

The Texas Commission on Environmental Quality (commission or TCEQ) proposes new §§114.80 - 114.87. 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 PROPOSED 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 were 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.

On December 20, 2002, the cities of Gilmer, Henderson, Kilgore, Longview, Marshall, and Tyler; the counties of Gregg, Harrison, Rusk, Smith, 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 proposed rulemaking would establish new rules relating to the implementation of the state's EAC plan authorized by Senate Bill 1159, and would implement a Texas 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 proposed.

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

## SECTION BY SECTION DISCUSSION

### *Chapter 114, Subchapter C*

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

In accordance with Senate Bill 1159, the commission proposes new §114.80, Applicability, which also 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.

The commission proposes new §114.80(a) requiring 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. The commission proposes new §114.80(b) which specifies the counties to which this rulemaking applies, namely Travis and Williamson Counties. Proposed new §114.80(c) requires all gasoline-powered motor vehicles 2 - 24 years old registered and primarily operated in Travis and Williamson Counties to undergo 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 DPS shall inspect all subject vehicles.

Proposed new §114.81, Vehicle Emissions Inspection Requirements, specifies program start dates, 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 paragraphs (1) and (2) specify the program start date and define 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; and new paragraph (3) specifies that all vehicle emissions testing stations must offer both OBD and TSI tests.

Proposed new §114.82, Control Requirements, 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.

Proposed 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 which does not comply with all applicable air

pollution emissions control-related requirements included in the annual vehicle safety inspection requirements administered by DPS.

Proposed 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, the commission proposes 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.

Proposed new §114.82(c) requires motorists in an affected EAC county who have received a notice from an emissions inspection station that there are recall items unresolved on their motor vehicle, 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.

Proposed 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.

Proposed 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 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 deemed necessary by DPS.

Proposed 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.

Proposed new §114.82(g) requires subject vehicles registered in a county without an I/M program that meets the applicability criteria of §114.80(c), 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 (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, 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.

Proposed 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.

Proposed new §114.83, Waivers and Extensions, 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. Currently, DPS is responsible for the issuance and enforcement of waivers and extensions.

Proposed new §114.84, Prohibitions, 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.

Proposed 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.

Proposed 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.

Proposed new §114.84(c) states that no organization, business, person, or other entity may represent itself as an emissions inspector certified by DPS, unless such certification has been issued under the certification requirements and procedures contained in Texas Transportation Code, §§548.401 - 548.404.

Proposed 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.

Proposed new §114.85, Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers, 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.

Proposed new §114.86, Low Income Repair Assistance Program (LIRAP) for Participating Early Action Compact Counties, 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). These provisions provide 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.

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

Proposed 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.

Proposed new §114.87, Inspection and Maintenance Fees, establishes fee schedules for EAC I/M counties.

Proposed 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 and 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. Proposed 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).

Proposed 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 set forth in §114.87(a). The challenge fee shall not be charged if the vehicle is retested within 15 days of the initial test.

Proposed new §114.87(c) requires 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.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

Senate Bill 1159, 78th Legislature, gave counties that were parties to EAC agreements the ability to request that the agency implement vehicle I/M programs in their counties. This proposed rulemaking establishes an I/M program for counties making such a request, and specifically, Travis and Williamson Counties and their largest municipalities, Austin and Round Rock, which have already requested a program. The proposed rulemaking also provides the agency and DPS with oversight and enforcement authority for I/M programs.

The proposed I/M program requires that vehicles 2 - 24 years old be tested for vehicle emissions during an annual safety inspection. Two vehicle emission tests are to be used. For 1996 and newer models, the OBD test is required. For 1995 and older models, the TSI test is required. Counties with an I/M program can also elect to participate in the LIRAP. Under these proposed rules, inspection stickers could not be issued unless both safety inspections and emission tests are performed on qualifying vehicles in the counties where an I/M program has been established.

