The Texas Natural Resource Conservation Commission (commission) adopts amendments to §114.50, Vehicle Emissions Inspection Requirements; §114.51, Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers; §114.52, Waivers and Extensions for Inspection Requirements; and §114.53, Inspection and Maintenance Fees. The commission adopts these amendments to Chapter 114 (Control of Air Pollution from Motor Vehicles), and to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area. These amendments are one element of the control strategy for the HGA Post-1999 Rate-of-Progress (ROP)/Attainment Demonstration SIP. Sections 114.50, 114.52, and 114.53 are adopted *with changes* to the text published in the August 25, 2000, issue of the *Texas Register* (25 TexReg 8180). Section 114.51 is adopted *without changes* and the text will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED 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. In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as HGA. 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 impacted the SIP planning process is the revision 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, 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 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 (ASM-2) equivalent motor vehicle inspection and maintenance (I/M) 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 state-wide 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 VIf); 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, the EPA 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 and other analysis supporting these rules and the HGA SIP indicates a gap of approximately an additional 91 tons per day (tpd) of $NO_x$ reductions is

necessary for an approveable attainment demonstration. The predicted emission reductions from these rules are necessary to successfully demonstrate attainment.

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 formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

This rule adoption is one element of the control strategy for the HGA SIP. Adoption and implementation of this control strategy is necessary in order for the HGA nonattainment area to comply with the requirements of the FCAA and achieve attainment for ozone. Additional elements of the control strategy for the HGA SIP are being adopted concurrently in this issue of the *Texas Register*, or were included in the HGA SIP considered by the commission on December 6, 2000 and planned to be submitted to EPA by December 31, 2000.

The amount of $NO_x$ reductions required for the area to attain the ozone NAAQS has been estimated by extensive use of sophisticated air quality grid modeling, which because of its scientific and statutory grounding, is the chief policy tool for designing emission reduction strategies. The FCAA, 42 USC, §7511a(c)(2), requires the use of photochemical grid modeling for ozone nonattainment areas designated serious, severe, or extreme. The modeling has been conducted with input from a technical

oversight committee. Commission staff have continued to improve the air quality modeling technology and refine emission inventory data. Numerous emission control strategies were considered in developing the modeling. Varying degrees of reductions from point sources, on-road and non-road mobile sources, and area sources were analyzed in multiple iterations of modeling, to test the effectiveness of different $NO_x$ reductions. The attainment demonstration modeling and other analysis submitted for public hearing and comment concurrently with the HGA SIP show that a significant amount of $NO_x$ reductions practicably achievable are necessary from ozone control strategies in order for the HGA nonattainment area to achieve the ozone NAAQS by 2007, including reductions from surrounding counties included in the HGA consolidated metropolitan statistical area (CMSA).

Additionally, reductions associated from the ozone control strategies that will be implemented outside the HGA nonattainment area will benefit the HGA nonattainment area. This is due to the regional nature of air pollution, the contribution from mobile sources, and the economies of scale and associated market advantages related to distribution networks for some strategies. At the time the 1990 FCAA Amendments were enacted, the focus on controlling ozone pollution was centered on local controls. However, for many years an ever increasing number of air quality professionals have concluded that ozone is a regional problem requiring regional strategies in addition to local control programs. As nonattainment areas across the United States prepared attainment demonstration SIPs in response to the 1990 FCAA Amendments, several areas found that modeling attainment was made much more difficult, if not impossible, due to high ozone and ozone precursor levels entering from the boundaries of their respective modeling domains, commonly called transport. Recent science indicates that regional approaches may provide improved control of ozone air pollution.

The current SIP revision contains rules, enforceable commitments, photochemical modeling analyses, and calculation of the remaining $NO_x$ reductions required to reach attainment (gap calculation) 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 I/M program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. An I/M program should also contribute to a successful demonstration of transportation conformity in the HGA area.

The commission adopted an air control strategy for $NO_x$ reductions which requires emissions testing of motor vehicles that are registered and primarily operated in the HGA ozone nonattainment area. The testing would use ASM-2 and on-board diagnostic (OBD) technologies. This adopted I/M program was modeled to cover the eight-county region comprising the HGA nonattainment area. The adopted I/M program will reduce $NO_x$ emissions from on-road vehicles in the HGA ozone nonattainment area by 36.20 tpd.

The adopted revisions will modify the vehicle emissions testing program by implementing ASM-2 testing in the HGA ozone nonattainment area. Unlike the current two-speed idle (TSI) test, ASM-2

technology has the ability to detect $NO_x$ emissions. Because $NO_x$ is a precursor to ground-level ozone formation, reduced $NO_x$ and VOC emissions will result in ground-level ozone reduction.

The amendments addressed in these rule changes include: changing the testing technology in the HGA area to ASM-2 and OBD for Harris County beginning May 1, 2002; implementing ASM-2 and OBD in Brazoria, Fort Bend, Galveston, and Montgomery Counties beginning May 1, 2003; implementing ASM-2 and OBD in Chambers, Liberty, and Waller Counties beginning May 1, 2004, and increasing the emissions inspection fee. The commission is adopting a phased approach to make for a smoother implementation of the adopted I/M program, while still providing significant air quality improvements. In addition, the adopted rules incorporate changes to the exhaust analyzer technical specifications which will apply in every I/M program area.

The commission solicited comments on the option of Chambers, Liberty, and Waller Counties individually or collectively developing alternative air control strategies, other than an I/M program, to meet or exceed the $NO_x$ emission reductions that are anticipated from the adopted I/M program. The initial estimated I/M $NO_x$ emission reductions for Chambers County were .98 tpd, for Liberty County were .94 tpd, and for Waller County were .77 tpd, for a combined estimated $NO_x$ emissions reduction of 2.69 tpd. The commission considered alternatives during the comment period and made a final determination. However, the remote sensing component implemented in Harris County will continue to cover vehicles registered in these counties even if an alternative control strategy is accepted by the commission.

The commission received thirteen comments to omit Chambers, Liberty, and Waller Counties. All comments are addressed in the ANALYSIS OF TESTIMONY section of this preamble.

In its effort to ensure that the SIP strategies impose no more burden than necessary to protect health and welfare, the commission decided to provide Chambers, Liberty, and Waller Counties, and their respective largest municipality, the flexibility to submit by May 1, 2002, individually or collectively, a resolution that is approved by the commission and the EPA as an alternative air control strategy. The resolution should provide a control strategy that will provide modeled reductions of VOC and $NO_x$ equivalent to the reductions that have been modeled for these counties through the implementation of the I/M program. The estimated "COAST Update October 2000" $NO_x$ emission reductions are: Chambers County, 1.25 tpd; Liberty County, 1.06 tpd; and Waller County, .75 tpd, for a combined estimated $NO_x$ emissions reduction of 3.06 tpd. If emission reductions from the alternative plan are in whole or part from stationary sources, appropriate ratios must be used to reflect the different impact which mobile sources have on air quality.

Based on the EPA notice of proposed rulemaking (NPRM) dated September 20, 2000, "Amendments to Vehicle Inspection Maintenance Program Equipment Requirements Incorporating the Onboard Diagnostic Check," the commission amended the I/M rules to allow OBD testing in lieu of tailpipe testing, for model year vehicles 1996 and newer, beginning May 1, 2002.

The commission solicited comment on additional flexibility relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. The flexibility may be available for both mobile and stationary sources. Additional flexibility may also be achieved through

innovative and/or emerging technology which may become available in the future. Additional funding sources for incentive programs may become available to substitute for some of the measures considered here. The commission received no comments on additional flexibility relating to rule content and implementation.

SECTION BY SECTION DISCUSSION

Adopted amendments to §114.50 establish revised program requirements for the state I/M program. The adopted program amendments concern the applicability and control requirements. The result of these amendments is to incorporate the entire HGA nonattainment area into the full I/M program in a phased manner. Section 114.50(a)(1) has been amended to extend TSI testing until April 30, 2002, to allow flexibility in acquiring new test equipment for the program. This is a change from the proposed rules based upon the EPA NPRM. Section 114.50(a)(2)(A) has been amended to provide for a May 1, 2002 start date for OBD testing in Dallas/Fort Worth (DFW) program area. Also, a new requirement has been added to ensure all vehicles that cannot be OBD tested will receive an EPA-approved tailpipe test. Section 114.50(a)(2)(B) and (C) have been deleted and Subparagraph (D) has been renumbered (B). Section 114.50(a)(3) has been amended by adding vehicles which are "registered and primarily operated in the extended DFW (EDFW), area" and subsection (a)(3)(A) was amended to reflect that vehicles which cannot be OBD tested will receive an EPA-approved tailpipe test. Requirements proposed in §114.50(a)(2) and (3) for all testing stations to offer both an OBD and ASM-2 test have been deleted. Adopted §114.50(a)(4) is amended by deleting "Harris County of" the HGA program area. Section 114.50(a)(4)(A) has been amended to provide for a start date of May 1, 2002, for OBD testing in Harris County. Also, a new requirement has been added to ensure all vehicles registered and primarily operated in Harris County that cannot be OBD tested will receive an EPA-approved tailpipe

test. The requirement in this section that the OBD test be conducted in conjunction with the TSI test has been deleted. Subparagraph (B) and proposed new subparagraph (C) have been deleted. New subparagraph (D) has been renumbered (B) and the requirement for emissions test stations to offer both an OBD test and ASM-2 test has been deleted. New subparagraph (E) has been renumbered (C) and the requirement of an ASM-2 test being conducted in conjunction with an OBD test was deleted. Subparagraph (F) has been renumbered (D) and the requirement for emissions test stations to offer both an OBD test and ASM-2 test has been deleted. New subparagraph (G) has been renumbered (E) and the requirement of an ASM-2 test being conducted in conjunction with an OBD test deleted. New subparagraph (H) has been renumbered (F) and the requirement of emissions test stations to offer both an OBD test and ASM-2 test has been deleted. New subparagraph (G) allows Chambers, Liberty, and Waller Counties, and their respective largest municipality to submit by May 1, 2002, individually or collectively, resolutions to implement an alternative control strategy. Should these strategies provide equivalent modeling credits that each of the counties would have received for the I/M program, and they are approved by the commission and the EPA, then subparagraphs (E) and (F) shall not apply. Subsection (a)(5)(A) has been amended to provide for a start date of May 1, 2002, for OBD testing in the El Paso program area. Also, a new requirement has been added to ensure all vehicles that cannot be OBD tested will receive an EPA-approved tailpipe test. Subparagraph (B) has been amended to provide for a start date of May 1, 2002, and the requirement that emissions test stations must offer both TSI and OBD test has been deleted.

Section 114.50(b)(3) is amended by adding “HGA” after EDFW to the program areas and deleting “or Harris County” concerning vehicle recall notification.

Section 114.51 is amended to update the equipment evaluation procedures for vehicle emissions test equipment. This section currently 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. Section 114.51(a) currently specifies a date of March 15, 2000, for the exhaust analyzer technical specifications known as "Specifications for Preconditioned Two Speed Idle Vehicle Exhaust Gas Analyzer Systems for use in the Texas Vehicle Emissions Testing Program." In order to incorporate new and updated specifications into the program, the adopted rule amendments specify a date of November 1, 2000, for both the TSI exhaust analyzer technical specifications, and the "Specifications for Acceleration Simulation Mode Vehicle Exhaust Gas Analyzer System for use in the Texas Vehicle Emissions Testing Program."

Proposed amendments to §114.52 would have established the schedule for when motorists in specific counties become eligible for waivers and extensions. The schedule was consistent with the dates for the implementation of the annual emissions testing program in each county. However, the proposed language implied that motorists who fail an on-road test would not be able to apply for a waiver. The commission determined that the proposed revision was not needed and therefore removed the proposed language on adoption.

Adopted amendments to §114.53 establish fee schedules for the different counties which must be paid for the vehicle emissions inspection at an inspection station. Section 114.53(a)(1) has changed to reflect TSI testing will be performed through April 30, 2002, in Dallas, Tarrant, Harris, and El Paso program areas. Inspection stations conducting TSI testing through April 30, 2002, shall collect a test fee of $13 and shall remit $1.75 to the Texas Department of Public Safety (DPS). Paragraphs (2) - (5), relating to

I/M inspections fees, have been deleted and replaced with language that clarifies emissions inspection test fees. The new language organizes test fees and start dates by program areas making it clear and concise. New paragraph (2) is being adopted to provide for the collection of fees by those inspection stations in El Paso County conducting TSI testing or OBD checks beginning May 1, 2002. Emission inspection stations under paragraph (2) shall collect a test fee of $14. New paragraph (3) explains that in the DFW program area beginning May 1, 2002, and in the EDFW program area beginning May 1, 2003, any emissions inspection station conducting an ASM-2 or OBD emissions test shall collect a test fee of $22.50. New paragraph (4) explains that in the HGA program area in Harris County beginning May 1, 2002, and beginning May 1, 2003 in Brazoria, Fort Bend, Galveston, and Montgomery Counties, and beginning May 1, 2004, in Chambers, Liberty, and Waller Counties any emissions inspection station conducting an ASM-2 or OBD emissions test shall collect a test fee of $22.50. The commission is still considering how much of the test fee should go to the state and will propose future rulemaking to clarify that amount.

In addition to the adopted amendments, the adopted revisions to the SIP narrative clarify the new program elements such as applicability changes; new performance standards; emissions testing network type; emissions testing; affected vehicle populations; enforcement actions related to vehicles and service providers; on-road vehicle emissions testing; and the implementation schedule.

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 has determined that the rulemaking 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.

These adopted rules do not meet any of the four applicability criteria for requiring a regulatory analysis of "major environmental rule" as defined in the Texas Government Code. Section 2001.0225 applies only 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.

As discussed earlier in this preamble, this rule adoption is one element of the control strategy for the HGA SIP. Adoption and implementation of this control strategy is necessary in order for the HGA nonattainment area to comply with the requirements of the FCAA and achieve attainment for ozone. Additional elements of the control strategy for the HGA SIP are being adopted concurrently in this issue of the *Texas Register*, or were included in the HGA SIP considered by the commission on December 6, 2000, and planned to be submitted to EPA by December 31, 2000.

The adopted amendments to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone. However, the inspection stations in and around

nonattainment areas would not normally be considered a sector of the economy. In addition, the commission structured the fees in this program to ensure that most additional equipment costs can be recovered. Therefore, the adopted rules do not affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments are intended to establish a vehicle emissions testing program as part of the control strategy to reduce $NO_x$ emissions necessary for the counties included in the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The adopted amendments are one element of the HGA Post-1999 Rate-of-Progress/Attainment Demonstration SIP. As defined in Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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; adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements of a "major environmental rule."

These rules do not exceed an express standard set by federal law, since they implement requirements of the FCAA. Specifically, the emission testing program within this proposal was developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meets 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. These rules were specifically developed as part of an overall control strategy to

meet the ozone NAAQS set by the EPA under 42 USC, §7409. Both a plan and emission reductions are required to assure that the nonattainment areas of the state will be able to meet the attainment deadlines set by the FCAA. The EPA has provided the criteria for both the submission and evaluation of attainment demonstrations developed by states to comply with the FCAA. This criteria requires states to provide, in addition to other information, photochemical modeling, and an analysis of specific emission reduction strategies necessary to attain the NAAQS. The commission's photochemical modeling and other analysis indicate that substantial emission reductions from both mobile and point source categories are necessary in order to demonstrate attainment. In this case, this rulemaking is intended to achieve reductions in ozone precursor emissions in the HGA nonattainment area. Additionally, nonattainment areas which are classified as severe are specifically required to include enhanced inspection and maintenance programs as part of their SIP under 42 USC, §7511a. These rules are adopted to meet that provision. Specifically, as noted elsewhere in this rule preamble, the emission reductions associated with these rules are a necessary element of the attainment demonstration required by the FCAA.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as HGA. By policy, the EPA requires photochemical grid modeling to demonstrate whether the 42 USC, §7511a(f), $NO_x$ measures would contribute to ozone attainment. The commission has 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 and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The 42 USC, §7511a(f), exemption from $NO_x$ measures for HGA

expired on December 31, 1997. The expiration of the exemption under 42 USC, §7511a(f), was based on the finding that $NO_x$ reductions in HGA are necessary for attainment of the ozone standard. Therefore, the adopted amendments are necessary components of and consistent with the ozone attainment demonstration SIP for HGA, required by 42 USC, §7410.

During the 75th Legislative Session, Senate Bill (SB) 633 amended the Texas Government Code to require agencies to perform a regulatory impact analysis (RIA) of certain rules. The intent of SB 633 was to require agencies to conduct an RIA of extraordinary rules. 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.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485. 489 (Tex. App.–Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App.–Austin 1990, no writ); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd*, Inc., 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.--Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as

falling under this standard. The commission has substantially complied with the requirements of §2001.0225.

