

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §114.307, Exemptions, and §114.309, Affected Counties. The commission adopts these amendments to Chapter 114, Control of Air Pollution from Motor Vehicles; Subchapter H, Low Emission Fuels; Division 1, Gasoline Volatility; and corresponding revisions to the state implementation plan (SIP). The commission adopts these amendments to allow research laboratories and academic institutions to conduct research using gasoline with a higher Reid vapor pressure (RVP), and to provide flexibility by more closely matching the exemptions established for the gasoline RVP rules to those exemptions allowed in the diesel fuel rules as specified in §114.317, Exemptions to Low Emission Diesel Requirements. The amendments to the RVP rules are not expected to have a significant impact on air quality. Section 114.307 is adopted *with changes* to the proposed text as published in the June 22, 2001 issue of the *Texas Register* (26 TexReg 4586). Section 114.309 is adopted *without changes* to the proposed text and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The regional low RVP gasoline program as established through the adoption of §114.301, Control Requirements for Reid Vapor Pressure; §114.304, Registration of Gasoline Producers and Importers; §114.305, Approved Test Methods; §114.306, Recordkeeping, Reporting, and Certification Requirements; and §114.309 in April 5, 2000, requires all conventional gasoline in the 95-county central and eastern Texas region to be limited to a maximum RVP of 7.8 pounds per square inch (psi) from May 1 through October 1 of each year, beginning May 1, 2000.

The 95-county central and eastern Texas region affected by these rules consists of 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 research laboratories and academic institutions located within the RVP control areas are concerned that the current language in §114.301 does not allow them to conduct research and test fuels, additives, and/or motor vehicles using fuels with an RVP higher than allowed during the ozone control period. The ozone control period normally extends from May 1 through October 31 of each year or for about six months. This places an undue hardship on those institutions that need to test with the higher RVP fuels during the ozone control period. Also, test fuels are sometimes required to be stored in quantities greater than the currently exempted 500 gallons. The adopted amendments to §114.307 will clarify that these affected facilities are exempt from the provisions.

Other amendments to §114.307 include an exemption for gasoline used for competition racing purposes; and an exemption for retail dispensing outlets from all monitoring, recordkeeping, and reporting requirements, except to maintain product transfer documents. Finally, the amendments will exempt gasoline that does not meet the RVP requirements, to be stored or transferred in the affected counties as long as it is not ultimately used in the affected counties to power a gasoline-powered, spark-ignition engine in a motor vehicle or non-road equipment. This storage and transfer exemption does not apply to that fuel used in conjunction with agricultural use; aviation use; research, development, or testing purposes; or as competition racing fuel.

In addition, one amendment will correct a typographical error relating to the name of Smith County, which is located in the RVP control area. In the rules adopted on April 5, 2000, Smith County was inadvertently listed as Judge Smith County. This amendment will eliminate confusion and correct the error by deleting the word "Judge."

#### SECTION BY SECTION DISCUSSION

The amendments to §114.307 add new subsections (b) - (e). The amendments to this section will make the exemptions for gasoline consistent with the exemptions for diesel fuel specified in §114.317.

Subsection (b) establishes an exemption for gasoline used in research, development, or testing purposes of fuels, additives, and/or motor vehicles. Under the current rules, research facilities and academic institutions are limited to a maximum RVP of 7.8 psi from May 1 through October 1. This exemption will allow research facilities and academic institutions to use higher RVP fuels year-round for their fuels-