#### *Estimated Revenue*

This proposed rulemaking will significantly increase revenues for TCEQ and DPS. Revenue is expected to increase because of a new, combined safety/emissions inspection sticker and a fee to cover the costs of the LIRAP.

The proposed emission/safety sticker will generate an increase of approximately \$4.50 in revenue per sticker issued. Of this amount, the DPS would receive a sticker revenue increase of \$2.00 per sticker.

This revenue would be used by DPS to cover the following: cost of training technicians on the I/M

program; staffing a challenge, waiver, and referee station; and implementing a gross polluter identifying or remote sensing program. TCEQ will receive \$2.50 in revenue to cover the costs of developing test and equipment specifications, developing a testing program, providing assistance through a re-registration denial hotline, and managing and funding the LIRAP. The LIRAP would receive \$2.00 from each sticker for funding, and \$.50 would go towards the development of the emission test program.

Staff estimates that the emissions program will be implemented for four months during the first year of implementation. During the first year of implementation, the number of government cars out of an estimated current pool of 2,514 in Travis and Williamson Counties that staff expects to be inspected totals 838. Out of an estimated current pool of private vehicles totaling 736,965, staff anticipates that 208,807 will be inspected the first year. Staff anticipates a 3% annual increase over the current pool of government and private vehicles subject to emission testing each year the emissions program is in effect.

Revenue appropriated to DPS is estimated to be as much as \$419,290 in the first year of implementation and increase to as much as \$1.4 million in the fifth year of implementation. Total DPS revenue for the first five years the proposed rules are implemented is estimated to be as much as \$5.8 million. Revenue appropriated to TCEQ for administration of the emission program is estimated to be as much as \$104,822 in the first year of implementation and growing to be as much as \$353,936 in the fifth year. The estimated total over the first five years is estimated to be \$1.5 million. Revenue appropriated to TCEQ for LIRAP administration is estimated to be \$419,290 in the first year and growing to be as

much as \$1.4 million in the fifth year. The estimated five year total revenue for LIRAP is \$5.8 million. Over the first five years of implementation, combined estimated revenue for both agencies could be as much as \$13 million.

#### *Cost Factors for Governmental Entities*

Under this proposed rulemaking, federal, state, and local governments will be fiscally impacted if they have vehicles requiring emission testing under an I/M program. There are an estimated 41 governmental entities that currently perform their own vehicle fleet safety inspections. Currently, there is an estimated pool of 2,514 government vehicles in Travis and Williamson Counties. Of this pool, 838 vehicles are expected to undergo emission inspections in the first year of the proposed program implementation. In the second year of implementation, the pool of government vehicles is expected to increase over the current pool by 3% to an estimated total of 2,589 vehicles. Each subsequent year, staff assumes an annual 3% growth rate in the pool of government vehicles.

Governments will have two choices under the I/M program. If they currently inspect their vehicle fleet, they may continue to do so. Governments can also choose to have their fleets undergo I/M inspections at privately owned stations which DPS has authorized.

#### *Costs if Governments Perform I/M Inspections on their Fleets*

If governments choose to perform their own I/M inspections, they will incur costs to purchase needed equipment, costs to purchase inspection stickers, costs to repair vehicles failing I/M testing, costs to install dedicated phone lines to transmit I/M data, and data transmission costs per inspection. If all 41