Therefore, in addition to not exceeding an express standard set by federal law, these rules do not exceed state requirements, and are not adopted solely under the general powers of the agency because the provisions of the TCAA, §§382.011, 382.012, 382.017, 382.019, 382.037 - 382.038, and 382.039 authorize the commission to implement a plan for the control of the states air quality, including measures necessary to meet federal requirements. The remaining applicability criteria, pertaining to exceeding a delegation agreement or contract between the state and the federal government does not apply. Thus, the commission is not required to conduct a regulatory analysis as provided in Texas Government Code, §2001.0225.

Comments received during the comment period regarding the draft RIA are addressed in the ANALYSIS OF TESTIMONY section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. The specific purpose of the rulemaking action is to implement a revised I/M program in the HGA ozone nonattainment area as part of the strategy to reduce emissions of ozone precursors necessary for the area to be able to demonstrate attainment with the ozone NAAQS.

Promulgation and enforcement of the rules will not burden private, real property because this rulemaking action does not require the installation of permanent equipment. Also, 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 rule amendments 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. In addition, §2007.003(b)(4) provides that Chapter 2007 does not apply to these adopted rules since they are reasonably taken to fulfill an obligation mandated by federal law. The amendments will implement requirements of 42 USC, §7410. This action is taken in response to the HGA area exceeding the NAAQS for ground-level ozone, which adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ambient $NO_x$ and ozone levels in HGA. Attainment of the ozone standard will eventually require substantial $NO_x$ reductions. Any $NO_x$ reductions resulting from the current rulemaking are no greater than what the best scientific research indicates is necessary to achieve the desired ozone levels. However, this rulemaking is only one step among many necessary for attaining the ozone standard. Additionally, these rules are adopted to meet the requirement of 42 USC, §7511a, that a severe nonattainment area include an enhanced inspection and maintenance program as part of the SIP.

The commission has included elsewhere in this preamble its reasoned justification for adopting this strategy and has explained why it is a necessary component of the SIP, which is federally mandated. This discussion, as well as the HGA SIP which is being adopted concurrently, explains in detail that

every rule in the HGA SIP package is necessary and that none of the reductions in those packages represent more than is necessary to bring the area into attainment with the NAAQS. For these reasons the rules do not constitute a takings under Chapter 2007 and does not require additional analysis. Comments received during the comment period regarding the takings impact assessment (TIA) are addressed in the ANALYSIS OF TESTIMONY section of this preamble.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this 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, 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 rulemaking 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(l)). No new air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rule amendments. The CMP policy applicable to this rulemaking action is the policy (31 TAC §501.14(q)) that commission rules comply with federal 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 will have a beneficial effect on SIP emissions reduction obligations relating to reasonable further progress and attainment

demonstrations by making additional emissions reductions over those made by the existing I/M program. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking 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 no comments.

HEARINGS AND COMMENTERS

The commission held public hearings on this proposal at the following locations: September 18, 2000, in Conroe and Lake Jackson; September 19, 2000 in Houston (two hearings); September 20, 2000, in Katy and Pasadena; September 21, 2000, in Beaumont, Amarillo, and Texas City; September 22, 2000, in Dayton, El Paso, and Arlington; and September 25, 2000, in Austin and Corpus Christi. The comment period closed at 5:00 p.m. on September 25, 2000.

Forty-six persons provided oral testimony at the hearings and 167 persons submitted written testimony. The following provided both oral and/or submitted written testimony: Alliance of Automobile Manufacturers (Alliance); Association of International Automobile Manufacturers (AIAM); Baker Botts (Baker Botts); Brazoria County Judge John Willy (Brazoria County); Brazoria County Commissioners Court through Brazoria County Criminal District Attorney's Office (Brazoria CCC); Business Coalition for Clean Air (BCCA); Chambers County Judge Jimmy Sylvia (Chambers County); City of Houston (Houston); City of Missouri City (Missouri City); Environmental Systems Products (ESP); ExxonMobil Corporation (ExxonMobil); Grandparents of East Harris County (GEHC); Harris County Judge Robert Eckels (Harris County); Houston-Galveston Area Council (HGAC); JB Services (JBS); Liberty County

Judge Lloyd Kirkhall (Liberty County); Liberty County Sheriff Gregg Arthur (Liberty County Sheriff); Montgomery County Judge Allen Sadler (Judge Sadler); Mothers for Clean Air (MCA); National Motorists Association (NMA); Phillips 66 Company (Phillips 66); Regional Air Quality Consensus Group (RAQCG); HGAC on behalf of the RAQCG (RAQCG); Sierra Club, Houston Regional Group (Sierra-Houston); Jan Horn on behalf of State Representative Jerry Madden Representative Madden); State Representative Zeb Zbranek (Representative Zbranek); Laura Silagy on behalf of State Senator David Bernsen (Senator Bernsen), SPX Corporation (SPX); Texas Association of Business and Chambers of Commerce (TABCC); Texas Automotive Dealers Association (TADA); Texas Chemical Council (TCC); the League of Women Voters of Texas (LWV-TX); EPA, and 186 individuals.

The following commenters generally supported the proposal: Alliance, Baker Botts, BCCA, Houston, ESP, ExxonMobil, GEHC, Harris County, JBS, HGAC, MCA, Phillips 66, RAQCG, Representative Madden, SPX, TABCC, TCC, LWV-TX, the EPA, and 34 individuals.

The following commenters generally opposed the proposal: Brazoria County, Chambers County, Missouri City, Liberty County, Montgomery County, NMA, Sierra-Houston, Liberty County Sheriff, TADA, and 40 individuals.

The following commenters suggested changes to the proposal as stated in the ANALYSIS OF TESTIMONY section of this preamble: Alliance, AIMA, Chambers County, ESP, Houston, Harris County, HGAC, Sierra-Houston, Liberty County, LWV-TX, MCA, Judge Sadler, RAQCG, Representative Zbranek, Senator Bernsen, SPX, TADA, and 39 individuals.

ANALYSIS OF TESTIMONY

*Emissions Testing Fees*

Three individuals did not want the test fee increased. In addition, 17 individuals expressed concern that raising the test fee will place a burden on the elderly, young people, and those who are the least able to afford the probable additional cost of car repair, or replacement.

**The fee increase is necessary to cover the cost of purchasing new vehicle emissions test equipment and associated costs to include, but not limited to, labor, training, warranties, insurance, and consumable items (such as calibration gases) used in conducting emissions tests. However, vehicles that are properly maintained should have no problem passing the emissions test regardless of their age. In the event that repairs are necessary, the commission acknowledges that these vehicle repairs may be costly, but there are mechanisms in place (waivers and extensions) that help alleviate the cost of emissions repairs for those who need help. The vehicle emissions testing program includes two waiver options: the minimum expenditure waiver, and the individual vehicle waiver. The minimum expenditure waiver is available to those who have made repairs to their vehicle within the established criteria and met the dollar limits established by the EPA rule. The individual vehicle waiver is for those who cannot meet emissions standards despite every reasonable effort by the motorist. In addition to these two waivers, the low-income time extension is available for those who can demonstrate a financial inability to either afford adequate repairs or meet the applicable minimum expenditure waiver amount. The waivers and time extension are a way to ensure that motorists who are making a "good faith" effort to comply with the I/M program requirements do not incur excessive repair costs and are not excessively inconvenienced. The commission made no changes to the rule in response to this comment.**

*Vehicle Coverage*

A classic car collector wanted to know what the requirements will be for his 1974, 1975, and 1977 cars in Brazoria County starting in 2003.

**Section 114.50(a) excludes antique vehicles registered with the Texas Department of Transportation (TxDOT) from emissions testing. Additionally, the program is designed with a "rolling" 24-year window with the most recent 24 model years being subject to the I/M program. The "rolling" 24-year window option was selected due to the small amount of vehicles that are on the road after 25 years and the large percentage of those on the road being classified as classics and/or antiques, which are not subject to emissions testing. In 2003, emissions testing is required only on vehicles 2 - 24 years of age, because none of the stated vehicles will be required to undergo emissions testing.**

Four individuals wanted tailpipe testing for all vehicles, including gasoline-powered trucks and sport utility vehicles (SUV).

**The I/M program tests all model year 2 - 24 years gasoline-powered vehicles, including trucks and SUVs. This allows a two-year exemption for the newest vehicles which are less likely to fail an emissions test. Vehicles that are 25 years and older are exempt for several reasons: many older vehicles were not required to have many of the pollution control devices now required; a large percentage of vehicles in this age group are classified as classics or antiques; and the vehicles in this age group make up a small percentage (approximately 2.5%) of the total fleet and drive fewer**

**miles per year making their overall emissions impact relatively small. The commission made no changes to the rule in response to this comment.**

The RAQCG and the HGAC supported the proposed I/M program, but recommended that the commission should consider a fee for exempting newer model year vehicles from testing, and the proceeds of such fees to be used for purchasing or removing high-emitting vehicles from the region's fleet or other emissions reduction programs.

**As the requirement to test vehicles 2 - 24 years old is established by the state legislature (SB 1856 of the 75th Legislature), the commission does not have the authority to exempt some of these model years from the program. The commission made no changes to the rules in response to these comments.**

Two individuals recommended exempting vehicles under five years of age. In addition, it was also recommended that vehicles over 25 years old should be exempt and should pay a fee that could be used to fund other $NO_x$ reduction projects.

**The requirement to test vehicles 2 - 24 years old is set by state statute (SB 1856 of the 75th Legislature). These vehicles account for the vast majority of vehicles on the road and the vehicle miles traveled, which have a direct correlation to the impact on air quality. The failure rate for vehicles less than five years old is approximately 1%. Because some newer models do fail the test and because vehicles subject to the testing are more likely to be properly maintained, the amount of emissions reductions benefits that can be claimed for an I/M program is reduced as more model**

**years are exempted from the program. In addition, since many of the vehicles under five years old are still under the manufacturer's warranty, identifying emissions-related problems could be viewed as consumer protection and potentially may save the vehicle's owner future repair costs.**

**Vehicles that are 25 years and older are exempt for several reasons: many older vehicles were not required to have many of the pollution control devices now required; a large percentage of vehicles in this age group are classified as classics or antiques; and the vehicles in this age group make up a small percentage (approximately 2.5%) of the total fleet and drive fewer miles per year making their overall emissions impact relatively small.**

**It is beyond the scope of this rulemaking to charge a fee to owners of vehicles already exempt from the program. The commission made no changes to the rules in response to these comments.**

One individual felt that vehicles with rotary powered engines should be exempt from emissions testing since a rotary engine does not produce $NO_x$ emissions. Also, individuals with non-stock (aftermarket) parts that increase performance on their vehicles should be exempt from testing when they can produce less pollutants than a stock-vehicle having proper emissions equipment installed.

**According to the National Center for Vehicle Emissions Control and Safety at Colorado State University, all gasoline-powered vehicles produce hydrocarbons (HC), carbon monoxide (CO), and $NO_x$ emissions. This includes rotary engine vehicles. Therefore, these vehicles will not be exempt from emissions testing. If the use of an aftermarket part causes the vehicle tailpipe emissions to be adversely affected, then the modification is considered to be tampering. The EPA**

**anti-tampering enforcement policy states that the EPA will not consider any modification to a certified configuration to be a violation of federal law if there is a reasonable basis that emissions are not adversely affected. Vehicles that have been modified from their original certified configuration will not be exempt from tailpipe testing. The purpose of the testing, which is to ensure that the emissions control system is working properly, is still a valid purpose for modified vehicles. The commission made no changes to the rules in response to these comments.**

One individual wanted vehicles over 24 years old tested.

**The requirement to test vehicles is set by state statute (SB 1856 of the 75th Legislature). Vehicles that are 25 years and older are exempt for several reasons: many older vehicles were not required to have many of the pollution control devices now required; a large percentage of vehicles in this age group are classified as classics or antiques; and the vehicles in this age group make up a small percentage (approximately 2.5%) of the total fleet and drive fewer miles per year making their overall emissions impact relatively small. The commission made no changes to the rules in response to this comment.**

One individual recommended I/M inspections must cover all mobile vehicles (cars to heavy diesel) under conditions realistically simulating in-use operating conditions by mid-year 2002, as well as including tests for catalyst integrity.

**The commission is adopting a phased approach to make for a smooth implementation while still providing significant air quality improvements. All gasoline-powered motor vehicles 2 - 24 years**

**old are subject to an annual emissions inspection. Military tactical vehicles, motorcycles, diesel-powered vehicles, dual-fueled vehicles which cannot operate using gasoline, and antique vehicles registered with the TxDOT are excluded from the program. While the commission is currently researching the feasibility of heavy-duty diesel vehicle testing, diesel testing is outside the scope of this rulemaking. The catalytic converter is a major emission control component for the control of $NO_x$. The ASM-2 test will identify vehicles with excessive $NO_x$ emissions which is usually caused by a malfunctioning catalytic converter or exhaust gas recirculation (EGR) valve. The ASM-2 test, which is required in the HGA nonattainment area, closely simulates in-use operating conditions by using a dynamometer. The commission made no changes to the rules in response to these comments.**

One individual recommended all vehicles that are used inside private plants should be required to pass an emissions test.

**According to the Texas Transportation Code (TTC), §502.002, the vehicle emissions testing program affects vehicles registered with TxDOT to be driven on public roads. Since the plant's roads are privately-owned, vehicles driven only inside the plant are not required to undergo emissions testing. Since these vehicles are not subject to the safety inspection and vehicle registration program, enforcement of an inspection and maintenance program for these vehicles would not be feasible. The commission made no changes to the rules in response to this comment.**

*Waivers*

One individual wanted to do away with waivers and extensions.

**Waivers are a way to ensure that motorists making every "good faith" effort to comply with I/M program requirements do not incur excessive repair costs and/or are not excessively inconvenienced. Waivers are not extended beyond one test cycle. Vehicle owners must meet all requirements and reapply, if necessary, the following year to receive a new waiver for that test cycle.**

**The minimum expenditure waiver is available to those who have made repairs to their vehicle within the established criteria (to include repairs made within 60 days of an inspection) and have met the dollar limits established by the EPA.**

**The commission committed to limit all waivers to no more than 3.0% in each program area. Since the inception of the current program, the waiver rate has not exceeded 0.4%. The commission will continue to monitor waiver rates in all program areas. The commission made no changes to the rules in response to this comment.**

*Remote Sensing*

Harris County wanted to work toward utilizing remote sensing as a replacement to tailpipe testing and expanding exemptions to a broader range of late model cars throughout the region. In addition, one individual wanted to know why random monitoring is ineffective in identifying gross polluters.

**The commission agrees that remote sensing has a useful role to play in detecting high-emitting vehicles in the I/M program areas. However, currently available remote sensing technologies are not as accurate as a tailpipe test in identifying vehicles that are near the established emissions standards. The commission will continue to evaluate technological advances in remote sensing to ensure the best possible testing methodologies and equipment are considered in future program development. As remote sensing technology improves, it may be considered for expanded use in the I/M program.**

**The requirement to test vehicles 2 - 24 years old is established by the state legislature (SB 1856 of the 75th Legislature). These vehicles account for the vast majority of vehicles on the road and the vehicle miles traveled, which have a direct correlation to the impact on air quality. The failure rate for vehicles less than five years old is approximately 1.0%. Because some newer models do fail the test and because vehicles subject to the testing are more likely to be properly maintained, the amount of emissions reductions benefits that can be claimed for an I/M program is reduced as more model years are exempted from the program. In addition, since many of the vehicles under five years old are still under the manufacturer's warranty, identifying emissions-related problems could be viewed as consumer protection and potentially may save the vehicle's owner future repair costs. The commission made no changes to the rules in response to these comments.**

One individual felt that commuting vehicles from outlying counties driving into Harris or Montgomery County would not be subject to inspections, but would still be polluting the air around Houston every day.

**The amended vehicle emissions testing program will require gasoline vehicles 2 - 24 years old, registered in the eight-county HGA nonattainment area to undergo vehicle emissions testing. In addition, remote sensing will be in operation in these counties. The remote sensing element of the vehicle emissions testing program is operated by the DPS and is used to find high-emitting vehicles. The commission made no changes to the rules in response to this comment.**

The EPA supported the phased approach as long as non-testing counties continue to be monitored by remote sensing for the vehicle shortfall in the testing areas until the non-testing counties begin testing.

**The I/M program will continue to use remote sensing to identify high-emitting vehicles being operated in the nonattainment area in situations where the number of vehicles subject to I/M program is less than the estimated fleet in the nonattainment area. Remote sensing of commuting vehicles will continue until the non-testing counties begin tailpipe testing all subject vehicles. The commission made no changes to the rules in response to this comment.**

Representative Zbranek, TADA, and one individual supported the expansion of the remote sensing program to target grossly polluting vehicles.

