vehicle is registered in an affected EAC county, or in any county adjacent to an affected EAC county, and has failed an on-road test administered by the DPS shall:

(1) submit the vehicle for an out-of-cycle vehicle emissions inspection within 30 days of written notice by the DPS; and

(2) satisfy all inspection, extension, or waiver requirements of the vehicle emissions I/M program contained in the Austin Area Early Action Compact Ozone State Implementation Plan Revision.

(g) A vehicle registered in a county without an I/M program that meets the applicability criteria of §114.80(c) of this title (relating to Applicability), 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 an affected EAC program 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 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 subsection.

(h) State, governmental, and quasi-governmental agencies that fall outside the normal registration or inspection process shall comply with all vehicle emissions I/M requirements contained in the Austin Area Early Action Compact Ozone State Implementation Plan Revision for vehicles primarily operated in I/M program areas.

§114.83. Waivers and Extensions.

A motorist may apply to the Texas Department of Public Safety for a waiver or an extension as specified in 37 TAC §23.93 (relating to Vehicle Emissions Inspection Requirements), which defers the need for full compliance with vehicle emissions standards for a specified period of time after failing a vehicle emissions inspection.

§114.84. Prohibitions.

(a) No person may issue or allow the issuance of a vehicle inspection report, as authorized by the Texas Department of Public Safety (DPS), unless all applicable air pollution emissions control-related requirements of the annual vehicle safety inspection and the vehicle emissions inspection and maintenance (I/M) requirements and procedures contained in the Austin Area Early Action Compact Ozone State Implementation Plan Revision are completely and properly performed in accordance with the rules and regulations adopted by DPS and the commission. Prior to taking any enforcement action regarding this provision, the executive director shall consult with DPS.

(b) No person may allow or participate in the preparation, duplication, sale, distribution, or use of false, counterfeit, or stolen safety inspection certificates, vehicle inspection reports, vehicle repair forms, vehicle emissions repair documentation, or other documents that may be used to circumvent the vehicle emissions I/M requirements and procedures contained in the Austin Area Early Action Compact Ozone State Implementation Plan Revision.

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

(d) 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. Requirements to become a DPS Recognized Emission Repair Technician are contained in 37 TAC §23.93 (relating to Vehicle Emissions Inspection Requirements).

§114.85. Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.

Guidelines for approval of an exhaust gas analyzer or analyzer system for use in the Texas Inspection and Maintenance program are contained in §114.51 of this title (relating to Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers).

§114.86. Low Income Repair Assistance Program (LIRAP) for Participating Early Action Compact Counties.

(a) Affected early action compact counties opting to implement a Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program shall meet the provisions contained in Subchapter C, Division 2 of this chapter (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement).

(b) The executive director shall provide funding for the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program with available funds from fees collected under §114.87 of this title (relating to Inspection and Maintenance Fees) or other designated and available funds.

§114.87. Inspection and Maintenance Fees.

(a) The following fees must be paid for an emissions inspection of a vehicle at an inspection station in an affected early action compact program county. This fee must include one free retest if the vehicle fails the emissions inspection, provided that the motorist has the retest performed at the same station where the vehicle originally failed; and the motorist submits, prior to the retest, a properly completed vehicle repair form showing that emissions-related repairs were performed; and the retest is conducted within 15 days of the initial emissions test. In Travis and Williamson Counties beginning September 1, 2005, any emissions inspection station required to conduct an emissions test in accordance with §114.80 of this title (relating to Applicability) shall collect a fee not to exceed \$16 and shall remit \$4.50 to the Texas Department of Public Safety (DPS) for each on-board diagnostic and two-speed idle test.

(b) The per-vehicle fee and the amount the inspection station remits to DPS for a challenge test, at an inspection station designated by DPS, must be the same as the amounts specified set forth in subsection (a) of this section. The challenge fee must not be charged if the vehicle is retested within 15 days of the initial test.

(c) Inspection stations performing out-of-cycle vehicle emissions inspections resulting from written notification that the subject vehicle failed on-road testing (remote sensing) shall charge a motorist for an out-of-cycle emissions inspection in the amount specified in subsection (a) of this section. If the vehicle passes the vehicle emissions inspection, the vehicle owner may request reimbursement from DPS.