

The Texas Natural Resource Conservation Commission (commission) proposes new §114.322, Control Requirements for Sulfur; §114.325, Approved Sulfur Test Methods; §114.326, Testing and Recordkeeping Requirements; §114.327, Exemptions; and §114.329, Affected Counties and Compliance Dates. The commission proposes these new sections in Chapter 114, Control of Air Pollution from Motor Vehicles; Subchapter H, Low Emission Fuels; new Division 3, Low Sulfur Gasoline; and revisions to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA), Beaumont/Port Arthur (BPA), and Dallas/Fort Worth (DFW) ozone nonattainment areas; and the 95-county central and eastern Texas region.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides (NO_x) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the NO_x waiver were

based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid

a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to the EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and NO_x reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999

for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VI f); identification of the level of reductions of VOC and NO_x necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity;

identification of specific source categories which, if controlled, could result in sufficient VOC and/or NO_x reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of NO_x reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of NO_x reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid-course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in NO_x emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of NO_x reductions is necessary for an approvable attainment demonstration.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains Post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce NO_x more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the Low Sulfur Gasoline (LSG) program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA, BPA, and DFW ozone nonattainment areas, as well as the 95-county central and eastern Texas area. An LSG program also should contribute to a successful demonstration of transportation conformity in the HGA, BPA, and DFW nonattainment areas.

These proposed rules are one element of the control strategy for the HGA Post-1999 ROP/Attainment Demonstration SIP. The purpose of these proposed rules is to establish a regional LSG air pollution control strategy in the counties located within the DFW, BPA, and HGA ozone nonattainment areas, and in an additional 95 central and eastern Texas counties, to reduce NO_x necessary for the counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the one-hour ozone NAAQS.

These proposed rules will implement a regional LSG program requiring gasoline used for both on-road and off-road applications in the DFW, BPA, and HGA ozone nonattainment areas and the 95-county central and eastern Texas region to meet the LSG standards. The use of LSG will lower the emissions of NO_x and other pollutants from fuel combustion. Because NO_x is a precursor to ground-level ozone formation, reduced NO_x emissions will result in ground-level ozone reductions. To comply with the state LSG regulations, gasoline producers and importers must ensure that gasoline distributed to areas required to participate in the LSG program meets the specifications stated in these proposed rules. The proposed rules require that beginning May 1, 2004 all gasoline produced for delivery and ultimate sale to the consumer in the affected area does not exceed 15 ppm sulfur.

The proposed new LSG rules will require LSG for the eight HGA ozone nonattainment area counties, which include Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; the four DFW ozone nonattainment area counties, which include Collin, Dallas, Denton, and Tarrant Counties; the three BPA ozone nonattainment area counties, which include Hardin, Jefferson, and Hardin Counties; and the 95 central and eastern Texas region counties which include Anderson,

Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The commission developed an LSG ozone control strategy which requires gasoline content limits more restrictive than federal gasoline regulations. Currently, the HGA and DFW ozone nonattainment areas are required to use federal reformulated gasoline (RFG). In these areas, federal rules prohibit the sale of gasoline which is not certified by the EPA as federal RFG. Consequently, gasoline in these areas will have to continue to meet the federal RFG requirements in addition to the proposed LSG rules. In addition to the federal RFG regulations, the current federal regulations governing gasoline quality in Title 40 Code of Federal Regulations (40 CFR) Part 80, Regulation of Fuels and Fuel Additives; Subpart H, Gasoline Sulfur; §80.195, What Are the Gasoline Sulfur Standards for Refiners and Importers?; establish limits for sulfur content in gasoline used in motor vehicle applications. These federal regulations limit sulfur in gasoline, beginning January 1, 2006, to a 30 ppm average and an 80 ppm cap.

The commission is concurrently submitting, as part of the SIP and with this proposed rulemaking, a waiver request in accordance with the 42 USC, §7545(c)(4)(C), to implement this proposed LSG rule which is more stringent than the federal sulfur control rules. This proposed waiver and SIP submittal is available to the public by contacting Heather Evans at (512) 239-1970.

Modeling assessing the benefits of this NO_x emission reduction strategy demonstrated that significant emission reductions could be achieved from using an LSG as specified by the commission requirements. By the year 2007, the LSG program will reduce NO_x emissions in the HGA ozone nonattainment area by 1.15 tpd, and in all affected areas by 4.98 tpd. The commission anticipates that production costs will increase from \$.03 to \$.07 per gallon of gasoline to comply with the rules.