**The I/M program will continue to use remote sensing to identify high-emitting vehicles. The commission agrees that remote sensing has a useful role to play in detecting high-emitting vehicles in the I/M program areas.**

TADA recommended that remote sensing be combined with a mandatory smoking vehicle program to ensure that all smoking vehicles are required to be repaired or retired.

**The state-wide smoking vehicle program is a voluntary program and relies on conscientious citizens to identify and report vehicles that they observe emitting visible exhaust. Current remote sensing technology does not have the ability to identify the particulate matter and sulfur compounds generally associated with visible exhaust. Future improvements in remote sensing technology, along with enforceable particulate standards for vehicle exhaust emissions, may make possible such a component of the Texas program to control mobile source emissions. The commission made no changes to the rules in response to this comment.**

One individual recommended the use of remote sensing to monitor commuting vehicles into Harris County and if vehicles are found to be polluting, recommended sending vehicle owners a notice that their vehicle has to be inspected.

**Currently, DPS is operating three remote sensing units in Harris County in order to monitor the emissions of vehicles commuting into the program county from surrounding counties. Owners of vehicles identified as gross polluters receive written notice of the violation instructing them to submit their vehicles to an emissions test at a state-certified emissions testing station for verification of exhaust emissions and to make necessary repairs to bring the vehicle into program compliance. Failure to comply with written notification of an emissions violation is a Class C misdemeanor punishable by a fine of not more than $350. Repeat violations are punishable by a**

**fine of not more than $1,000. The commission made no changes to the rules in response to this comment.**

ESP recommended using remote sensing (total screening) as an alternative to I/M testing. Total screening is a combination of clean screening and high emitter identification. Also, one individual recommended improving motorist convenience by exempting from testing those vehicles that have demonstrated through on-road measurements that they do not have high emissions.

**The commission agrees that remote sensing has a useful role to play in detecting high-emitting vehicles in the I/M program areas. However, the commission believes that "clean-screening" is not a viable option at this time for the following reasons: 1) the possibilities of false failures increase dramatically as the cut-points for remote sensing failures are more closely aligned to the cut-points of the tailpipe test; and 2) the cost of clean-screening depends on many factors, such as market competitiveness, total number of remote sensing measurements, level of automation, economies of scale, and term of contract. According to the "California Inspection and Maintenance Review Committee Report on Remote Sensing of Vehicle Emissions," dated September 9, 1998, a clean-screening program that exempted 25% of the subject fleet would cost approximately $34 million per year. Although the commission believes that "clean-screening" is not a viable option at this time, the commission will continue to evaluate technological advances in emissions testing to ensure the best possible testing methodologies and equipment are considered in future program development. The commission made no changes to the rules in response to these comments.**

Brazoria CCC submitted a report which concludes that remote sensing has little practical value or use in identifying individual, dirty or clean vehicles, that it predicts vehicle emissions at a rate less than chance and that measure emissions with unacceptably wide variations. The report also states that remote sensing can only view a part of the fleet. The commenter also stated that experience and data from remote sensing in Texas show a high percentage of inaccuracy.

**The commission acknowledges the comment from Brazoria CCC. The remote sensing program was not implemented for the purpose of replacing annual tail pipe testing. Remote sensing is used as a non-intrusive, but efficient tool to monitor a portion of the vehicle fleet and identify excessive polluters as a complement to traditional mobile source emission control programs. The remote sensing program is designed to detect potentially high-emitting vehicles registered in or commuting into any of the affected nonattainment counties. Owners of vehicles identified as high emitters receive written notice instructing them to submit their vehicles to a tailpipe test at a state-certified emissions testing station to determine compliance with emissions regulations. The commission recognizes that remote sensing is not currently as accurate as the tailpipe test in characterizing vehicle emissions and therefore requires identified vehicles to submit to a confirmatory tailpipe test for validation of the remote sensing results. The commission will continue to evaluate technological advances in remote sensing in order to insure the best possible equipment and testing methodologies are considered in future program development.**

One individual recommended remote sensing of vehicles registered in Collin, Denton, and Johnson Counties when driving into the city limits of Dallas, Garland, Richardson, Carrollton, Fort Worth, Grapevine, Southlake, Burleson, and Mansfield.

**Remote sensing on highways in the DFW area to identify high-emitting vehicles began in October 1998. Identified high-emitting vehicles may be vehicles either registered in the designated I/M program counties (Dallas and Tarrant Counties) or commuting from surrounding nonattainment counties (Denton and Collin Counties). According to the vehicle emissions testing program adopted April 2000, vehicles 2 - 24 years old, registered in Dallas, Tarrant, Collin, and Denton Counties, beginning May 1, 2002, and Johnson, Parker, Ellis, Kaufman, and Rockwall Counties, beginning May 1, 2003, will be subject to vehicle emissions testing. In addition, remote sensing is currently in operation in the DFW nonattainment area (Dallas, Tarrant, Collin, and Denton Counties) and will be extended to include the other five counties in 2003. All the cities listed in the comment are included in the adopted DFW I/M program area. The commission made no changes to the rules in response to this comment.**

One individual advocated remote sensing of vehicles registered in Brazoria, Fort Bend, Galveston, and Montgomery Counties, as well as when driving into the city limits of Pearland, Houston, Katy, Missouri City, Stafford, and Friendwood toward Central Houston.

**The amended vehicle emissions testing program will require gasoline vehicles 2 - 24 years old, registered in the eight-county HGA nonattainment area to undergo vehicle emissions tailpipe testing. In addition, the DPS will continue to use remote sensing to identify high-emitting vehicles being operated in the eight counties. All the cities listed in the comment are included in the remote sensing program. The commission made no changes to the rules in response to this comment.**

One individual recommended seven requirements for prosecution if a motor vehicle is cited for display of excess tailpipe emissions (remote sensing): 1) diesel or gasoline-powered vehicles 1979 - 1994, gasoline-powered vehicles of model year 1978 or earlier or 1995 -2002, would be sent notices of the need to seek repairs; 2) a peace officer from the sheriff's department, not a constable deputy or trooper, to conduct remote sensing; 3) owner of the motor vehicle must be served in person at his place of residence by a sheriff deputy of the county of residence; 4) vehicle owner to be provided with the time, date, location, and identity of driver; 5) residence of the alleged owner of the accused motor vehicle must be in one of the seven relevant counties, except for a truck tractor assigned to a place of business in any one of the 12 affected counties, drivers of motor vehicles of other counties/states only would get notices of the need to seek repairs; 6) accused allowed a hearing before a Justice of the Peace of the alleged offense with all court costs waived; and 7) citation allowed to be make repairs to get the citation dismissed after the first offense.

**The on-road testing component of the Texas I/M program uses remote sensing to identify high-emitting gasoline vehicles. Currently, remote sensing technology does not have the ability to identify the particulate matter and sulfur compounds generally associated with visible exhaust (diesels and smoking vehicles). Future improvements in remote sensing technology, along with enforceable particulate standards for vehicle exhaust emissions, may make possible such a component of the Texas program to control mobile source emissions. Owners of gasoline vehicles identified as high emitters of HC and CO receive written notice of the violation from DPS instructing them to submit their vehicles to an emissions test at a state-certified emissions testing station for verification of exhaust emissions and to make necessary repairs to bring the vehicle into program compliance. Brochures on repairing vehicles are available at each testing station.**

**Failure to comply with written notification of an emissions violation is a Class C misdemeanor punishable by a fine of not more than $350. Repeat violations are punishable by a fine of not more than $1,000.**

**The commission appreciates the suggestions for enforcement of the remote sensing element of the emissions testing program, but several are outside the commission's jurisdiction. The commission made no changes to the rules in response to this comment.**

One individual proposed that vehicle owners be allowed one of the following options should the vehicle fail the remote sensing/emissions test: 1) to appeal to commissioners court for assistance from an "indigent " person fund created by increasing the license plate fee in order make repairs; 2) to sell the vehicle (1986 or older model) to the state in a "buy back" program funded by a local-option motor fuel sales tax of $.02 - $.05 per gallon; 3) move to a place of residence outside of the affected counties.

**The commission understands that vehicle repairs can be costly. In order to assist the public, the vehicle emissions testing program includes two waiver options: the minimum expenditure waiver and the individual vehicle waiver. The minimum expenditure waiver is available to those who have made repairs to their vehicle within the established criteria and met the dollar limits established by the EPA rule. The individual vehicle waiver is for those who cannot meet emissions standards despite every reasonable effort by the motorist. In addition to these two waivers, the low income time extension is available for those who can demonstrate a financial inability to either afford adequate repairs or to meet the applicable minimum expenditure waiver amount. The**

**waivers and extension are ways to ensure that motorists who are making a "good faith" effort to comply with the I/M program requirements do not incur excessive repair costs, are not excessively inconvenienced, or are not denied re-registration of their vehicle.**

**Enforcement of the program is the responsibility of the DPS, TxDOT, and the commission. Vehicles registered in an I/M program area must comply with the safety and emissions testing program (either by passing the test or qualifying for a waiver or extension) to be issued a safety certificate. The commission, TxDOT, and DPS implemented a vehicle re-registration denial enforcement element for vehicles that fail to comply with the emissions testing program. Remote sensing is used to identify high-emitting vehicles commuting into an area and as an additional enforcement mechanism to identify high-emitting vehicles that have not complied with the program. Once a high-emitting vehicle is identified, the owner of the vehicle is instructed by written notice from the DPS to bring the vehicle in to a state-certified emissions testing station for a verification emissions test and to make necessary repairs to bring the vehicle into program compliance. Failure to comply with the notice is a Class C misdemeanor. Local law enforcement officials are responsible for ensuring that vehicles operating on public roads have a valid registration sticker and safety certificate.**

**Provisions for a tax to create an "indigent person" or "buy back" fund would require legislative authorization and is beyond the scope of this rulemaking.**

**Currently, 30 TAC Chapter 117, Tax Relief for Property Used for Environmental Proetction, is the commission's program that provides tax relief for the purchase of pollution control property.**

**On November 2, 1993, the voters of Texas approved a constitutional amendment, commonly referred to as "Proposition 2," that provides an exemption from property taxation for pollution control property. The intent of the constitutional amendment was to ensure that capital investment undertaken to comply with federal, state, or local environmental mandates did not result in an increase in a facility's property taxes. Legislation implementing that amendment, House Bill 1920, was passed during the 73rd Texas Legislative session which added a new §11.31 and §26.045 to the Texas Tax Code (Tax Code). The Tax Code provides that pollution control property could include any land purchased after January 1, 1994, or any structure, building, installation, excavation, machinery, equipment, or device and any attachment or addition to or reconstruction, replacement, or improvement of property that is used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any federal, state, or local environmental agency for the prevention, monitoring, control, or reduction of air, water, or land pollution. Motor vehicles are specifically noted as being ineligible for an exemption under this provision of the Tax Code. The Tax Code contains a two-step process for securing an exemption from property taxes for pollution control property. An applicant must first receive a determination from the commission that the property is used for pollution control purposes. The applicant then can use this determination to apply to the local appraisal district for a property tax exemption. The commission made no changes to the rules in response to these comments.**

*Program Start-up*

The Alliance, AIAM, and the EPA supported the use of OBD checks instead of conventional I/M tests for 1996 and later model year gasoline vehicles. The Alliance, AIAM, and the EPA recommended the OBD checks should not be used in conjunction with I/M testing (i.e., vehicles should not be subject to

both an I/M test and an OBD check) since this would lead to unnecessary customer confusion and frustration.

**The commission concurs and adopts rules for OBD emissions testing to be used in place of traditional tailpipe testing for 1996 and newer cars in anticipation of the NPRM by the EPA becoming final. The EPA NPRM provides additional flexibility by allowing states to replace the traditional I/M test on model year 1996 and newer vehicles with a check of the OBD system. Thus, the NPRM removes the requirement to perform both a tailpipe test and OBD checks, and authorizes OBD-only checks on 1996 and newer vehicles. In addition, the NPRM extends implementation of OBD checks to January 1, 2002. The commission revised the rules based on the release of the NPRM.**

*Program Equipment*

The Sierra-Houston and one individual recommended I/M 240 centralized inspection and maintenance tailpipe testing in conjunction with OBD testing. In addition, three individuals would like to see a state-run test like the old IM-240.

**Because the Houston nonattainment area needs to reduce $NO_x$ emissions, modifications to the current TSI emissions testing program are being adopted. The ASM-2 or equivalent test, which uses a dynamometer, is required for the HGA program area beginning in 2002. An ASM-2 type test is estimated to achieve VOC and $NO_x$ emission reductions comparable to those achieved by an IM-240 type test, but at less than one-third of the cost, and can be implemented through the current decentralized testing network. The EPA NPRM provides additional flexibility by allowing**

**states to replace the traditional I/M test on model year 1996 and newer vehicles with a check of the OBD system. Thus, the requirement to perform both a tailpipe test and OBD checks has been removed and OBD-only checks have been authorized on 1996 and newer vehicles. In addition, the NPRM extends implementation of OBD checks to January 1, 2002. The commission made no changes to the rules in response to these comments.**

One individual opposed the ASM-2 test because it is not as efficient as the IM-240 in determining polluting vehicles. He expressed support of OBD as an add-on to IM-240 and wants to know what is meant by "reductions comparable to those achieved by IM-240."

**The ASM-2 test achieves modeled VOC and $NO_x$ reductions comparable to those achieved by an IM-240 test but at less than one-third the cost. Moreover, the ASM-2 test is considered effective in identifying high-emitting vehicles, and can be implemented through the current decentralized testing network. The EPA NPRM provides additional flexibility by allowing states to replace the traditional I/M test on model year 1996 and newer vehicles with a check of the OBD system. Thus, the requirement to perform both a tailpipe test and OBD checks has been removed and OBD-only checks have been authorized on 1996 and newer vehicles. In addition, the NPRM extends implementation of OBD checks to January 1, 2002.**

**The phrase "reductions comparable to those achieved by IM-240" refers to modeled emissions reductions that can be achieved using an alternative I/M testing methodology, such as ASM-2. For example, the level of modeled emissions reductions for the pollutant $NO_x$ using the ASM-2**

**testing method are approximately the same as the level of modeled emissions reductions for $NO_x$ using IM-240. The commission made no changes to the rules in response to these comments.**

TADA supported OBD testing, but disagreed with the use of ASM-2 testing and stated that it will be inconvenient and extremely expensive for the driving public.

**More sophisticated photochemical modeling demonstrates that the HGA area needs to reduce $NO_x$ emissions in order to achieve the ozone NAAQS. An ASM-2, or similar test, is estimated to achieve VOC and $NO_x$ emission reductions comparable to those achieved by an IM-240 type test, but at less than one-third of the cost, and can be implemented through the current decentralized testing network which includes over 2,300 testing facilities in the four I/M program counties (Dallas, El Paso, Harris, and Tarrant). The test fee for a loaded mode test like ASM-2 will not be above the average for what is currently charged nationwide for a similar test. As OBD testing is applicable only to 1996 and newer vehicles, a tailpipe test that can measure $NO_x$ emissions, such as ASM-2, must be available in order to test the pre-1996 vehicles. The commission made no changes to the rules in response to these comments.**

TADA suggested a more equitable method of paying for emissions testing equipment is to provide a tax credit or exemption.

**Provisions for a tax credit or exemption for stations owners would require legislative authorization and is beyond the scope of this rulemaking. The commission made no changes to the rules in response to this comment.**

One individual recommended a visual check of the exhaust system should be performed as part of the annual vehicle inspection. If an abnormality is found, such as a loose or broken exhaust or visual smoke, the owner would be required to have a more thorough check and repairs performed, before the vehicle inspection is approved.

**The emissions test is conducted annually in conjunction with the vehicle safety inspection. The annual safety inspection procedures consist of a visual exhaust emissions check on 1968 and newer vehicles. The check includes inspection of the exhaust emission system to determine if it has been removed, disconnected or altered in any manner to make it ineffective. If an exhaust leak is detected, then the vehicle must be repaired before the emissions test can be conducted. The commission made no changes to the rules in response to this comment.**

One individual stated opposition to the proposed I/M program and believed dyno testing is no better than BAR-90 testing and would like to know the effectiveness of current program.