related research. New subsection (c) establishes an exemption for gasoline used for competition racing purposes. Competition racing gasolines have higher RVP specifications than allowed which would have effectively limited the competition racing events to the non-ozone control periods. This exemption will allow competition racing events year-round. New subsection (d) exempts the owner or operator of a retail fuel dispensing outlet from all monitoring, recordkeeping, and reporting requirements of these rules, except for the requirement to maintain product transfer documents. This exemption will eliminate unnecessary paperwork for retail gasoline dispensing outlets. The recordkeeping requirement related to product transfer documents was left unchanged, because it allows the commission to track gasoline back to its producers if enforcement actions are needed. Finally, new subsection (e) states that gasoline, which does not meet the RVP requirements, is allowed in the affected counties as long as it is not ultimately used to power a gasoline-powered, spark-ignition engine in a motor vehicle or non-road equipment in the affected counties. This exemption will allow gasoline suppliers and transporters to ship and store their higher RVP fuels into and through the affected areas rather than having to ship or store the fuel outside of the affected areas. The exemption in subsection (e) does not apply to fuel used in conjunction with agricultural use; aviation use; research, development, or testing purposes; or as competition racing fuel. The phrase “subsections (a), (b), and (c) of this section” was changed to “subsections (a) - (c) of this section” in subsection (e)(1) and (2) to reflect *Texas Register* style guidelines.

The amendment to §114.309 will correct a typographical error relating to the name of Smith County, which is located in the RVP control area. In the April 5, 2000 adopted revisions to this section, Smith County was inadvertently listed as “Judge Smith County.”

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. “Major environmental rule” means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendments to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone but will not 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 amendments are intended to provide flexibility in the RVP air pollution control program as part of the strategy to reduce emissions of nitrogen oxides (NO<sub>x</sub>) necessary for the counties included in the Houston/Galveston (HGA) ozone nonattainment area to be able to demonstrate attainment with the ozone national ambient air quality standard (NAAQS). Impacts on the fuel manufacturing and distribution network and the environment will not be significant because the amendments simply add a few clarifying exemptions to §114.307, remove monitoring, recordkeeping, and reporting requirements for retail gasoline dispensing outlets except the requirement to maintain product transfer documents, and correct a typographical error. Based on this, the amendments are not major environmental rules.

Additionally, even if these amendments were major environmental rules, §2001.0225 only applies to a major environmental rule that: 1.) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2.) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceeds 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.) adopts a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking action does not meet any of these four applicability requirements. Specifically, the RVP fuel requirements including these amendments were developed in order to meet the ozone NAAQS set by the United States Environmental Protection Agency (EPA) under 42 United States Code (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, 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 (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 42 USC. 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<sub>x</sub> 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<sub>x</sub> emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking action 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 action 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 invited public comment on the draft RIA determination, but received no comments.

#### TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for this rulemaking action in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking action is to provide flexibility in the RVP fuel program which will act as an air pollution control strategy to reduce NO<sub>x</sub> emissions necessary for the eight counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Promulgation and enforcement of the adopted rules will not burden private, real property because this rulemaking action does not require an investment in the permanent installation of new refinery processing equipment.

Although the rulemaking action does not directly prevent a nuisance or prevent an immediate threat to life or property, the RVP program does prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within the RVP program 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 §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 these

rules is to provide flexibility in implementing low RVP gasoline which is necessary for the HGA ozone nonattainment area to meet the air quality standards established under federal law as NAAQS.

Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, this rulemaking action does not constitute a takings under the Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking action 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 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), 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<sub>x</sub> air emissions will be reduced as a result of the existing RVP rules and these amendments. 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 51. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission solicited comments on the consistency of the proposed rules with the CMP during the public comment period, and received one comment which will be addressed in the RESPONSE TO COMMENT section.

#### HEARINGS AND COMMENTERS

The commission scheduled a hearing on July 17, 2001, in Austin, however, the hearing was not officially convened because no one from the public attended. The comment period closed on July 23, 2001. The Texas Department of Transportation (TxDOT) submitted written comment regarding the CMP. No other persons submitted written or oral comment.

#### RESPONSE TO COMMENT

TxDOT submitted a letter stating that they had reviewed the proposed amendments by the commission to Chapter 114 to certify, as consistent with State law, the proposed amendment. TxDOT stated that they conducted their review in accordance with 31 TAC §505.11(a)(6) and (b)(2), and that they did not have any comments or suggestions to offer on the proposed amendments at this time.