The commission solicits comment regarding the possible benefits of controlling components of gasoline other than sulfur by which equivalent emission reductions could be achieved as a possible alternative to the controls on sulfur as described in this proposal.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

The proposed new §114.322 establishes the control requirement that the sulfur content in gasoline shall not exceed 15 ppm sulfur in the affected areas. This 15 ppm state sulfur cap is more stringent than the federal 30 ppm average and 80 ppm cap.

The proposed new §114.325 establishes the American Society for Testing and Materials (ASTM) Test Method D2622-98 (Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry), dated 1998, or ASTM D5453-00 (Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Motor Fuels and Oils by Ultraviolet Fluorescence), dated 2000, as the approved test methods to determine sulfur content in gasoline.

The proposed new §114.326 establishes the testing and recordkeeping requirements for the LSG program. These proposed requirements stipulate that producers and importers are required to test each batch of fuel for its sulfur content, maintain records of this testing for two years, and include a certification statement on the product transfer document that certifies that the fuel being transferred into the affected areas meets the 15 ppm sulfur standard.

The proposed new §114.327 provides exemptions to the LSG program regulations. These exemptions stipulate that gasoline solely intended for use as aviation gasoline is exempt from the proposed sulfur standard, the owner or operator of a retail fuel dispensing facility is exempt from the proposed testing requirements, and gasoline that does not meet the proposed sulfur standard is not prohibited from being

transferred, placed, stored, and/or held within the affected counties so long as it is not ultimately used to power a gasoline-fueled spark-ignition engine in the affected counties.

The proposed new §114.329 establishes the compliance date and coverage area that is required to comply with the requirements of the LSG program. This section lists the affected counties for the DFW, BPA, and HGA ozone nonattainment areas, and the counties included in the 95-county region.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed new sections are in effect, the commission anticipates no significant fiscal implications for any single unit of state and local government as a result of administration or enforcement of the proposed new sections. The commission estimates the total annual fuel related fiscal impact to state and local governments in the counties affected by the new sections to be approximately \$20 to \$47 per vehicle per year following implementation of LSG fuel standards on May 1, 2004.

The proposed new sections will require LSG fuel for on-road and non-road use within the eight-county HGA, the three-county BPA, and the four-county DFW ozone nonattainment areas, along with 95 additional counties in the central and eastern Texas region. The HGA ozone nonattainment area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; the BPA nonattainment area consists of Hardin, Jefferson, and Orange Counties; the DFW ozone nonattainment area consists of Collin, Dallas, Denton, and Tarrant Counties; and the 95 additional central and eastern Texas counties include Anderson, Angelina, Aransas, Atascosa, Austin,

Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somerville, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The proposed new sections are one element of the proposed HGA Post-1999 ROP/Attainment Demonstration SIP. A SIP is a plan developed for any region where existing (measured and/or estimated) ambient pollutant levels exceed the level specified in a national standard. The plan establishes a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards.

In order to comply with the proposed new sections, beginning May 1, 2004, gasoline fuel producers and importers must ensure that all gasoline distributed to affected areas shall not exceed 15 ppm sulfur.

The EPA analysis *Regulatory Impact Analysis: Control of Air Pollution from Motor Vehicles: Tier 2 Vehicle Emissions Standards and Gas Sulfur Control Requirements* and the responses to public comment from the California Air Resource Board (CARB) regarding adoption of federal Phase 3 gasoline

standards, indicates that the anticipated cost of producing gasoline to the May 1, 2004 standard will range from \$.03 to \$.07 per gallon. The commission estimates that the increased production costs will raise the cost for this fuel at the pump by \$.03 to \$.07 per gallon. In addition, the proposed new sections will require gasoline producers and importers who provide fuel to the affected areas to test their fuel for compliance with the standard, maintain records for two years, and include certification statements regarding sulfur content compliance on product transfer documents.

The proposed rules contain several exemptions to the LSG program regulations, which are: gasoline solely intended for use as aviation gasoline is exempt from the proposed LSG standards; the owner or operator of a retail fuel dispensing facility is exempt from the proposed testing requirements; and gasoline that does not meet the proposed LSG standard is not prohibited from being transferred, placed, stored, or held within the affected counties as long as it is not ultimately used to power a gasoline fueled spark-ignition engine in the affected counties.