**The commission recently completed its Mass Emissions Transient Testing (METT) study to determine the effectiveness of the current I/M program when compared to the EPA benchmark program for METT study. The Texas TSI I/M program achieves about 84% HC reductions, and about 104% CO reductions, when compared to the Arizona I/M 240 program (EPA's benchmark program). However, TSI testing does not allow for the measurement of $NO_x$ because under idle modes the temperature and pressure in the combustion chambers are not high enough to produce a significant amount of measurable $NO_x$. In order to help the HGA nonattainment area achieve the necessary $NO_x$ reductions, the current tailpipe test must be upgraded to an alternative test**

**type, such as ASM-2 or equivalent dynamometer test, that can measure $NO_x$ emissions. OBD checks will be given to 1996 and newer model year vehicles. The commission made no changes to the rules in response to these comments.**

*Repair Program*

One individual wanted stricter controls and recommended a one-year warranty on all repairs.

**Establishing a one-year warranty on repairs by inspection repair shops is beyond the scope of this rulemaking, and is outside the scope of the commission's jurisdiction to regulate the repair industry for consumer protection. The commission's focus is on the resulting air quality benefits measured after the repair is completed. The commission made no changes to the rules in response to this comment.**

*Program Convenience*

Six individuals expressed the belief that the I/M testing program being proposed is going to hurt those residents that have older cars that were not built with emissions tests in mind.

**Vehicles that are properly maintained should have no problem passing the emissions test regardless of their age. Vehicles 2 - 24 years old are required to undergo emissions testing. The cut points which determine whether a vehicle passes or fails are calculated by factors such as the vehicle weight, model year, and engine size. Thus, older vehicles are required to meet standards based on criteria specific to them. The commission made no changes to the rules in response to this comment.**

Five individuals expressed opposition to the program and feel the government is too intrusive, putting too many restrictions on consumers, that the I/M test is too expensive, that the proposed rules go far beyond anything necessary to protect the environment, and will be ineffective in reducing the ozone levels.

**The I/M program is one of the key strategies necessary to bring the HGA area into attainment of the ozone standards. If the plan is unsuccessful, the HGA area may suffer considerable economic sanctions. In addition, cleaner air provides economic benefits to the community, such as fewer sick days, lower medical costs, and fewer pollution-associated illnesses.**

**More sophisticated photochemical modeling demonstrates that the HGA area needs to reduce $NO_x$ emissions in order to achieve the ozone NAAQS. An ASM-2, or similar test, is estimated to achieve VOC and $NO_x$ emission reductions comparable to those achieved by an IM-240 type test, but at less than one-third of the cost, and can be implemented through the current decentralized testing network which includes over 2,300 testing facilities in the four I/M program counties (Dallas, El Paso, Harris, and Tarrant). The test fee for a loaded mode test like ASM-2 will not be above the average for what is currently charged nationwide for a similar test. As OBD testing is applicable only to 1996 and newer vehicles, a tailpipe test that can measure $NO_x$ emissions, such as ASM-2, must be available in order to test the pre-1996 vehicles. The commission made no changes to the rules in response to these comments.**

*Program Network*

Two individuals wanted to know what is wrong with the existing program. Also, what percentage of vehicles tested under the current program failed. Also, how much of the ozone is attributed to automobiles in the Houston area.

**More sophisticated photochemical modeling demonstrates that the HGA area needs to reduce $NO_x$ emissions in order to achieve the ozone NAAQS. Although the current TSI testing program is considered effective in identifying vehicles grossly polluting for HC or CO, idle testing does not allow for the measurement of $NO_x$. Under idle modes the temperature and pressure in the combustion chambers are not high enough to produce a significant amount of measurable $NO_x$. This current TSI test must be upgraded to an alternative test type, such as ASM-2, that can measure $NO_x$ emissions, and therefore achieve significant $NO_x$ reductions.**

**It is estimated that 24% of the $NO_x$ emissions in the HGA area are from on-road mobile sources, such as vehicles. The current TSI emissions testing program tests vehicles 2 - 24 years old. These vehicles account for the vast majority of vehicles on the road and the vehicle miles traveled, which have a direct correlation to the impact on air quality. The amount of emissions reduction benefits is not only based on repairing failed vehicles (currently approximately 5% fail), but also from vehicles being properly maintained because they are subject to emissions testing. The commission made no changes to the rules in response to these comments.**

Four individuals stated that the system in place now is more than adequate. All expressed opposition to the commission reinstating a centralized IM-240 type inspection system.

**The commission has no intention of mandating a centralized I/M 240 program. However, in order to help the HGA nonattainment areas achieve the necessary $NO_x$ reductions, the current TSI test must be upgraded to an alternative test type, such as ASM-2, that can measure $NO_x$ emissions, and therefore achieve significant $NO_x$ reductions. An ASM-2 type test is estimated to achieve VOC and $NO_x$ emission reductions comparable to those achieved by an IM-240 test, but at less than one-third the cost, and can be implemented through the same decentralized testing system as is used for the current TSI test. The commission made no changes to the rules in response to this comment.**

Alliance, Houston, ESP, ExxonMobil, GEHC, Harris County, JBS, HGAC, MCA, TCC, Phillips 66, BCCA, RAQCG, Baker Botts, Representative Madden, SPX, TABCC, LWV-TX, EPA, and 34 individuals supported the proposed emissions testing program.

**The commission appreciates the support for the vehicle emissions testing program.**

One individual stated that owners of vehicles certified as low emission or ultra-low emission should not be penalized for living in an area with vehicles that spew pollutants.

**All vehicles certified as low emissions and ultra-low emissions should pass the emissions test if they are properly maintained. The amount of emissions reduction benefits is not only based on repairing failed vehicles, but also from all vehicles being properly maintained because they are subject to emissions testing. The commission made no changes to the rules in response to this comment.**

Five individuals commented that testing vehicles on a dynamometer is a big mistake. Cars can come off the rollers while testing causing damage to the vehicles.

**Emissions testing using dynamometers has been conducted in many states without serious incidents being reported. Compared with the IM-240 test, where the top speed of the car on the dynamometer is 56 miles per hour (mph), the dynamometer's top speed will be 25 mph as prescribed by the ASM-2 type test and the vehicle will be required to be tied down during the test. An intensive training program will be implemented for all inspectors operating a dynamometer type emissions test. The commission made no changes to the rules in response to this comment.**

Three individuals felt that small inspection stations will not have room to set up this type of test or be willing to accept responsibility for accidents on this type of equipment. In addition, three individuals expressed concern that $40,000 is more than most inspection stations can afford.

**The commission adopted the emissions test fee for the new program in order to cover costs involved in the use of loaded mode test equipment. These costs include labor, training, warranties, insurance, and consumable items (such as calibration gases) used in conducting emissions tests. Based on internal cost analysis of the proposed loaded mode testing program, the commission approved a $22.50 emissions test fee for the new program. According to the cost analysis study at a fee of $22.50/test, for a station to break even in five years, based just on equipment cost of $40,000, a station must perform about 43 emissions tests per month. For a station to break even in five years based on equipment cost combined with an average monthly operating cost of $1,000, a station must perform about 94 tests per month. Continued**

**participation in the program as it evolves will be a business decision made by each individual station owner. The proposed ASM-2 type dynamometer can be installed above ground in a space approximately 14 feet by 23 feet, which is the same dimensions of most repair bays. The commission made no changes to the rules in response to these comments.**

Three individuals expressed concern that there would not be enough emission testing facilities to test their vehicles in the counties.

**The current decentralized network improved convenience over the previous centralized network by providing more than 2,300 testing facilities in the original four I/M program counties (Dallas, El Paso, Harris, and Tarrant). The commission and DPS are working to ensure that the program maintains an acceptable ratio of the subject testing fleet to emissions testing stations. The commission made no changes to the rules in response to this comment.**

One individual supported the proposed vehicle emissions testing program, but would like to see the city-owned and government-owned vehicles tested also.

**The commission appreciates the support for the vehicle emissions testing program. Chapter 114, §114.50(b)(7) requires state, governmental, and quasi-governmental agencies which fall outside the normal registration or inspection comply with all vehicle emissions I/M requirements contained in the Texas I/M SIP for vehicles primarily operated in I/M program areas. The commission made no changes to the rules in response to this comment.**

HGAC, Houston, MCA, and 20 individuals recommended establishing a testing program for heavy-duty diesel vehicles. One individual wanted a more thorough and frequent stringent emissions tests for large trucks and buses (gas and diesel) because it appears that these large trucks are the worst violators of clean air.

**Approximately 97% of the registered fleet, which is 2 - 24 years old, will be tested using the ASM-2/OBD technology. These vehicles account for the vast majority of vehicles on the road and the vehicle miles traveled, which have a direct correlation to the impact on air quality. Due to equipment limitations, heavy-duty gasoline vehicles (those vehicles over 8,500 pounds) will be tested using the current TSI test. While the commission is currently researching the feasibility of heavy-duty diesel vehicle testing, diesel testing is outside the scope of this rulemaking. The commission made no changes to the rules in response to this comment.**

Two individuals stated that since vehicle manufacturers are required by our federal government to install emissions controls on all vehicles made to comply with federal clean air act, why is it that we now need stricter emissions exhaust tests for state inspections?

**A major contributor to air pollution is the exhaust from cars and trucks. All over Texas vehicles contribute as much as half of the harmful air emissions that create pollution. One vehicle in bad repair can produce 28 times as much pollution as one vehicle in good repair. Although vehicle manufacturers are required to install emissions controls on all vehicles, improperly maintained emission controlled devices may eventually malfunction. The emissions testing program tests vehicles 2 - 24 years old. These vehicles account for the vast majority of vehicles on the road and**

**the vehicle miles traveled, which have a direct correlation to the impact on air quality. The amount of emissions reduction benefit is not only based on repairing failed vehicles, but also on vehicles being properly maintained because they are subject to emissions testing. In addition, more sophisticated photochemical modeling demonstrates that the HGA area needs to reduce $NO_x$ emissions in order to achieve the ozone NAAQS. The TSI testing does not allow for the measurement of $NO_x$ because under idle modes the temperature and pressure in the combustion chambers are not high enough to produce a significant amount of measurable $NO_x$. In order to help the HGA nonattainment area achieve the necessary $NO_x$ reductions, the current tailpipe test must be upgraded to an alternative test type, such as ASM-2 or equivalent dynamometer test, that can measure $NO_x$ emissions. On-board diagnostic checks will be given to 1996 and newer model year vehicles. The commission made no changes to the rules in response to this comment.**

One individual stated that there are still too many heavy polluters on our roads, particularly pick-ups, poorly maintained cars and commercial trucks.

**Identifying and having these vehicles repaired will only help the HGA area achieve the ozone NAAQS. The I/M program covers all gasoline-powered cars and trucks regardless of size. These vehicles represent 97% of the on-road fleet which is 2 - 24 years old. Although the current TSI testing program is considered effective in identifying vehicles grossly polluting for HC or CO, idle testing does not allow for the measurement of $NO_x$. The current TSI test must be upgraded to an alternative test type, such as ASM-2 with OBD, that can measure $NO_x$ emissions, and therefore achieve significant $NO_x$ reductions. The proposed ASM-2 type test is a more stringent test and estimated to achieve VOC and $NO_x$ emission reductions comparable to those achieved by an IM-**

**240 test, but at less than one-third the cost, and can be implemented through the same decentralized testing system as is used for the current TSI test. In addition, remote sensing is used to identify high-emitting vehicles. Owners of vehicles identified as high-emitters receive written notice of the violation instructing them to submit their vehicles to an emissions test at a state-certified emissions testing station for verification of exhaust emissions and to make necessary repairs to bring the vehicle into program compliance. Failure to comply with written notification of an emissions violation is a Class C misdemeanor punishable by a fine of not more than $350. Repeat violations are punishable by a fine of not more than $1,000. The commission made no changes to the rules in response to this comment.**

One individual wanted to install tailpipe testers on major roads to catch the 10% of the vehicles that cause most pollution and rely on the annual test to catch the rest.

**In addition to the requirement of all gasoline-powered vehicles 2 - 24 years of age to undergo annual emissions test, remote sensing is used to identify high-emitting vehicles commuting into an area and as an additional enforcement mechanism to identify high-emitting vehicles that have not complied with the program. Once a high-emitting vehicle is identified, the owner of the vehicle is instructed by written notice from the DPS to bring the vehicle in to a state-certified emissions testing station for a verification emissions test and to make necessary repairs to bring the vehicle into program compliance. The commission made no changes to the rules in response to this comment.**

Five individuals wanted to see California I/M standards implemented in Houston and six individuals wanted to see California I/M standards implemented statewide.

**The State of California is currently operating an emissions testing program that uses the ASM-2 testing technology and will incorporate the OBD testing technology. Modifications to the current emissions testing program in Texas are also being adopted to include the ASM-2 testing technology, and OBD testing technology in the designated I/M program areas. ASM-2 testing technology will be used on 1995 and older model year vehicles. On-board diagnostic testing technology will be used on 1996 and newer model year vehicles. Expansion of the I/M program in all counties is beyond the scope of this rulemaking and may require legislative authority. However, TTC, §548.301(b) and Texas Health and Safety Code, §382.037(c) allow the commission to establish by rule an I/M program in any county provided the county and its most populous municipality adopt a resolution requesting such a program. The commission has not received any such resolution to allow for implementation statewide. The commission made no changes to the rules in response to these comments.**

One individual suggested that legislation to require technological means to clean up the dirtiest engines is be more effective and cause less disruption of life style.

**The commission does not have the authority to write legislation, but to only enact rules based on current legislative authority. The proposed amendments to the vehicle emissions testing program are one part of an overall clean-air strategy for the state. Because of the scale of the HGA air quality problem the commission is adopting a wide range of rules, including both vehicle testing**

**and technology solutions. The commission made no changes to the rules in response to this comment.**

Five individuals suggested a tax supported program to assist the poor in improving their vehicles would be acceptable, if designed to minimize abuse.

**Establishing a tax to assist the poor in improving their vehicles is beyond the scope of this rulemaking and requires legislative authority. The commission made no changes to the rules in response to this comment.**

Four individuals commented that the proposed tailpipe test could not be enforced and had too many loopholes (i.e., buying without having vehicle inspected).

**Enforcement of the program is the responsibility of the DPS, TxDOT, and the commission. Vehicles registered in an I/M program area must comply with the safety and emissions testing program to be issued a safety certificate. The commission, TxDOT, and DPS implemented a vehicle re-registration denial enforcement element for vehicles that fail to comply with the emissions testing program. In counties subject to emissions testing, owners of vehicles that fail an emissions test and do not demonstrate proof of compliance can not re-register or obtain their registration certificate until obtaining proof that their vehicle complies with the emissions testing program. Remote sensing is used to identify high-emitting vehicles commuting into an area and as an additional enforcement mechanism to identify high-emitting vehicles that have not complied with the program. Once a high-emitting vehicle is identified, the owner of the vehicle is instructed**

**by written notice from the DPS to bring the vehicle in to a state-certified emissions testing station for a verification emissions test and to make necessary repairs to bring the vehicle into program compliance. Failure to comply with the notice is a Class C misdemeanor. Local law enforcement officials are responsible for ensuring that vehicles operating on public roads have a valid registration sticker and safety certificate.**

**The DPS routinely conducts covert and overt audits on inspection stations to identify personnel fraudulently selling stickers. Personnel that are caught are prosecuted in accordance with the law. The commission made no changes to the rules in response to this comment.**

Five individuals wanted local law enforcement agencies to strictly enforce the new tailpipe test for automobiles and trucks.

**Enforcement of the program is the responsibility of the DPS, TxDOT, and the commission. Vehicles registered in an I/M program area must comply with the safety and emissions testing program to be issued a safety certificate. The commission, TxDOT, and DPS implemented a vehicle re-registration denial enforcement element for vehicles that fail to comply with the emissions testing program. Remote sensing is used to identify high-emitting vehicles commuting into an area and as an additional enforcement mechanism to identify high-emitting vehicles that have not complied with the program. Once a high-emitting vehicle is identified, the owner of the vehicle is instructed by written notice from the DPS to bring the vehicle in to a state-certified emissions testing station for a verification emissions test and to make necessary repairs to bring the vehicle into program compliance. Failure to comply with the notice is a Class C misdemeanor.**

**Local law enforcement officials are responsible for ensuring that vehicles operating on public roads have a valid registration sticker and safety certificate. The current decentralized I/M program has mechanisms in place to prevent fraud and ensure compliance, such as referee challenge facilities, citations, fines, registration denial, and covert audits. The commission made no changes to the rules in response to this comment.**

Five individuals stated that too many dilapidated and unsafe cars and trucks were on the road and must be brought up to standards, taken off the road, or scrapped.