governmental entities currently performing inspections elect to perform I/M inspections, they will have to purchase analyzers totaling \$15,000 per machine. This one-time cost totals \$615,000 for all 41 entities. The cost increase to purchase I/M stickers is \$4.50 per sticker. During the first year of implementation, this cost could total as much as \$3,771. As the vehicle pool increases each year, costs are expected to increase, and in the fifth year of implementation, they could total as much as \$12,733. The estimated failure rate for I/M inspections is estimated to be 10%. Repair costs average \$480 per vehicle. In the first year of implementation, this could cost governments as much as \$40,224. Again, as the vehicle pool increases each year, repair costs would also increase. In the fifth year of implementation, repair costs could total as much as \$135,817. Total repair costs over a five-year period are estimated to be \$560,216. To transmit data, governments will have to pay an estimated annual cost of \$360 for a dedicated phone line. The transmission costs per inspection are estimated to total \$.78. For the 41 governments, phone line costs would total an estimated \$14,760. Transmission costs would increase as the vehicle pool increases and are estimated to range from \$654 in the first year to \$2,207 in the fifth year. The total cost over the five-year period for data transmission is estimated at \$82,904. Over the first five years the proposed rules are implemented, governments should expect to see an estimated increase in their inspection costs total as much as \$1.3 million.

*Estimated Costs to Governments for I/M Inspections Performed by Others*

If governments in Travis and Williamson Counties elect to have I/M inspections on their vehicle fleets performed by others, they would pay an increased sticker cost of \$16 per sticker as well as repair costs for vehicles failing the I/M inspection the first time. Under this option, governments could pay as much as \$13,408 in increased sticker costs and \$40,224 in repair costs the first year of program

implementation. In the fifth year of implementation, increased sticker costs could total \$45,272 and repair costs could total an estimated \$135,817 if vehicle fleets increase as anticipated. Over a five-year period, these costs could total as much as \$746,955.

#### PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be a reduction in Travis and Williamson Counties of pollutants that contribute to ozone formation.

The public is affected in several ways by this proposed rulemaking. Individuals and organizations that own vehicles subject to I/M testing will have to pay more for I/M inspection stickers. I/M inspection stations will have to incur the same costs as governments for equipment, repairs, and data transmission lines. However, inspection stations performing I/M inspections for other entities would earn \$11.50 in revenue per sticker. This would help mitigate the costs incurred to perform I/M inspections.

#### *Estimated I/M Inspection Costs*

Staff estimates that currently 51 entities perform inspections on their vehicle fleets and 299 privately owned stations perform inspections for the general public. Records from the Texas Department of Transportation (TxDOT) indicate that a public vehicle pool of 736,965 vehicles in Travis and Williamson Counties could be subject to I/M inspections under the proposed rules. During the first year of implementation, the program is anticipated to be implemented only four months. When testing I/M programs in Dallas and Houston, usually about 85% of the vehicles identified by TxDOT were

tested. Therefore, the first year of implementation, the number of private vehicles in the program is estimated to be 208,806. Assuming an annual 3% increase in the pool, vehicles tested could range from 645,213 in the second year to 705,042 in the fifth year if the proposed rules are implemented.

To be able to perform I/M inspections, authorized inspection stations would have to purchase analyzers estimated to cost \$15,000 each. This one-time cost could total \$765,000 for entities performing I/M inspections for their own fleets. If the 299 stations currently performing public inspections follow the pattern expected and one-half implement an I/M program in year one and another 30% implement a program in year two, costs to purchase analyzers could be as much as \$2.2 million in year one and \$1.3 million in year two. In addition, a dedicated phone line would have to be purchased at an estimated annual cost of \$360 and data would have to be transmitted over the lines for each inspection at an estimated \$.78. Data transmission costs could range from \$163,229 in year one to \$550,292 in year five. An estimated 10% of vehicles are expected to require repair at an estimated cost of \$480 per vehicle after I/M inspection. In year one, this cost could total as much as an estimated \$10 million. In year five, repair costs could total as much as an estimated \$33.8 million. If the private vehicle fleet grows at an annual 3% rate as projected, total repair costs over a five-year period would be an estimated \$139.5 million. Entities that perform I/M inspections will see an increase in sticker cost of \$16 per sticker. Increased sticker costs could range from \$3.3 million in year one to \$11.2 million in year five. A total estimated five-year increased sticker cost could be as much as \$46.5 million. (If inspections are performed by those who own a vehicle fleet, the increase sticker cost would be only \$4.50. However, the number of vehicles that would be inspected in this manner is unknown and this cost differential cannot be estimated. For purposes of this analysis, the cost of \$16 is used.) Total

costs to implement an I/M program over a five-year period is estimated to be as much as \$192.7 million for Travis and Williamson Counties.