The following analysis in this fiscal note only considers on-road gasoline powered vehicles. Vehicle counts for non-road gasoline powered vehicles is not available.

Units of state and local government that own or operate gasoline powered vehicles within the affected counties will likely be required to pay an additional \$.03 to \$.07 per gallon for gasoline that meets the proposed LSG requirements following the May 1, 2004 deadline. Approximately 48,992 state and local government vehicles within the affected areas consumed approximately 33 million gallons of gasoline in 1999. Based on a 1.5% growth rate, an estimated 52,778 gasoline fueled vehicles would use

approximately 36 million gallons of fuel in 2004. The total annual fuel related fiscal impact to units of state and local governments in 2004 would range from approximately \$705,000 to \$1.6 million or approximately \$13 to \$31 per vehicle for 2004 (May - December 2004) and then approximately \$1 million to \$2.5 million or approximately \$20 to \$47 per year per vehicle afterward.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for the first five years the proposed new sections are in effect, the public benefit anticipated from enforcement of and compliance with the proposed new sections will be the potential reduction of on-road and off-road mobile source emissions, contribution toward demonstration of attainment and maintenance with the ozone NAAQS for the HGA, BPA, and DFW ozone nonattainment areas, and potentially improved air quality for all counties affected by the new sections.

The commission does not anticipate significant fiscal implications for any single owner or operator of gasoline fueled vehicles as a result of administration or enforcement of the proposed new sections. The commission anticipates that gasoline producers that supply fuel to the affected counties will incur additional costs to produce fuel that meets the proposed LSG standards. The cost of producing this LSG fuel is estimated to be approximately \$.03 to \$.07 per gallon more than for current gasoline. The commission estimates that gasoline prices will increase by an additional \$.03 to \$.07 per gallon following implementation of the proposed LSG standards.

The commission estimates that approximately 11,357,736 privately owned and operated gasoline fueled vehicles in the affected counties consumed approximately 7.6 billion gallons of gasoline in 1999. Based on a 1.5% growth rate, an estimated 12,235,507 privately owned and operated gasoline fueled vehicles would use approximately eight billion gallons of gasoline in 2004. The total annual fuel related fiscal impact to units of individuals and businesses in the affected areas in 2004 would range from approximately \$163 million to \$380 million or approximately \$13 to \$31 per vehicle for 2004 (May - December 2004) and then approximately \$247 million to \$578 million or approximately \$20 to \$47 per year per vehicle afterward.

The commission anticipates significant increases to capital and operating costs in order for refineries to meet the proposed May 1, 2004 standard. An estimated cost to refineries to decrease sulfur content in gasoline to 15 ppm is not available; however, an EPA cost study that shows the costs to refine gasoline to 30 ppm provides an indication of the overall cost to refineries to meet the May 1, 2004 15 ppm standard. According to EPA analysis found in the *Regulatory Impact Analysis: Control of Air Pollution from Motor Vehicles: Tier 2 Vehicle Emissions Standards and Gas Sulfur Control Requirements*, the estimated capital costs for a typical refinery to decrease the sulfur content in gasoline to 30 ppm would be approximately \$44 million and the average annual operating cost would be approximately \$16 million. The commission anticipates no significant additional costs for gasoline producers and importers associated with required records retention and certification statements. Likewise, the commission anticipates no additional costs to producers for testing LSG gasoline, because producers are already testing their fuel for compliance with federal regulations and industry standards.

SMALL AND MICRO-BUSINESS ASSESSMENT

The commission does not anticipate fiscal implications which have an adverse fiscal impact on any small business or micro-business as a result of administration or enforcement of the proposed new sections. There are no known gasoline producers or importers that would be considered small or micro-businesses. However, the commission anticipates that many independent gasoline retailers within the affected counties are small or micro-businesses. Therefore, production costs of approximately \$.03 to \$.07 per gallon are not anticipated to affect small or micro-business except to pass the increased costs of production through to consumers. The fiscal implications for small or micro-businesses within the affected areas would include additional costs of approximately \$.03 to \$.07 per gallon for LSG beginning May 1, 2004. The total annual fuel-related costs would depend on the amount of fuel used by the business. On an average basis, the annual fuel-related cost to small or micro-businesses within the affected areas would be approximately \$20 to \$47 per vehicle per year.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is subject to §2001.0225 because it meets the definition of a “major environmental rule” as defined in that statute. “Major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The new sections to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to