**The TTC, §502.009, states that if a vehicle has passed the safety and emissions test it is legal for that vehicle to be driven on the road. Motorists are issued citations by local and state law enforcement officials for driving a vehicle with an expired or invalid state inspection certificate, or for evading the emissions inspection or inspection outside of the affected area. These violations of TTC, §548.602 (Class C misdemeanor) and §548.603 (Class B misdemeanor) are respectively punishable by a fine starting at $200 and not exceeding $2,000 for each occurrence. The owner will be subject to an additional citation every time the vehicle is driven. Violators are given notification that they must comply with the I/M program requirements. Noncompliance will result in delivery of additional citations and fines which may accumulate to more than the expense of a minimum expenditure waiver. For those vehicles that fail to comply with the emissions testing program, a vehicle re-registration denial enforcement element has been implemented. In addition, remote sensing is used to identify high-emitting vehicles commuting into an area and as an additional enforcement mechanism to identify high-emitting vehicles that have not complied with the program. Once a high-emitting vehicle is identified, the owner of the vehicle is instructed**

**by written notice from the DPS to bring the vehicle in to a state-certified emissions testing station for a verification emissions test and to make necessary repairs to bring the vehicle into program compliance. Failure to comply with the notice is a Class C misdemeanor. Ultimately, local law enforcement officials are responsible for ensuring that vehicles operating on public roads have a valid registration sticker and safety certificate. Although the commission does not currently implement a scrappage program, the commission adopted rules in April 2000 which enabled and helped define locally run scrappage programs. The commission made no changes to the rules in response to this comment.**

One individual recommended that ample test lanes be provided and consumer protection criteria built into the program if IM-240 is utilized.

**The commission is not recommending the adoption of an IM-240 program. The ASM-2 test for model year vehicles 1995 and older and the OBD check for model year vehicles 1996 and newer will be offered in the decentralized test and repair network. The commission made no changes to the rules in response to this comment.**

One individual wanted to know what happened to the "choice" in the Texas Motorist Choice Program. We were told we would have a choice between centralized and decentralized I/M.

**The proposed amendments to the emissions testing program do not change any of the choices motorists had under the Texas Motorists Choice Program. The TSI testing program improved convenience by providing over 2,300 decentralized testing facilities in the original four I/M**

**program counties (Dallas, El Paso, Harris, and Tarrant). This decentralized network allows motorists a choice of test-and-repair or test-only facilities that offer the required emissions and gas cap integrity test. Test-only facilities may offer other services for the convenience of their customers, such as, but not limited to, oil changes, self-serve gasoline, and any other items that are not related to automotive parts, sales, and/or service. Test and repair facilities may offer a wide range of repairs and services for the convenience of their customers. The amended program will use this decentralized network to offer the same choices to motorists. However, continued participation in the program as it evolves will be a business decision made by each individual station owner. The commission made no changes to the rules in response to this comment.**

One individual commented that the local industry proposal is far superior to the plan proposed by the commission.

**The proposed amendments to the vehicle emissions testing program are only one part of the regional air control strategy. In order to achieve the ozone NAAQS, the HGA area needs to reduce $NO_x$ emissions. An ASM-2, or similar test, is estimated to achieve VOC and $NO_x$ emission reductions comparable to those achieved by an IM-240 type test, but at less than one-third of the cost, and can be implemented through the current decentralized testing network. The commission made no changes to the rules in response to this comment.**

Representative Zbranek, Judge Lloyd Kirkhall of Liberty County, Senator Bernsen, and two individuals recommended omitting Liberty and Chambers Counties from the proposed program. Representative Zbranek also wanted the commission and the EPA to justify why Liberty and Chambers Counties

should be included in the proposed program when modeling shows otherwise. Judge Sadler and three individuals recommended omitting Montgomery County from the proposed I/M testing program. The RAQCG, Harris County, and the HGAC supported the I/M program being proposed but recommended the commission omit the counties of Chambers, Liberty, and Waller and other appropriate counties from the I/M program based on the small amount of mobile source emissions from these counties. In addition, one individual made two recommendations: 1) omit Liberty County from the proposed I/M program; and 2) to have inclusion in I/M by some other geographical boundary, such as the border of the Trinity River or precincts which actually join Houston and have large numbers of people that commute into Houston.

**In the HGA area, eight counties have been designated as nonattainment for the ozone NAAQS: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. Photochemical modeling demonstrated that reductions of both $NO_x$ and VOC are required over the entire eight-county area. While the commission adopted the ASM-2 plus OBD I/M program for all eight counties, it included a provision in the rules to allow Chambers, Liberty, and Waller Counties the flexibility of replacing the I/M program with an alternative control strategy, as long as the proposed strategy achieves VOC and $NO_x$ reductions equivalent to those from the I/M program. The concept of redefining the I/M program area by geographical boundaries would prove very difficult to implement, especially due to the focus on county of registration in the program enforcement.**

Missouri City wanted to know if its city vehicles are exempt from additional inspection and from additional test fees.

**The vehicle I/M program requires annual testing of all gasoline-powered motor vehicles (including city and state-owned vehicles and leased vehicles) that are 2 - 24 years old, primarily operated and registered, or required to be registered, in the affected counties. There is no exemption for government vehicles. The commission made no changes to the rules in response to this comment.**

One individual generally supported the program but recommended mandatory emissions testing every three years.

**The commission appreciates the support of the vehicle emissions testing program. Vehicle emission testing is an integral part of the total air control strategy. Emission reduction credits achieved by any type of I/M program are reduced significantly when the program is not implemented as an annual test. The commission made no changes to the rules in response to this comment.**

One individual recommended allowing individuals to report license plate numbers from smoking vehicles to a police computer. After three reports, a letter would be sent out instructing the motorist to bring the vehicle in for testing. If the vehicle passes the inspection, the inspection is free. If the vehicle fails, the owner is charged an inspection fee and given 30 days to fix, repair, sell, retire, or destroy the vehicle.

**The commission implements a state-wide smoking vehicle program which relies on conscientious citizens to identify and report vehicles that they observe emitting visible exhaust. Citizens may report vehicles by an established hotline (1-800-453-SMOG(7664)) or through the WEB at**

**WWW.SMOKINGVEHICLE.ORG. Letters and informational brochures on causes of excessive smoke are sent to vehicle owners encouraging them to have their vehicle checked, and if necessary, repaired. The commission does not plan to change this program at this time. The commission made no changes to the rules in response to this comment.**

One individual recommended that vehicle inspection facilities be open 24 hours a day.

**There are currently more than 2,300 emissions testing facilities in the original four I/M program counties (Dallas, El Paso, Harris, and Tarrant). According to DPS safety and emissions station requirements, an inspection station must be open at a minimum of 40 hours per week. The actual operational hours are a business decision made by each individual station owner and are outside the scope of this rulemaking. If there is a demand for after hours testing the commission expects that the market would respond. However, it would not be reasonable to require every station to provide this service. The commission made no changes to the rules in response to this comment.**

SPX supported the proposed ASM-2/OBD testing program with the following provisions: implement the enhanced I/M program as soon as possible in all areas; test fees should be market driven; continue the proposed program for a minimum of five years; commission specify that BAR-97 certification be a minimum requirement for companies providing equipment to the new program; and use on-road remote sensing as one of the tools the commission will use for program evaluation. In addition, TADA commented that a market-based fee system would be appropriate if ASM-2 testing is adopted.

**The commission is adopting a phased approach to make for a smooth implementation while still providing significant air quality improvements. ASM-2 and OBD testing will be implemented in Harris, Dallas, Tarrant, Denton, and Collin Counties beginning May 1, 2002; in Brazoria, Fort Bend, Galveston, Montgomery, Ellis, Johnson, Kaufman, Parker, and Rockwall Counties beginning May 1, 2003; and in Chambers, Liberty, and Waller Counties beginning May 1, 2004.**

**The commission believes a fixed fee to be more equitable across the market place by allowing for consistency of price within program areas and provides consumer protection. The commission made no change to these rules.**

**An emissions testing program is required by federal law and has been authorized to be implemented through Texas state law. The program is subject to change based on changes that could occur in the federal and/or state laws which authorized the current program. Because the program is subject to this authorization, the commission cannot guarantee the program for any set amount of time. Purchasing new testing equipment is a business decision and is the responsibility of the buyer at any given point in time to determine if an investment in an analyzer is worth the cost. Furthermore, as technology evolves over time, the commission will continue to evaluate technological advances in emissions testing to ensure the best possible testing methodologies and equipment are considered in future program development.**

**The commission concurs with the minimum requirement for all companies to submit proof that the test equipment which they plan to provide as a part of the new program has received BAR97**

**certification. The specifications for test equipment used in the new program contain this requirement.**

**Remote sensing is an integral part of the I/M program. Although it is not used as part of the program evaluation, it is used to capture the requirement of on-road testing and used to identify high-emitting vehicles registered in the designated I/M program areas. The current method that is used by staff for I/M program evaluation is the EPA-approved Sierra Research method for METT. The commission will continue to evaluate technological advances in methods for I/M program evaluation.**

**The commission made no changes to the rules in response to these comments.**

SPX stated that the alternative test procedures study completion date may be too late to have an impact on program design decisions and recommended that the study be completed sooner or abandoned in favor of a generally accepted I/M program design.

**The commission is conducting a study that will evaluate the use of an alternative test procedure. The scheduled completion date for the study is February 2001. The commission believes that this date will provide sufficient time to implement any necessary program changes. The commission made no changes to the rules in response to this comment.**

TADA commented that small business owners will decline to participate in an ASM-2 program because the equipment is more expensive, higher wages will have to be paid for more qualified inspectors, and

insurance and liability claims will increase due to dynamometer testing. In addition, Judge Sylvia of Chambers County expressed concern that the proposed I/M program will place a heavy burden on his constituents. Judge Sylvia also expressed concern that there will not be enough testing stations that can afford the $40,000 for new equipment and enough testing stations to perform the emissions test.

**The commission adopted a fee of $22.50 for both the ASM-2 and OBD tests in order to cover costs involved in the use of loaded mode test equipment. These increased costs include labor, training, warranties, insurance, and consumable items (such as calibration gases) used in conducting emissions tests. Continued participation in the program as it evolves will be a business decision made by each individual station owner. However, staff are in discussion with analyzer manufacturers to identify ways to relieve the economic burden for inspection station operators at the outset of the program. The commission made no changes to the rules in response to these comments.**

Representative Madden generally supported the program, but made two comments regarding the proposed I/M program. First, Representative Madden did not want to have any contractual obligations as the state had with the previous testing contractor, Tejas. Second, he wanted to ensure that there will time to evaluate the vehicle test project now in the DFW area and included in the SIP area so that there will be flexibility to modify the requirement of better testing methods for $NO_x$ produced or if the same results are produced by a less costly test method.

**The commission has no intention of contracting with one company to implement a centralized testing system as was the case with the original IM-240 program. The I/M program will continue**

**to be implemented using a decentralized network comprised of individual inspection station owners. However, some specialized portions of the program such as remote sensing and computerized data management are currently contracted out. These contracts do not approach the magnitude of the Tejas contracts.**

**The commission included flexibility in the rules and SIP to change the testing methodology based on the results of the vehicle technology testing project if the alternative testing technology proves to be as or more effective than the proposed ASM-2 testing methodology in identifying vehicles with excessive $NO_x$ emissions. The commission believes there will be sufficient time to do this, decided, before the first implementation date of May 1, 2002. The commission made no changes to the rules in response to these comments.**

One individual recommended that owners of polluting vehicles pay a stiff fine for driving on city streets.

**Vehicles registered in an I/M program area must comply with the safety and emissions testing program to be issued a safety certificate. Motorists are issued citations by local and state law enforcement officials for driving a vehicle with an expired or invalid state inspection certificate. These violations of the TTC, §548.602 (Class C misdemeanor) and §548.603 (Class B misdemeanor) are respectively punishable by a fine starting at $200 and not exceeding $2,000 for each occurrence. The owner is subject to a possible additional citation every time the vehicle is driven. Violators are given notification that they must comply with the I/M program requirements. Noncompliance will result in delivery of additional citations and fines. In addition,**

**remote sensing is used to identify high-emitting vehicles commuting into an area and as an additional enforcement mechanism to identify high-emitting vehicles that have not complied with the program. When a high-emitting vehicle is identified, the owner of the vehicle is instructed by written notice from the DPS to bring the vehicle in to a state-certified emissions testing station for a verification emissions test and to make necessary repairs to bring the vehicle into program compliance. Failure to comply with the notice is a Class C misdemeanor. Local law enforcement officials are responsible for ensuring that vehicles operating on public roads have a valid registration sticker and safety certificate. According to the TTC, Chapter 548, vehicles failing to have a valid safety and emissions certificate could range from a Class C misdemeanor to a second degree felony, based on the charge. The fine could range from $200 to $10,000 and potentially involve confinement in a state jail. The commission made no changes to the rules in response to this comment.**

One individual recommended the commission avoid proposals not based on proven technologies i.e., tailpipe testing.

**The commission is adopting a tailpipe test method that is accepted by the EPA through research conducted by the National Center for Vehicle Emissions Control and Safety at Colorado State University. The I/M program checks whether the emission control system on a vehicle is working correctly. All new passenger cars and trucks sold in the United States today must meet stringent pollution standards, but they can only retain this low-pollution profile if the emission controls and engine are functioning properly. The I/M program is designed to ensure that vehicles stay clean in actual consumer use. Through annual vehicle emissions inspection and required repairs for**

**vehicles that fail the test, the I/M program encourages proper vehicle maintenance and discourages tampering with emission control devices. I/M programs have been implemented for many years and the technology has been proven effective.**

*State Compliance*

One individual in Liberty County suggested that the current program has only a 40% compliance rate.

**Current I/M program data and a 1996 vehicle safety inspection sticker compliance rate survey for Dallas, El Paso, Harris, and Tarrant Counties (Appendix J of the SIP) suggests a compliance rate of approximately 96%. The commission will continue to monitor the program's compliance rate.**

*Motorist Compliance*

Two individuals commented that stricter exhaust emission checks are just another way to pay more money for inspection stickers and squeeze revenue from the consumer. They believed most vehicles will pass anyway and for those that fail, there are plenty of places that will pass you for an extra $10 under the table.

**More sophisticated photochemical modeling demonstrates that the HGA area needs to reduce $NO_x$ emissions in order to achieve the ozone NAAQS. The current TSI test does not identify $NO_x$ emissions because under idle modes, the temperature and pressure in the combustion chambers are not high enough to produce a significant amount of measurable $NO_x$. In order to help the HGA nonattainment area achieve the necessary $NO_x$ reductions, the current tailpipe test must be upgraded to an alternative test type, such as ASM-2, that can measure $NO_x$ emissions. OBD**

**checks will be given to 1996 and newer model year vehicles. An ASM-2, or similar test, is estimated to achieve VOC and $NO_x$ emission reductions comparable to those achieved by an IM-240 type test, but at less than one-third of the cost, and can be implemented through the current decentralized testing network which includes over 2,300 testing facilities in the four I/M program counties (Dallas, El Paso, Harris, and Tarrant). The test fee for a loaded mode test like ASM-2 will not be above the average of what is currently charged nationwide for a similar test. As OBD testing is applicable only to 1996 and newer vehicles, a tailpipe test, such as ASM-2, must be available in order to test the pre-1996 vehicles.**

**A major contributor to air pollution is the exhaust from cars and trucks. All over Texas vehicles contribute as much as half of the harmful air emissions that create pollution. One vehicle in bad repair can produce 28 times as much pollution as one vehicle in good repair. Even though vehicle manufacturers are required to install emissions controls on all vehicles, improperly maintained emissions controlled devices may eventually malfunction. The amount of emissions reduction benefit is not only based on repairing failed vehicles, but also on vehicles being properly maintained because they are subject to emissions testing.**

**To combat fraud and abuse in the emissions testing program, mechanisms are in place to prevent fraud and ensure compliance, such as referee challenge facilities, citations, fines, registration denial, and covert and overt audits of inspection stations.**

**The commission made no changes to the rules in response to these comments.**

Two individuals recommended deleting the visual examination (parameter check) to verify that certain factory equipment remains installed on the vehicle. In addition, the visual examination prevents the car owner from improving on the original design of the car and further reducing emissions and/or improving fuel economy.

**Vehicle configurations are certified by the EPA. The FCAA, §203(a)(3) (42 USC, §7522(a)(3)), "prohibits any person from removing or rendering inoperative any emission control device or element of design installed on or in a motor vehicle or motor vehicle engine prior to its sale and delivery to an ultimate purchaser" and prohibits "any person from knowingly removing or rendering inoperative any such device or element of design after such sale and delivery to the ultimate purchaser." The visual check is an important part of the vehicle safety inspection. The commission made no changes to the rules in response to these comments.**

One individual recommended that all vehicles operating in or commuting into all nonattainment areas be subject to a more stringent test and issued a corresponding "distinctive" sticker.