If an estimated 80% of the 299 stations performing inspections implement an I/M program and inspect the projected number of vehicles, they will see a revenue increase of \$11.50 per sticker. If I/M inspections are performed on both the government and private vehicle pools, total revenue could range from \$2.4 million in year one to \$8.1 million in year five, producing a five-year revenue stream of approximately \$33.6 million. Their costs would consist of equipment costs and data transmission costs. These are estimated to be \$3.5 million and \$2.2 million over a five-year period, leaving a total net revenue stream of \$27.9 million.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

A small or micro-business is defined as having fewer than 100 or 20 employees respectively. No adverse fiscal implications are anticipated for small or micro-businesses. It is not anticipated that large vehicle fleets would be owned by small or micro-businesses. If vehicles are owned by a small or micro-business, the same costs that governments and larger entities pay to obtain an I/M inspection sticker would apply. If a small or micro-business performs I/M inspections, it is anticipated that revenue would be enough to make this program profitable if the business chooses to provide this service.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the 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 for ensuring attainment and maintenance of national ambient air quality standards once established by EPA. Under 42 United States Code (USC), §7412, states must submit to EPA for 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 proposed rulemaking 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 proposal is intended to help keep the Austin EAC area from going into nonattainment of the eight-hour ozone standard. This proposed rulemaking 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 proposal does not exceed the requirements of the compact. This proposed rulemaking helps the Austin EAC area continue to meet the milestones of the compact and demonstrate continuing attainment of the ozone standard. This proposed rulemaking 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 does not meet any of the four applicability requirements, §2001.0225 does not apply, and a regulatory impact analysis is not required. The commission invites public comment on the draft regulatory impact analysis determination.

## TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rulemaking action and performed an analysis of whether Texas Government Code, Chapter 2007 is applicable. The analysis indicates 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 for ensuring 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 and thus defer a nonattainment designation if future monitoring shows nonattainment of the ozone standard.

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 proposed 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 proposed rules meet the exemption in §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and

(13). Additionally, the proposed rules would be neither a statutory nor a constitutional taking because they do not impact private real property. Specifically, the proposed rules do not affect private property in a manner which 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 proposed rules do not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking action and found that the proposal is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §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 proposed rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of the proposed rulemaking. 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. Interested persons may submit comments regarding the consistency of the proposed rulemaking with the CMP during the public comment period.

#### ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking have been scheduled for the following times and locations:

August 23, 2004, 2:00 p.m., Texas Commission on Environmental Quality, 12100 North I-35, Building E, Room 254S, Austin; August 24, 2004, 10:00 a.m., Longview City Hall Council Chambers, 300 West Cotton Street, Longview; and August 26, 2004, 10:00 a.m. and 7:00 p.m., Alamo Area Council of Governments Board Room, 8700 Tesoro Drive, Suite 100, San Antonio. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes before each hearing and will answer questions before and after each hearing.

Persons planning to attend the hearing who have special communication or other accommodation needs, 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 Lola Brown, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to [eacsip@tceq.state.tx.us](mailto:eacsip@tceq.state.tx.us). All comments should reference Rule Project Number 2004-071-114-AI. Comments must be received by 5:00 p.m., August 30, 2004.

For further information, please contact Bob Wierzowiecki of the Technical Analysis Division at (512) 239-1769 or Ray Austin of the Policy and Regulations Division, at (512) 239-6814.

**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 proposed 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 proposed 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.

The proposed new sections implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.019, 382.201 - 382.216, 382.301, and 382.302.

**§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 registered and primarily operated in Travis and Williamson Counties to undergo an annual emissions inspection, beginning with the first safety inspection. 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 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, 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 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 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 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 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.