ozone and could affect in a material way, a sector of the economy, competition, and the environment due to its impact on the fuel manufacturing and distribution network of the state. The new sections are intended to implement a LSG air pollution control program as part of the strategy to reduce NO_x emissions necessary for the counties included in the eight-county HGA, three-county BPA, and four-county DFW ozone nonattainment areas to be able to demonstrate attainment and maintenance of the ozone NAAQS. The proposed new sections are one element of the proposed HGA Post-1999 ROP/Attainment Demonstration SIP. Although the proposed new sections meet the definition of a “major environmental rule” as defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This proposed rulemaking action does not meet any of these four applicability requirements.

Specifically, the LSG requirements within these proposed rules were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement.

Provisions of 42 USC, §7410, require states to adopt a SIP which provides for “implementation, maintenance, and enforcement” of the primary NAAQS in each air quality control region of the state.

While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include “enforceable emission limitations and other control measures, means or

techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter,” (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded “based on an

assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application.” The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that NO_x emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This

rulemaking is intended to obtain NO_x emission reductions which will result in reductions in ozone formation in the HGA, BPA, and DFW ozone nonattainment areas and the 95-county central and eastern Texas region, and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, 382.037(g), and 382.039.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rulemaking is to establish an LSG program which will act as an air pollution control strategy to reduce NO_x emissions necessary for the eight-county HGA and the four-county DFW ozone nonattainment areas, to be able to demonstrate attainment and maintenance of the ozone NAAQS. Promulgation and enforcement of the proposed rules may possibly burden private, real property because this proposed rulemaking action may result in investment in the permanent installation of new refinery processing equipment. 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 partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within this proposal have been developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the proposed rules is to implement cleaner burning gasoline which is necessary for the HGA and DFW ozone nonattainment areas to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, these proposed rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the 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(1)). No new sources of air contaminants will be authorized and NO_x air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations:

September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High

School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

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

SUBMITTAL OF COMMENTS

Written comments may be submitted to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, faxed to (512) 239-4808, or emailed to siprules@tnrcc.state.tx.us. All comments should reference Rule Log Number 2000-011F-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Morris Brown at (512) 239-1438 or Alan Henderson at (512) 219-1510.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under Texas Health and Safety Code, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, 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; §382.037(g), which authorizes the commission to regulate fuel content if it is demonstrated to be necessary for attainment of the NAAQS; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

SUBCHAPTER H: LOW EMISSION FUELS

DIVISION 3: LOW SULFUR GASOLINE

§§114.322, 114.325 - 114.327, 114.329

§114.322. Control Requirements for Sulfur.

No person shall sell, offer for sale, supply, or offer for supply, dispense, transfer, allow the transfer, place, store, or hold in any stationary tank, reservoir, or other container any gasoline containing more than 15 parts per million sulfur, on a per gallon basis, which may ultimately be used to power a gasoline-fueled spark-ignition engine in the counties listed in §114.329 of this title (relating to Affected Counties and Compliance Dates).

§114.325. Approved Sulfur Test Methods.

(a) Compliance with the sulfur content requirements under §114.322 of this title (relating to Control Requirements for Sulfur) shall be determined by applying American Society for Testing and Materials (ASTM) Test Method D2622-98 (Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry), dated 1998, or ASTM D5453-00 (Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Motor Fuels and Oils by Ultraviolet Fluorescence), dated 2000.

(b) Alternatives to the test methods prescribed in subsection (a) of this section may be used if validated by 40 Code of Federal Regulations 63, Appendix A, Test Method 301 (effective December 29, 1992). For the purposes of this paragraph, substitute "executive director" each place that Test Method 301 references "administrator."

§114.326. Testing and Recordkeeping Requirements.

(a) Every producer or importer that has elected to sell, offer for sale, supply, or offer for supply gasoline in counties listed in §114.329 of this title (relating to Affected Counties and Compliance Dates) is subject to the requirements of this section.