**Vehicles within the designated I/M program areas have a distinctive bar on the vehicle's registration sticker to identify that the vehicle is registered in the program area and therefore subject to an emissions test. All 2 - 24 year old gasoline-powered vehicles registered in an I/M program area, as well as vehicles that operate more than 60 calender days per testing cycle in an I/M program area, are required to comply with emissions standards for such an area. Vehicles must comply with the safety and emissions testing program to be issued a safety certificate. As an additional enforcement mechanism, remote sensing is used to identify high-emitting vehicles**

**operating in an I/M program area. Once a high-emitting vehicle is identified, the owner of the vehicle is instructed by written notice to bring the vehicle in to a state-certified emissions testing station for a verification emissions test and to make necessary repairs to bring the vehicle into program compliance. Vehicles registered outside the nonattainment areas are not subject to emissions testing. The commission made no changes to the rules in response to this comment.**

Six individuals wanted to see obvious oil burning or ill-maintained vehicles stopped and cited when on the freeway. It was also recommended that after a citation has been issued, a five-day retractable grace period be implemented, if the motorist brings the vehicle back into compliance.

**The TTC, §548.306, specifies that a motor vehicle registered in an ozone nonattainment area commits an offense if visible smoke remains suspended in the air ten or more seconds before fully dissipating. Therefore, law enforcement personnel may issue a citation to the registered owner of a vehicle that produces excessive visible smoke. A law enforcement officer who has probable cause to believe that this offense has been committed, has the authority to issue the driver of the vehicle an informative citation and explain that the registered owner of the vehicle may receive notice in the mail about the violation. 30 TAC §111.111(a)(5) states that motor vehicles shall not have visible exhaust emissions for more than ten consecutive seconds. This rule applies statewide and can be enforced by local law enforcement agencies. Implementing a five-day grace period after the citation has been issued is beyond the scope of this rulemaking. The commission made no changes to the rules in response to these comments.**

One individual recommended that a program be established to find older cars without smog devices and people who disable their catalytic converter.

**According to the "Rules and Regulations Manual for Operation of Official Vehicle Inspection Stations" the annual safety inspection procedures consist of a visual exhaust emissions check on 1968 and newer vehicles. The check includes inspecting the exhaust emission system to determine if it has been removed, disconnected, or altered in any manner to make it ineffective; checking the plumbing or hoses for leaks, breaks, and improper routing; and checking the air pump (air injection type) to determine if it is loose, broken, excessively cracked, frayed, or has pieces missing. The inspector also checks the catalytic converter on 1984 or later model vehicles to make sure it has not been removed or is leaking or disconnected. The commission made no changes to the rules in response to this comment.**

Three individuals wanted to incorporate mandatory inspections prior to registration of the vehicle.

**Incorporating mandatory inspections prior to registration of the vehicle requires legislative authority and is therefore beyond the scope of this rulemaking. Currently, motorists whose vehicle have failed the emissions test and have not complied with the I/M program requirements are denied re-registrations of the subject vehicle until the motorist has complied with the I/M program requirements. The commission made no changes to the rules in response to this comment.**

ExxonMobil, LWV-TX, BCCA, and two individuals supported ASM-2 testing with integrated OBD testing in all eight counties of the HGA.

**The commission appreciates the support of OBD and ASM-2 testing and agrees that emissions reductions of $NO_x$ and VOCs are required from all eight counties for the HGA area to demonstrate ozone attainment.**

The Liberty County Sheriff asked who is going to enforce the regulation?

**The vehicle emissions testing program is administered under Texas state law by the commission, TxDOT, and the DPS. Vehicles registered in an I/M program area must comply with the safety and emissions testing program to be issued a safety certificate. Motorists can be issued citations by local and state law enforcement officials for driving a vehicle with an expired or invalid state inspection certificate, or for evading the emissions inspection or inspection outside of the affected area. These violations of the TTC, §548.602 (Class C misdemeanor) and §548.603 (Class B misdemeanor) are respectively punishable by a fine starting at $200 and not exceeding $2,000 for each occurrence. Violators are given notification that they must comply with the I/M program requirements. The commission, TxDOT, and DPS implement a vehicle re-registration denial enforcement element for vehicles that fail to comply with the emissions testing program.**

**Remote sensing is used to identify high-emitting vehicles commuting into an area and as an additional enforcement mechanism to identify high-emitting vehicles that have not complied with the program. Once a high-emitting vehicle is identified, the owner of the vehicle is instructed by**

**written notice from the DPS to bring the vehicle into a state-certified emissions testing station for a verification emissions test and to make necessary repairs to bring the vehicle into program compliance. Failure to comply with the notice is a Class C misdemeanor. Local law enforcement officials are responsible for ensuring that vehicles operating on public roads have a valid registration sticker and safety certificate.**

**DPS also conducts overt and covert audits of the vehicle inspection stations.**

One individual recommended sticking to the existing program.

**The current TSI testing program is considered effective in identifying vehicles grossly polluting for HC or CO. However, idle testing does not allow for the measurement of $NO_x$ because under idle modes the temperature and pressure in the combustion chambers are not high enough to produce a significant amount of measurable $NO_x$. In order to help the HGA nonattainment area achieve the necessary $NO_x$ reductions, the current TSI test must be upgraded to an alternative test type, such as ASM-2 that can measure $NO_x$ emissions, and therefore achieve significant $NO_x$ reductions. The commission made no changes to the rules in response to this comment.**

*Geographic Coverage*

The Sierra-Houston and seven individuals supported tougher auto emissions testing and felt that all counties should be subject to this rule and enforced statewide. LWV-TX commented that testing should be required throughout the airshed.

**Expansion of the I/M program in all counties is beyond the scope of this rulemaking and may require legislative authority. However, TTC, §548.301(b) and Texas Health and Safety Code, §382.037(c) allow the commission to establish by rule an I/M program in any county provided the county and its most populous municipality adopt a resolution requesting such a program. The commission has not received any such resolutions to allow for implementation statewide. The commission made no changes to the rules in response to these comments.**

One individual recommended tailpipe testing for all vehicles registered by residences of the following cities: Dallas, Garland, Richardson, Carrollton, Coppell, Fort Worth, Grapevine, Southlake, Burleson, Mansfield, Pearland, Houston, Katy, Missouri City, Stafford, and Friendwood.

**Residents of Dallas (Collin, Dallas, Denton, Kaufman, and Rockwall Counties); Garland (Collin, Dallas, and Rockwall Counties); Richardson (Collin and Dallas Counties); Carrollton (Collin, Dallas, and Denton Counties); Coppell (Dallas and Denton Counties); Fort Worth (Tarrant and Denton Counties); Grapevine (Dallas, Denton, and Tarrant Counties); Southlake (Denton and Tarrant Counties); Burleson (Johnson and Tarrant Counties); Mansfield (Ellis, Johnson, and Tarrant Counties); Pearland (Brazoria and Harris Counties); Houston (Fort Bend, Harris, and Montgomery Counties); Katy (Fort Bend, Harris, and Waller Counties); Missouri City (Fort Bend and Harris Counties); Stafford (Fort Bend and Harris Counties); and Friendswood (Galveston and Harris Counties) are all in affected counties and will be required to have emissions tests conducted on their registered vehicles. The commission made no changes to the rules in response to this comment.**

One individual recommended tailpipe testing for residents in Plano, the Colony, Flower Mound, Lewisville, Corinth, Denton, Lake Dallas Shores, Dickinson, League City, New Caney, Porter, The Woodlands, and Oak Ridge North prior to acquisition of new plates for: 1) diesel-powered motor vehicles; 2) gasoline vehicles model years 1979 - 1994 registered with new plates starting in 2002; 3) gasoline vehicles model years 1995 - 2002 which are repaired after collisions; and 4) out-of-state residents receiving Texas license plates.

**All 2 - 24 year old gasoline-powered vehicles registered in the program area must comply with the safety and emissions testing program to be issued a safety certificate. A phased approach to implementing the I/M program has been adopted by the commission which will include all of the cities listed.**

**Currently, diesel-powered vehicles are not included in the I/M program. These vehicles make up a small percentage (approximately 3%) of the vehicle population. Due to less standardization in diesel vehicles, more technological development is needed before testing is initiated. The commission is, however, researching the future feasibility of diesel testing.**

**All vehicles are tested annually whether in an accident or not. In addition, most collisions do not necessarily impair vehicle emissions equipment. Motorists who relocate to Texas from out-of-state must pass a safety inspection prior to registering their vehicle in Texas. Also, if the motorist resides in an I/M program area, they are required to comply with the safety and emissions requirements before receiving Texas plates.**

**The commission made no changes to the rules in response to these comments.**

*Other Issues*

One individual commented that Texas consider alternative means, such as those taken recently by Florida, of dealing with air pollution that do not interfere with every individual.

**The air quality in the nonattainment areas in Florida has improved enough to have the areas classified as attainment areas in 1994. The vehicle emissions testing program in Florida was a voluntary measure by the Florida Legislature to ensure continued compliance with the air quality standards. Later, Florida's state implementation plan indicated that the state could demonstrate continued compliance with the air quality standards without using tailpipe testing as a control strategy. Therefore, the Florida Legislature had the option of eliminating their emissions testing program. Since the Houston area cannot demonstrate compliance with the air quality standards, vehicle emissions testing must continue to be one of the many control strategies used in Texas. The commission made no changes to the rules in response to this comment.**

Three individuals felt that tailpipe testing would do no good.

**A major contributor to air pollution is the exhaust from cars and trucks. All over Texas vehicles contribute as much as half of the harmful air emissions that create pollution. One vehicle in bad repair can produce 28 times as much pollution as one vehicle in good repair. Even though vehicle manufacturers are required to install emissions controls on all vehicles, if the vehicles are not being properly maintained, the emissions control devices will be less effective. The emissions**

**testing program tests vehicles 2 - 24 years old. These vehicles account for the vast majority of vehicles on the road and the vehicle miles traveled, which have a direct correlation to the impact on air quality. The amount of emissions reduction benefits is not only based on repairing failed vehicles, but also from vehicles being properly maintained because they are subject to emissions testing. As OBD testing only applies to model year 1996 and newer vehicles, there is a need for a tailpipe test to identify high $NO_x$ emissions from older vehicles. The commission made no changes to the rules in response to this comment.**

GEHC supported tougher programs for testing vehicles emissions but not until obvious changes have taken place to stop grandfathered and industrial pollution.

**The commission has made no change in response to the comments. The implementation of the vehicle emissions program is one of many programs being adopted to reduce ozone. The commission's plan to reduce ozone pollution also includes programs designed to achieve significant reductions from industrial and manufacturing facilities. Combined, these programs provide the best plan for achieving the necessary reductions without overburdening any one sector of the community.**

**The adopted rules that apply to facilities, for example the Chapter 117 $NO_x$ requirements and the Chapter 115 VOC requirements, apply to both permitted and non-permitted ("grandfathered") sources in HGA. The commission agrees that it is appropriate to pursue cost-effective measures to reduce pollution; however, any such measures must be within the statutory authority of the commission. The TCAA does not authorize the commission to require grandfathered sources to**

**obtain permits in order to operate, or to prohibit operation of those sources. A grandfathered facility is one that existed at the time the Texas Legislature amended the TCAA in 1971. These facilities were not required to comply with (i.e., were grandfathered from) the then new requirement to obtain permits for construction activities. Whenever a grandfathered facility is modified (as that term is defined in the TCAA) then it is required to comply with the TCAA permitting requirements in order to be authorized to construct and operate that modification. If a grandfathered facility has never been modified, it continues to be authorized by the TCAA to operate without a permit. Further, the definition of "modification" specifically excludes changes to facilities that are authorized by an exemption, i.e., any facility, including a grandfathered facility, can make a change using a commission exemption (now permit by rule) and this change is not considered to be a modification that would trigger the permitting requirements of the TCAA. During the 76th Texas Legislative Session in 1999, the issue of grandfathered sources was addressed by two different legislative programs. Senate Bill 766 was passed which provided a framework for a voluntary permitting program for grandfathered sources under the TCAA, and SB 7 which requires mandatory permitting and emission reductions from electric generating facilities. The commission continues to pursue enforcement action against companies who are not in compliance with the permitting requirements of the TCAA. However, Senate Bill 766 does provide for amnesty from enforcement for facilities eligible to participate in the voluntary emission reduction permit program as long as a permit application is received before the TCAA deadline of September 1, 2001.**

Brazoria CCC commented that the impact of the emissions testing and denial of re-registration of vehicles who do not pass the test has a disparate impact upon the economically disadvantaged citizens.

The commenter stated that this denial of the right to use a vehicle is a taking of property without a hearing and without compensation. The commenter stated that the procedures contained in the SIP constitute an unlawful delegation of legislative authority to an administrative agency.

**Although it is not clear what, if any, legal standard the commenter alleges the commission would violate in adopting the rules, they state that the rules would "disproportionately impact" economically disadvantaged. This could be a reference to Title VI of the Civil Rights Act of 1964. In order for the commission to be shown in violation of Title VI, a disproportionately negative impact to minorities must be shown. The commission maintains that the rules as adopted will not have a disparate impact on persons based on race, color, or national origin. The basis for the rules is protection of human health and the environment, and the reduction in overall motor vehicle emissions is anticipated to provide reductions in the formation of ozone in the area. As for potential negative impacts of the rules, these are clearly borne equally by all drivers governed by the rules without any differentiation by race, color, or national origin.**

**The commission understands that vehicle repairs can be costly. In order to assist the public, the vehicle emissions testing program includes two waiver options: the minimum expenditure waiver and the individual vehicle waiver. The minimum expenditure waiver is available to those who have made repairs to their vehicle within the established criteria and met the dollar limits established by the EPA rule. The individual vehicle waiver is for those who cannot meet emissions standards despite every reasonable effort by the motorist. In addition to these two waivers, the low-income time extension is available for those who can demonstrate a financial inability to either afford adequate repairs or to meet the applicable minimum expenditure waiver amount. The**

**waivers and extension are ways to ensure that motorists who are making a "good faith" effort to comply with the I/M program requirements do not incur excessive repair costs, are not excessively inconvenienced, or are not denied re-registration of their vehicle.**

**With regard to the idea that the program amounts to a taking of a vehicle, the commission disagrees with the commenter. Legally, this program is no different than the requirement that all drivers must carry liability insurance in order to operate their vehicle. While both programs set conditions which must be met before operating a motor vehicle, the state's police power to protect the health and safety of the general public outweighs the burden on the individual driver. Neither program represents a taking of a vehicle without hearing or just compensation.**

**Finally, the I/M program is not an unlawful delegation of legislative authority to an administrative agency. The Texas Legislature has defined and redefined the parameters of an authorized I/M program over the past decade. The current specific state authorization is found in the TCAA, §§382.037 - 382.038. Additionally, the directive of the legislature to adopt a program as required by federal law, TCAA, §382.037(c)(1), was written in light of the specific federal program requirements found in FCAA, §182(c)(3) and in EPA rules at 40 CFR Part 51, Subpart S. The I/M program has been lawfully authorized and the implementation of the program lawfully delegated to the commission.**

Brazoria CCC commented that the remote sensing component of the program is a violation of the United States Constitution because it is covert surveillance of citizens without probable cause. Brazoria CCC stated that the proposed program violates the United States Constitution as it pertains to

criminalizing innocent behavior and not affording the presumption of innocence, as well as proposing enforcement tactics that clearly violate the safeguards of probable cause in the criminal justice system.

**The commission disagrees with the commenter that the remote sensing component of the program amounts to an illegal search. The remote sensing components detects emissions of vehicles which are operating on the public roadway in plain view and therefore is not a search. There is no unlawful entry into private domain and the vehicle is not stopped at the time of the test so there is no seizure. Further, as case law indicates, there is a reduced expectation of privacy associated with motor vehicles and therefore only probable cause is required to search an automobile.**

**The commission disagrees with the commenter's assertion that the program criminalizes innocent behavior. It is not a crime to be detected as a high-emitter by remote sensing equipment so there is no presumption of guilt or innocence. In the event that a vehicle detected as a high-emitter, the operator is required to bring the vehicle in for an emission test. The operator may choose to repair the vehicle before bringing it for a test, in which case a clean test will mean there are no further conditions upon that operator. If the operator then fails the emission test, the operator must either repair the vehicle or qualify for a waiver within a certain period of time. It is only the operator who does not bring the vehicle in at all or who does not follow-up after a failed test who is subject to penalty under the program. In these cases, probable cause has clearly been demonstrated and due process is provided through the enforcement phase.**

One individual commented that the proposed I/M program was illegal, unconstitutional, and unenforceable. In addition, he wanted to know if he will be considered a criminal for driving a vehicle that cannot pass a tailpipe test.