**The commission thanks TxDOT for their time and review of our proposed amendments.**

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under the Texas Health and Safety Code, TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under TCAA, §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, concerning Methods Used to Control and Reduce Emissions from Land Vehicles, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037(g), concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to regulate fuel content if it is demonstrated to be necessary for attainment of the NAAQS; and §382.039, concerning Attainment Program, 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.

**SUBCHAPTER H: LOW EMISSION FUELS**

**DIVISION 1: GASOLINE VOLATILITY**

**§114.307, §114.309**

**§114.307. Exemptions.**

(a) The following uses are exempt from §§114.301, 114.305, and 114.306 of this title (relating to Control Requirements for Reid Vapor Pressure; Approved Test Methods; and Recordkeeping, Reporting, and Certification Requirements):

(1) any stationary tank, reservoir, or other container:

(A) used exclusively for the fueling of implements of agriculture; or

(B) with a nominal capacity of 500 gallons (1,893 liters) or less; and

(2) all gasoline solely intended for use as aviation gasoline ("av-gas").

(b) Any gasoline that is either in a research, development, or test status; or is sold to petroleum, automobile, engine, or component manufacturers for research, development, or test purposes; or any gasoline to be used by, or under the control of petroleum, additive, automobile, engine, component

manufacturers for research, development, or test purposes; or any independent research laboratories or academic institutions for use in research, development, or testing of petroleum, additive, automobile, engine, component products, is exempt from the provisions of this division (relating to Gasoline Volatility), provided that:

(1) the gasoline is kept segregated from non-exempt product, and the person possessing the product maintains documentation identifying the product as research, development, or testing fuel, as applicable, and stating that it is to be used only for research, development, or testing purposes; and

(2) the gasoline is not sold, dispensed, or transferred, or offered for sale, dispensing, or transfer from a retail fuel dispensing facility. It shall also not be sold, dispensed, or transferred, or offered for sale, dispensing, or transfer from a wholesale purchaser-consumer facility, unless such facility is associated with fuel, automotive, or engine research, development, or testing.

(c) Any gasoline that is refined, sold, dispensed, transferred, or offered for sale, dispensing, or transfer as competition racing fuel is exempted from the provisions of this division, provided that:

(1) the fuel is kept segregated from non-exempt fuel, and the party possessing the fuel for the purposes of refining, selling, dispensing, transferring, or offering for sale, dispensing, or transfer as competition racing fuel maintains documentation identifying the product as racing fuel, restricted for non-highway use in competition racing motor vehicles or engines;

(2) each pump stand at a regulated facility, from which the fuel is dispensed, is labeled with the applicable fuel identification and use restrictions described in paragraph (1) of this subsection; and

(3) the fuel is not sold, dispensed, transferred, or offered for sale, dispensing, or transfer for highway use in a motor vehicle.

(d) The owner or operator of a retail fuel dispensing outlet is exempt from all requirements of §114.306 of this title, except §114.306(b) of this title.

(e) Gasoline that does not meet the requirements of §114.301 of this title 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:

(1) a gasoline-powered spark-ignition engine in a motor vehicle in the counties listed in §114.309 of this title (relating to Affected Counties), except for that used in conjunction with purposes stated in subsections (a) - (c) of this section; or

(2) a gasoline-powered spark-ignition engine in non-road equipment in the counties listed in §114.309 of this title, except for that used in conjunction with purposes stated in subsections (a) - (c) of this section.

**§114.309. Affected Counties.**

All affected persons in the following counties shall be in compliance with §§114.301 and 114.304 - 114.307 of this title (relating to Control Requirements for Reid Vapor Pressure; Registration of Gasoline Producers and Importers; Approved Test Methods; Recordkeeping, Reporting, and Certification Requirements; and Exemptions) no later than the dates specified in §114.301(b) of this title: 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.