(1) Each producer or importer shall sample and test for the sulfur content in each final blend of gasoline which the producer has produced or imported, by collecting and analyzing a representative sample of gasoline taken from the final blend, using the methodologies specified in §114.325 of this title (relating to Approved Sulfur Test Methods). If a producer or importer blends gasoline components directly to pipelines, tank ships, railway tank cars, or trucks and trailers, the loading(s) shall be sampled and tested for the sulfur content by the producer, importer, or authorized contractor. The producer or importer shall maintain, for two years from the date of each sampling, records showing the sample date, identity of blend sampled, container or other vessel sampled, final blend volume, and sulfur content. All gasoline produced or imported by the producer or importer and not tested for sulfur by the producer or importer as required by this section shall be deemed to have a

sulfur content exceeding the requirements in §114.322 of this title (relating to Control Requirements for Sulfur), unless the producer or importer demonstrates that the gasoline meets those requirements.

(2) A producer or importer shall provide to the executive director any records required to be maintained by the producer or importer in accordance with this section within five days of a written request from the executive director if the request is received before expiration of the period during which the records are required to be maintained. Whenever a producer or importer fails to provide records regarding a final blend of gasoline in accordance with the requirements of this section, the final blend of gasoline shall be presumed to have been sold or supplied by the producer or importer in violation of the sulfur content requirements specified in §114.322 of this title.

(b) For each final blend which is sold or supplied by a producer or importer from their production or import facility, and which contains volumes of gasoline that they have produced or imported and volumes that they neither produced nor imported, the producer or importer shall establish, maintain, and retain adequately organized records containing the following information:

(1) the volume of gasoline in the final blend that was not produced or imported by the producer or importer, the identity of the person(s) from whom such gasoline was acquired, the date(s) on which it was acquired, and the invoice representing the acquisition(s);

(2) the sulfur content of the volume of gasoline in the final blend that was not produced or imported by the producer or importer, determined either by:

(A) sampling and testing, by the producer or importer, of the acquired gasoline represented in the final blend; or

(B) written sampling results and gasoline testing supplied by the person(s) from whom the gasoline was acquired; and

(3) a producer or importer subject to subsection (b) of this section shall establish such records by the time the final blend triggering the requirements is sold or supplied from the production or import facility, and shall retain such records for two years from such date. During the period of required retention, the producer or importer shall make any of the records available to the executive director upon request.

(c) All parties in the distribution chain (producers, importers, terminals, pipelines, truckers, rail carriers, and retail fuel dispensing outlets) subject to the provisions of §114.322 of this title must maintain copies or records of product transfer documents for a minimum of two years, and shall upon request, make such copies or records available to representatives of the commission, the EPA, or local air pollution agency having jurisdiction in the area. The product transfer documents must contain, at a minimum, the following information:

(1) the date of transfer;

(2) the name and address of the transferor;

(3) the name and address of the transferee;

(4) the volume of gasoline being transferred;

(5) the location of the gasoline at the time of transfer; and

(6) the following certification statement: "This product complies with the control requirements for sulfur specified in Title 30 Texas Administrative Code §114.322, and may be used in any Texas county requiring gasoline with a maximum sulfur content of 15 parts per million."

§114.327. Exemptions.

(a) The following exemptions apply in the counties listed in §114.329 of this title (relating to Affected Counties and Compliance Dates).

(1) All gasoline solely intended for use as aviation gasoline is exempt from §114.322 and §114.326 of this title (relating to Control Requirements for Sulfur; and Testing and Recordkeeping Requirements).

(2) The owner or operator of a retail fuel dispensing facility is exempt from all requirements of §114.326 of this title except §114.326(c) of this title.

(b) Gasoline that does not meet the requirements of §114.322 of this title is not prohibited from being transferred, placed, stored, and/or held within the counties listed in §114.329 of this title so long as it is not ultimately used to power a gasoline-fueled spark-ignition engine in the affected counties.

§114.329. Affected Counties and Compliance Dates.

Beginning May 1, 2004, all affected persons in the counties listed in paragraphs (1) - (4) of this section shall be in compliance with §§114.322, 114.325 - 114.327 of this title (relating to Control Requirements for Sulfur; Approved Sulfur Test Methods; Testing and Recordkeeping Requirements; and Exemptions):

(1) Collin, Dallas, Denton, and Tarrant;

(2) Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller;

(3) Hardin, Jefferson, and Orange; and

(4) Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston,

Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak,
Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces,
Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San
Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt,
Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.