**The FCAA Amendments of 1990 require vehicle emission testing in all communities where ozone levels exceed federal health standards which have been classified as moderate or above nonattainment areas. Senate Bill 1856, passed by the Texas Legislature, 75th Session, 1997, gave the commission the authority to establish the current I/M program.**

**The vehicle emissions testing program is administered under Texas state law by the commission and the DPS. The TTC, §548.301, states that the commission shall establish a motor vehicle emissions inspection and maintenance program for vehicles as required by any law of the United States or the state's air quality state implementation plan. The TCAA, §382.037, specifies that the commission by rule may require emissions-related inspection and maintenance of land vehicles, including testing exhaust emissions, examining emission control devices and systems, verifying compliance with applicable standards, and other requirements as provided by federal law or regulation. Motorists are issued citations by local and state law enforcement officials for driving a vehicle with an expired or invalid state inspection certificate, or for evading the emissions inspection or inspection outside of the affected area. These violations of the TTC, §548.602 (Class C misdemeanor) and §548.603 (Class B misdemeanor) are respectively punishable by a fine starting at $200 and not exceeding $2,000 for each occurrence. The owner will be subject to an additional citation every time the vehicle is driven. Violators are given notification that they must comply with the I/M program requirements.**

**Although it is a criminal offense to drive a vehicle without a proper safety and emissions certificate, it is not a criminal offense to drive a vehicle that has not passed the emissions test if the vehicle has received a waiver or extension.**

**The commission disagrees with the commenter's statement that the I/M program is unconstitutional for all the reasons stated in response to comments regarding unlawful taking, due process, unlawful delegation.**

**The commission made no changes to the rules in response to these comments.**

Baker Botts commented that it generally supports the ongoing efforts by the commission to develop a SIP that is technologically achievable, economically reasonable, and legally approvable. Baker Botts, BCCA, ExxonMobil, Harris County Judge Robert Eckels, Phillips 66, TCC, and an individual commented that the commission should incorporate into the SIP a greater level of reductions from federally preempted sources and stated that EPA-regulated sources account for about 40% of the $NO_x$ emissions in the HGA. The commenters stated that the EPA issued a number of regulations for some federally preempted sources, such as land-based spark engines, marine, recreational and land-based diesel engines, aircraft and locomotive engines, well after the FCAA deadlines, and that the EPA recently strengthened rules for on-road and non-road vehicles and fuels, such as low sulfur gas and diesel, Tier II motor vehicles, heavy-duty highway vehicle standards, and non-road Tier II/Tier III heavy-duty engine standards. The commenters stated that delays in implementing these rules have prompted the commission to propose technically and economically infeasible emission reductions from sources in HGA that the state has authority to regulate to make up for the missing federal reductions.

The commenters stated that these delays have forced the commission to propose expensive regional fuels and significant use restriction regulations. The commenters stated that the commission and the EPA can ensure an equitable distribution of the compliance burdens necessary to meet mandated air quality improvement in HGA only by allowing the SIP to capture anticipated emission reductions from federally preempted sources. Baker Botts noted that the EPA demonstrated a willingness to assume responsibility for a portion of emission reductions by creating a process in Los Angeles called a "public consultative process," that would resolve issues related to emissions from national and international sources, and that the EPA has also provided flexibility in obtaining offsets by allowing states to provide offsets to refiners based on emission reductions that the EPA projected would result from mobile sources using Tier II gasoline. Baker Botts suggested that this same sort of prospective crediting should be used to develop a more rational HGA SIP, and that the EPA should allow the commission to credit in the SIP the prospective emission reductions that will result from implementation of the Tier II gasoline rule and from other federally preempted sources. Finally, Baker Botts cited two cases wherein the District of Columbia Circuit has approved the EPA's flexibility with respect to statutory deadlines under the FCAA when the EPA has failed to meets its own deadlines, and this failure was deemed to upset the balanced federal/state responsibilities under the FCAA. ExxonMobil commented that it supports the commission and the EPA crediting the HGA SIP with an additional 60 tpd of federally preempted emission reductions that will occur over the next ten years. Harris County Judge Robert Eckels commented that the commission should work with the EPA to accelerate the implementation schedule for federally preempted emissions so that at least one-half of the related emission reductions are achieved by 2007, and that as a part of this process, the commission should delineate federal assignments detailing the engine standards and emission reductions necessary to achieve real and sustainable pollution reductions.

**The commission agrees with the commenters that emission reductions from federally preempted sources would provide benefits for the HGA SIP demonstration, and the inability of the commission to regulate certain source categories has necessitated the use of other ozone control strategies. However, the commission understands that the EPA SIP approval process does not provide a mechanism for credit for emission reductions that occur after the attainment date. The commission understands that EPA is not currently considering accelerating implementation schedules for existing federal rules. The commission is working with EPA to determine the availability of SIP credit for many non-traditional control strategy mechanisms, like economic incentive programs and flexibility for preempted source categories. Additionally, the commission is working with EPA to determine an appropriate federal contribution credit available for the HGA SIP.**

BCCA, ExxonMobil, and Phillips commented that the commission has failed to follow the requirements for adopting a major environmental rule as required by Texas Government Code, §2001.0225 (i.e. no cost benefit analysis performed; no draft impact analysis performed; no description of why identified reasonable alternative were rejected; and no final RIA performed). BCCA and Phillips commented that the proposed rule meets the definition of a major environmental rule and that the RIA requirements of Texas Government Code, §2001.0225 are triggered because the proposed rule exceeds standards set by federal law and exceeds an express requirement of state law. BCCA further commented that the commission's efforts to avoid an RIA by asserting that the proposed rules are exempt from the RIA requirements because federal law mandates the rules is legally flawed and may render the rules invalid.

**The commission disagrees with the commenters that the proposed rules meet the definition of a major environmental rule and that its interpretation of the exemption for federally mandated standards is legally flawed. While the rules may require significant capital investments by inspection station owners, the fee established under the rules should offset most, if not all of the costs. Additionally, whether a rule is a "major environmental rule" alone is not enough to trigger the RIA requirements. Texas Government Code, §2001.0225 only applies to a major environmental rule adopted by a state agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.**

**This rulemaking action does not meet any of these four applicability requirements, and is adopted in substantial compliance with the RIA requirements. Texas Government Code, §2001.035. These rules do not exceed an express standard set by federal law because the I/M requirements are specifically developed to meet the ozone NAAQS set by the EPA under 42 USC, §7409 and the requirement for a severe nonattainment are to have an I/M program under 42 USC, §7511a(d). Title 42 USC, §7410 requires 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. Failure to develop control strategies to demonstrate attainment can result in federal sanctions. Specifically, as noted elsewhere in this rule preamble, the emission reductions**

**associated with these rules are a necessary element of the attainment demonstration required by the FCAA.**

**This conclusion is supported by the legislative history for Texas Government Code, §2001.0225. During the 75th Legislative Session, SB 633 amended the Texas Government Code to require agencies to perform an RIA of certain rules. The intent of SB 633 was to require agencies to conduct a RIA of 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. 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. Because of the ongoing need to address nonattainment demonstrations required by federal law, the commission routinely proposes and adopts SIP rules. If each rule proposed for inclusion in the SIP was incorrectly considered as exceeding federal law, every SIP rule would require the full RIA contemplated by SB 633. This result would be inconsistent with the cost estimates and fiscal notes prepared by the commission and by the LBB. 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 meet the requirements under §2001.0225(a). 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. In other**

**words, the proposed rules are intended to meet federal and state law, and do not go above and beyond what is required to meet federal or state statutes.**

**The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation."** ***Central Power & Light Co. v. Sharp*****, 919 S.W.2d 485, 489 (Tex. App.–Austin 1995),** ***writ denied with per curiam opinion respecting another issue*****, 960 S.W.2d 617 (Tex. 1997);** ***Bullock v. Marathon Oil Co.*****, 798 S.W.2d 353, 357 (Tex. App.–Austin 1990, no writ); <eti>** ***Cf. Humble Oil & Refining Co. v. Calvert*** **<et>, 414 S.W.2d 172 (Tex. 1967);** ***Sharp v. House of Lloyd*****, Inc., 815 S.W.2d 245 (Tex. 1991);** ***Southwestern Life Ins. Co. v. Montemayor*****, 24 S.W.3d 581 (Tex. App.--Austin 2000,** ***pet. denied*****); and** ***Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*****, 563 S.W.2d 916 (Tex. 1978).**

**The commission's interpretation of the RIA requirements is also supported by a change made to the APA by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of §2001.0225.**

**Therefore, in addition to not exceeding an express standard set by federal law, these rules do not exceed state requirements, and are not adopted solely under the general powers of the agency because the provisions of the TCAA, §§382.011, 382.012, 382.017, 382.019, 382.037 - 382.038, and 382.039 authorize the commission to implement a plan for the control of the states air quality, including measures necessary to meet federal requirements. The remaining applicability criteria, pertaining to exceeding a delegation agreement or contract between the state and the federal government does not apply. Thus, the commission is not required to conduct a regulatory analysis as provided in Texas Government Code, §2001.0225.**

BCCA, ExxonMobil, and Phillips commented that the rule was proposed without an adequate takings impact assessment. The commenters stated that Section 2007 of the Texas Government Code requires an agency to prepare a written takings impact assessment when proposing a rule. They further stated that the assessment must describe the purpose of the proposed action; determine whether engaging in the proposed action will constitute a taking; and describe reasonable alternative actions that could accomplish the specified purpose and explain whether these alternatives actions also would constitute takings. BCCA and ExxonMobil stated that guidelines from the attorney general direct an agency to carefully review governmental actions that have a significant impact on the owner's economic interest. Finally, BCCA commented that commission did not explain why the rule was reasonably taken to meet the federal requirement and therefore does not qualify for the exemption claimed. BCCA stated that this rule requires more than is necessary to meet the federal requirement.

**The primary reason the commission determined that these rules did not constitute a takings under Texas Government Code, Chapter 2007 is that they will not burden private real property. These**

**rules apply to motor vehicles and to equipment required at vehicle inspection stations, neither of which are real property or appurtenance thereto.**

**In its analysis, the commission also found that the rules are exempt from Texas Government Code, Chapter 2007 pursuant to §2007.003(b)(4) because they are reasonably taken to fulfill an obligation mandated by federal law. The commission has included elsewhere in this preamble its reasoned justification for adopting this strategy and has explained why it is a necessary component of the SIP which is federally mandated. This discussion, as well as the HGA SIP which is being adopted concurrently, explains in detail that every rule in the HGA SIP package is necessary and that none of the reductions in those packages represent more than is necessary to bring the area into attainment with the NAAQS. Additionally, these rules implement an I/M program which is specifically required by 42 USC, §7511a(d). This rulemaking therefore meets the requirements of §2007.003(b)(4). Although the rule amendments 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 and therefore meet the requirement of §2007.003(b)(13). For these reasons the rules do not constitute a takings under Chapter 2007 and do not require additional analysis.**

BCCA, ExxonMobil, and Phillips66 commented that the small and micro-business assessment was inadequate as provided. Specifically, the commenters stated that the commission failed to consider the costs of compliance for small and micro-businesses, and that the proposal did not adequately compare of the cost of compliance for small businesses to the cost of compliance for the largest businesses affected by the proposed rules. BCCA noted that none of the Plan's small and micro-business

assessments applied the mandated cost comparison standards, even where the commission acknowledged "significant" impact. BCCA commented that the commission either restated the costs of compliance it identified in the analyses of public benefits and costs, or concluded that it cannot determine the cost to small businesses. Finally, BCCA noted that it is impossible for the public to provide comment on whether the commission adequately considered the effect of the rule on small business because the commission did not publish the information required by Texas law.

**The agency has estimated, to the extent possible, the costs to small businesses and has determined that the cost depends more upon either the number of motor vehicles operated by the business or, for inspection stations, the number of vehicle inspection lanes, and that it is not dependent upon the number of employees, hours of labor, or amount of sales income. Some small businesses have only one motor vehicle while others have large fleets. Large businesses vary in the same way. The size of the fleet is not dependent upon the size of the business. Additionally, for inspection stations, the number of lanes dedicated to inspections will determine the amount of test equipment needed. The commission has provided the estimated cost per vehicle and per piece of testing equipment and argues that this is the only meaningful way to provide sufficient notice of the cost to small business and therefore that it meets the objective of Texas Government Code, Chapter 2006. This assertion is supported by the fact that no small businesses provided comments which include cost of compliance in terms of the number of employees, hours of labor, or amount of sales income.**

BCCA, ExxonMobil, and Phillips 66 stated that the proposed rules did not include adequate notice as required under Texas Government Code, §2002.024. The commenters stated that Texas Government

Code, §2001.024, requires adequate notice of a proposed rule, including information about its public benefits and costs. The commenters stated that adequate notice is essential for fairness as well as a meaningful opportunity to comment on a proposed rule, and that courts have considered notice "adequate" only if: interested persons can confront the agency's factual suppositions and policy preconceptions; and the agency provides interested parties the opportunity to challenge the underlying factual data relied upon by the agency. The commenters asserted that in proposing the rules, the commission failed to provide interested parties with sufficient information to constitute adequate notice.

BCCA stated that the rule proposal preamble appears short of adequate notice because the cost estimates were “dramatically underestimated” and added that the commission provided no bases for estimating that only 10% of the current stations in Harris County would need to purchase new equipment.

The commenters stated that they had identified a number of critical gaps in the underlying factual data, methodology, and analysis in support of the proposed rules. The commenters asserted that the proposal included insufficient information and analysis regarding costs and impacts. The commenters asserted that the commission has not adequately responded to requests for additional information from stakeholders. The commenters stated that the following requests for information were outstanding: information regarding the modeling of emissions; information regarding the corrected emissions inventory database; and information supporting the estimated costs of control. The commenters stated that this information is necessary in order to comment effectively on the proposed rules and that data gaps in the proposal hindered effective comment.

**The commission disagrees with the commenters and has made no change in response to these comments. Texas Government Code, §2001.024 requires of the notice of a proposed rule include certain information. Subsection (a)(5) requires that the notice state the public benefits expected as a result of the adoption of the proposed rule and the probable economic cost to persons required to comply with the rule. Adequate notice is essential for fairness as well as a meaningful opportunity to comment on a proposed rule. *United Loans, Inc. v. Pettijohn*, 955 S.W.2d 649, 651 (Tex. App.-Austin 1997). To achieve the goal of encouraging meaningful public participation in the formulation and adoption of rules by state agencies, the notice must have sufficient information so that interested persons can determine whether it is necessary for them to participate in order to protect their legal rights and privileges. The proposed rules contained an analysis of information available to the commission regarding the costs and benefits of the proposed rules. The commission received intelligent comments which were substantial in both number and in scope, regarding the costs as well as the benefits. Therefore, the commission believes this goal has been achieved and that the notice includes sufficient information to constitute adequate notice.**

**BCCA's statements that the costs were "dramatically underestimated" did not state how that conclusion was reached. Mere disagreement with cost estimates does not render notice inadequate. BCCA did not state that why they disagreed with the commission's 10% estimate for stations in Harris County. In fact, the commission based this estimate on knowledge of which machines are in use under the current program and information from the vendor indicating whether those machines can be upgrade or must be replaced altogether. To simply state that the proposal failed to provide sufficient information does not provide the commission with sufficient**

**information to propose changes or alternative strategies. The commenters did not say how the notice is insufficient, merely that it is insufficient. Nevertheless, the commission has reviewed the notice and has determined it is adequate.**

**Similarly, the comments which state there are critical gaps did not identify what those gaps are or how that results in inadequate notice. The commission is unaware of any requests for additional information to which it was not completely responsive.**

BCCA, ExxonMobil, and Phillips 66 stated that the proposed rules did not include the local employment impact statement required under Texas Government Code, §2001.022. The commenters stated that Texas Government Code, §2001.022, requires the commission to determine whether the rule proposal has the potential to affect a local economy before proposing the rule for adoption. The commenters stated that if answered affirmatively, the commission must request the Texas Employment Commission prepare a local employment impact statement describing in detail the probable effect of the rule on employment in each geographic area affected by the rule for each year of the first five years that the rule will be in effect. The commenters further asserted that the commission failed to make the required initial determination and ignored the potential for the proposal to adversely affect the local economy. The commenters stated that a local employment impact statement should have been requested and prepared in advance of the proposal.

**The commission agrees with the commenters that the proposed rules may affect a local economy, however, does not agree that it is the responsibility of the commission to provide the local employment impact analysis. The APA requires state agencies to determine whether a rule may**

**affect a local economy before proposing a rule for adoption. If the agency determines that a proposed rule may affect a local economy, the agency must send a copy of the proposed rule and other information to the Texas Workforce Commission (Workforce Commission) before the agency files notice of the proposed rule with the secretary of state. The APA requires the Workforce Commission to prepare a local employment impact statement for proposed rules, if a state agency requests the statement. The commission determined that the proposed rules might affect a local economy, and sent the proposed rules and other requested information to the Workforce Commission. The commission received a letter from the Workforce Commission, indicating that the Workforce Commission did not have the ability to determine the potential local employment impacts from the proposed rules.**

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt rules necessary to carry out its powers and duties under the TWC. The amendments are also adopted under the Texas Health and Safety Code, TCAA, §382.011, which provides the commission the authority to control the quality of the state's air; §382.012, which provides the commission the authority to prepare and develop a general, comprehensive plan for the control of the state’s air; §382.017, which provides the commission the authority to adopt rules consistent with the 0policy and purposes of the TCAA; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037 through §382.038, which provide the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of the FCAA; and §382.039, which provides the commission

the authority to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of NAAQS and to protect the public from exposure to hazardous air contaminants from motor vehicles.

## SUBCHAPTER C: VEHICLE INSPECTION AND MAINTENANCE

## §§114.50 - 114.53

### §114.50. Vehicle Emissions Inspection Requirements.

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

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

(2) This paragraph applies to all vehicles registered and primarily operated in the Dallas/Fort Worth (DFW) program area.

(A) Beginning May 1, 2002, all 1996 and newer model year vehicles registered and primarily operated in Collin, Dallas, Denton, and Tarrant Counties equipped with on-

board diagnostic (OBD) systems shall be tested using EPA-approved OBD test procedures. If OBD data cannot be collected from the vehicle, an EPA-approved tail-pipe emissions test will be used.

(B) Beginning May 1, 2002, all pre-1996 model year vehicles registered and primarily operated in Collin, Dallas, Denton, and Tarrant Counties shall be tested using an acceleration simulation mode (ASM-2) test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA.

(3) This paragraph applies to all vehicles registered and primarily operated in the extended DFW (EDFW) program area.

(A) Beginning May 1, 2003, all 1996 and newer model year vehicles registered and primarily operated in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties equipped with OBD systems shall be tested using EPA-approved OBD test procedures. If OBD data cannot be collected from the vehicle, an EPA approved tail-pipe emissions test will be used.

(B) Beginning May 1, 2003, all pre-1996 and older model year vehicles registered and primarily operated in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall be tested using an ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA.

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

(A) Beginning May 1, 2002, all 1996 and newer model year vehicles registered and primarily operated in Harris County equipped with OBD systems shall be tested using EPA-approved OBD test procedures. If OBD data cannot be collected from the vehicle, an EPA approved tail-pipe emissions test will be used.

(B) Beginning May 1, 2002, all pre-1996 model year vehicles registered and primarily operated in Harris County shall be tested using an ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA.

(C) Beginning May 1, 2003, all 1996 and newer model year vehicles equipped with OBD systems and registered and primarily operated in Brazoria, Fort Bend, Galveston, and Montgomery Counties shall be tested using EPA-approved OBD test procedures. If OBD data cannot be collected from the vehicle, an EPA approved tail-pipe emissions test will be used.

(D) Beginning May 1, 2003, all pre-1996 and newer model year vehicles registered and primarily operated in Brazoria, Fort Bend, Galveston, and Montgomery Counties shall be tested using the ASM-2 test procedures, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA.

(E) Beginning May 1, 2004, all 1996 and newer model year vehicles equipped with OBD systems and registered and primarily operated in Chambers, Liberty, and Waller Counties shall be tested using EPA-approved OBD test procedures. If OBD data cannot be collected from the vehicle, an EPA-approved tail-pipe emissions test will be used.

(F) Beginning May 1, 2004, all pre-1996 model year vehicles registered and primarily operated in Chambers, Liberty, and Waller Counties shall be tested using an ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA.

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

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

(A) Beginning May 1, 2002, all 1996 and newer model year vehicles equipped with OBD systems shall be tested using EPA-approved OBD test procedures. If OBD data cannot be collected from the vehicle, an EPA-approved tail-pipe emissions test will be used.

(B) Beginning May 1, 2002, all pre-1996 vehicles shall be tested using a TSI test.

(b) Control requirements.

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

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

(B) the vehicle emissions inspection and maintenance requirements contained in this subchapter.

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

(3) Any motorist in the DFW, EDFW, HGA, or El Paso program areas who has 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.

(4) 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.

(5) A motorist whose vehicle has failed an emissions test and has not requested a challenge retest or has failed a challenge retest must have emissions-related repairs performed and must submit a properly completed Vehicle Repair Form (VRF) in order to receive a retest, a minimum expenditure waiver, or a parts availability time extension.

(6) A motorist whose vehicle is registered in the DFW, EDFW, HGA, or El Paso program areas and has failed an on-road test administered by the DPS shall:

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

(B) satisfy all inspection, extension, or waiver requirements of the vehicle emissions I/M program contained in the revised Texas I/M SIP.

(7) State, governmental, and quasi-governmental agencies which fall outside the normal registration or inspection process shall comply with all vehicle emissions I/M requirements contained in the Texas I/M SIP for vehicles primarily operated in I/M program areas.

(c) Waivers and extensions. A motorist may apply to the DPS for a waiver or an extension as specified in §114.52 of this title (relating to Waivers and Extensions for Inspection Requirements), which defer the need for full compliance with vehicle emissions standards for a specified period of time after failing a vehicle emissions inspection.

(d) Prohibitions.

(1) No person may issue or allow the issuance of a vehicle inspection report (VIR), as authorized by DPS, unless all applicable air pollution emissions control related requirements of the annual vehicle safety inspection and the vehicle emissions I/M requirements and procedures contained in the revised Texas I/M SIP 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.

(2) 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 which may be used to circumvent the vehicle emissions I/M requirements and procedures contained in the revised Texas I/M SIP.

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

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

**§114.51. Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.**

(a) Any manufacturer or distributor of vehicle testing equipment may apply to the executive director of the Texas Natural Resource Conservation Commission (commission) or his appointee, for approval of an exhaust gas analyzer or analyzer system for use in the Texas Inspection and Maintenance (I/M) program administered by the Texas Department of Public Safety. Each manufacturer shall submit a formal certificate to the commission stating that any analyzer model sold or leased by the manufacturer or its authorized representative and any model currently in use in the I/M program will satisfy all design and performance criteria set forth in "Specifications for Preconditioned Two Speed Idle Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program," dated November 1, 2000, or in "Specifications for Acceleration Simulation Mode (ASM-2) Vehicle Exhaust Gas Analyzer Systems for use in the Texas Vehicle Emissions Testing Program," dated November 1, 2000. Copies of these documents are available at the commission's Central Office, located at 12100 Park 35 Circle, Austin, Texas 78753. The manufacturer shall also provide sufficient documentation to demonstrate conformance with these criteria including a complete description of all hardware components, the results of appropriate performance testing, and a point-by-point response to each specific requirement.

(b) All equipment shall be tested by an independent test laboratory. The cost of the certification shall be absorbed by the manufacturer. The conformance demonstration shall include, but is not limited to:

(1) certification that equipment design and construction conform with the specifications referenced in subsection (a) of this section;

(2) documentation of successful results from appropriate performance testing;

(3) evidence of necessary changes to internal computer programming, display format, and data recording sequence;

(4) a commitment to fulfill all maintenance, repair, training, and other service requirements described in the specifications referenced in subsection (a) of this section. A copy of the minimum warranty agreement to be offered to the purchaser of an approved vehicle exhaust gas analyzer shall be included in the demonstration of conformance; and

(5) documentation of communication ability using protocol provided by the commission or the commission Texas Data Link contractor.

(c) If a review of the demonstration of conformance and all related support material indicates compliance with the criteria listed in subsections (a) and (b) of this section, the executive director or his

appointee may issue a notice of approval to the analyzer manufacturer which endorses the use of the specified analyzer or analyzer system in the Texas I/M program.

(d) The applicant shall comply with all special provisions and conditions specified by the executive director or his appointee in the notice of approval.

(e) Any manufacturer or distributor which receives a notice of approval from the executive director or his appointee for a vehicle emissions test equipment for use in the Texas I/M program may be subject to appropriate enforcement action and penalties prescribed in the TCAA or the rules and regulations promulgated thereunder if:

(1) any information included in the conformance demonstration as required in subsection (b) of this section is misrepresented resulting in the purchase or operation of equipment in the Texas I/M program which does not meet the specifications referenced in subsection (a) of this section; or

(2) the applicant fails to comply with any requirement or commitment specified in the notice of approval issued by the executive director or implied by the representations submitted by the applicant in the conformance demonstration required by subsection (b) of this section; or

(3) the manufacturer or distributor fails to provide on-site service response by a qualified repair technician within two business days of a request from an inspection station, excluding Sundays, national holidays (New Year's Day, Martin Luther King Jr. Day, President's Day, Memorial

Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, and Christmas Day), and other days when a purchaser's business might be closed;

(4) the manufacturer or distributor fails to fulfill, on a continuing basis, the requirements described in this section or in the specifications referenced in subsection (a) of this section; or

(5) the manufacturer fails to provide analyzer software updates within six months of request and fails to install analyzer updates within 90 days of commission written notice of acceptance.

**§114.52. Waivers and Extensions for Inspection Requirements.**

(a) Applicability. The waivers and extensions apply to any motorist who can satisfy the conditions of a specific waiver or extension. Applications must be made to the Department of Public Safety (DPS). For the minimum expenditure waiver, individual vehicle waiver, and parts availability time extension, the motorist may apply only once during each testing cycle. For the low income time extension, the motorist may apply every other test cycle.

(b) Minimum expenditure waiver. A motorist shall use any available warranty coverage to obtain needed repairs before expenditures shall be used in calculating the minimum repair expenditures to qualify for a minimum expenditure waiver, unless the warranty remedy has been denied in writing from the manufacturer or authorized dealer. A motorist may not use or attempt to use expenditures for tampering-related repairs in calculating the minimum repair expenditures to qualify for a minimum

expenditure waiver. A minimum expenditure waiver shall be valid for the remaining portion of the testing cycle. Tampering includes, but is not limited to, engine modifications, emissions system modifications, or fuel-type modifications disapproved by the Texas Natural Resource Conservation Commission or EPA. A minimum expenditure waiver may be granted in accordance with the following conditions:

(1) The applicant must have a valid retest Vehicle Inspection Report (VIR), a valid Vehicle Repair Form (VRF), and the vehicle must have failed a retest after all qualifying repairs. Qualifying repairs must meet the following conditions.

(A) The minimum expenditure waiver in any program area shall be at least $450 or that amount adjusted by the Consumer Price Index.

(B) All qualifying repairs shall be performed by a Recognized Emissions Repair Technician of Texas (as designated by DPS) in order to count labor cost and/or diagnostic costs.

(C) Qualifying repairs must be directly applicable to the cause for the test failure (repairs conducted up to 60 days prior to the initial test may count toward the waiver amount).

(D) When repairs are not performed by a Recognized Emissions Repair Technician of Texas, only the purchase price of parts, applicable to the failure, qualify as a repair expenditure for the minimum expenditure waiver.

(2) The motorist provides to the DPS an original retest VIR, a properly completed VRF, and an original itemized receipt indicating the emissions-related repairs performed. If labor and/or diagnostic charges are being claimed toward the minimum expenditure, the VRF shall be completed by a Recognized Emissions Repair Technician of Texas.

(c) Low income time extension. A low income time extension may be granted in accordance with the following conditions.

(1) A motorist must supply proof that the subject vehicle failed the initial emissions inspection test in the form of an original failed vehicle inspection report.

(2) A motorist shall provide proof in writing to the DPS that the registered vehicle owner(s) meet(s) the following conditions:

(A) the low income time extension applicant is the owner of the vehicle that has failed an inspection and maintenance (I/M) test;

(B) the vehicle has not been granted a low income time extension waiver in the previous inspection cycle; and

(C) the applicant meets one of the following:

(i) the applicant receives financial assistance from the Texas Department of Human Services (subject to approval by the director of DPS); or

(ii) the applicant's adjusted gross income is within the current federal poverty income guidelines;

(D) the applicant shows proof of conformity with paragraph (2)(C) of this subsection by providing to the DPS one of the following, which the applicant certifies are true and correct:

(i) a federal income tax return; or

(ii) other documentation authorized by the director of the DPS.

(3) After a motorist receives an initial low income time extension, the vehicle must pass an emissions test prior to receiving another low income time extension or any waiver or extension.

(d) Parts availability time extension. The parts availability time extension does not exempt the vehicle from the compliance requirements of the I/M program but merely extends the period for compliance. By the end of the time extended, the vehicle must be repaired, retested, and receive a passing VIR or comply with paragraph (4) of this subsection. Only one parts availability time extension is allowed in each test cycle for each vehicle. A parts availability time extension may be granted in accordance with the following conditions.

(1) The motorist can document that emissions-related repairs cannot be completed before the expiration of the safety inspection certificate or before the 30-day period following an out-of-cycle inspection because the repairs require an uncommon part.

(2) The motorist shall provide to the DPS an original VIR indicating that the vehicle failed the emissions test and an original itemized documentation by a Recognized Emissions Repair Technician of Texas, indicating parts ordered by name; description and catalog number; order number; sources of parts, including addresses and phone numbers; and expected delivery and installation dates of uncommon parts before a parts availability time extension can be issued.

(3) The motorist shall return the motor vehicle to the DPS for a retest and verification of repairs upon completion of the repairs.

(4) The motorist shall provide to the DPS, prior to expiration of a parts availability time extension, adequate documentation that one of the following conditions exists:

(A) the motor vehicle passed a retest;

(B) the motorist qualifies for a Minimum Expenditure Waiver or Low Income Time Extension; or

(C) the motor vehicle shall no longer be operated in the program area.

(5) A vehicle which receives a parts availability time extension in one test cycle must have the vehicle repaired and retested prior to the expiration of such extension or the vehicle shall be ineligible for a parts availability time extension in the subsequent test cycle in addition to other penalties authorized for non-compliance.

(6) The length of a parts availability time extension shall depend upon expected delivery and installation dates of uncommon parts as determined by the DPS representative on a case-by-case basis and issued for either 30, 60, or 90 days or longer if necessary, but shall not exceed one test cycle.

(e) Individual vehicle waiver. If a vehicle has failed an I/M test, a motorist may petition the director of the DPS for an individual vehicle waiver. Upon demonstration that the motorist has taken reasonable measures to comply with the requirements of the vehicle emissions I/M program contained in the revised Texas I/M State Implementation Plan and that such waiver shall have minimal impact on air quality, the director may approve the petition, and the motorist may receive a waiver. Motorists may apply for the individual vehicle waiver each test cycle.

**§114.53. Inspection and Maintenance Fees.**

(a) The following fees must be paid for an emissions inspection of a vehicle at an inspection station. This fee shall include 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 Vehicle Repair Form showing that emissions-related repairs were performed and the retest is conducted within 15 days of the initial emissions test.

(1) Through April 30, 2002, any emissions inspection station required to conduct a two-speed idle (TSI) test in accordance with §114.50(a)(1) of this title (relating to Vehicle Emissions Inspection Requirements) shall collect a fee of $13 and shall remit $1.75 to the Department of Public Safety (DPS).

(2) In El Paso County beginning May 1, 2002, any emissions inspection station required to conduct an emissions test in accordance with §114.50(a)(5)(A) or (B) of this title (relating to Vehicle Emissions Inspection Requirements) shall collect a fee of $14.

(3) In the Dallas/Fort Worth (DFW) program area beginning May 1, 2002, any emissions inspection station required to conduct an emissions test in accordance with §114.50(a)(2)(A) or (B), and in the extended DFW (EDFW) program area beginning May 1, 2003, any emissions inspection station required to conduct an emissions test in accordance with §114.50(a)(3)(A) or (B) of this title shall collect a fee of $22.50.

(4) In the Houston/Galveston program area beginning May 1, 2002, any emissions inspection station in Harris County required to conduct an emissions test in accordance with §114.50(a)(4)(A) or (B); beginning May 1, 2003, any emissions inspection station in Brazoria, Fort Bend, Galveston, and Montgomery Counties required to conduct an emissions test in accordance with §114.50(a)(4)(C) or (D); and beginning May 1, 2004, any emissions inspection station in Chambers,

Liberty, and Waller Counties required to conduct an emissions test in accordance with §114.50(a)(4)(E) or (F) shall collect a fee of $22.50.

(b) 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 subsection (a) of this section. The challenge fee shall 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 for the state's remote sensing element shall charge a motorist for an out-of-cycle emissions inspection in the amount specified in subsection (a) of this section, resulting from written notification that subject vehicle failed on-road testing. If the vehicle passes the vehicle emissions inspection, the vehicle owner may request reimbursement from DPS.