

The Texas Natural Resource Conservation Commission (commission) adopts new §114.500, Definitions; §114.502, Control Requirements for Motor Vehicle Idling; §114.507, Exemptions; and §114.509, Affected Counties and Compliance Dates. The commission adopts these new sections to Chapter 114, Control of Air Pollution From Motor Vehicles; new Subchapter J, Operational Controls for Motor Vehicles; new Division 1, Motor Vehicle Idling Restrictions; and corresponding revisions 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 114.500 and 114.507 are adopted *with changes* to the proposed text as published in the August 25, 2000 issue of the *Texas Register* (25 TexReg 8247). Sections 114.502 and 114.509 are adopted *without changes* to the proposed text and 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% 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 oxide (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, the 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 revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard.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

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory 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 VI(f)); identification of the level of reductions of VOC and NO_x necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or NO_x reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

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

In order for the state to have an approvable attainment demonstration, 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 indicate a gap of approximately an additional 91 tons per day (tpd) of NO_x reductions is necessary for an approvable attainment demonstration. The commission estimates that this measure will achieve a minimum of 0.48 tpd of NO_x equivalent reductions and is therefore a necessary measure to consider for closing the gap and successfully demonstrating 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, 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 these rules limiting idling of heavy-duty motor vehicles will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. These rules may also contribute to a successful demonstration of transportation conformity in the HGA area.

These rules are one element of the control strategy for the HGA Attainment Demonstration SIP. The purpose of these rules is to establish heavy-duty motor vehicle idling restrictions as one element of an

air pollution control strategy in the eight-counties HGA ozone nonattainment area to reduce NO_x necessary for the counties to be able to demonstrate attainment with the ozone NAAQS.

These rules will implement idling limits for gasoline and diesel-powered engines in heavy-duty motor vehicles in the HGA area. These idling limits will lower NO_x emissions and other pollutants from fuel combustion. Because NO_x is a precursor to ground-level ozone formation, reduced emissions of NO_x will result in ground-level ozone reductions. To comply with the motor vehicle idling regulations, no person in the affected counties may cause, suffer, allow, or permit the primary propulsion engine of a heavy-duty motor vehicle to idle for more than five consecutive minutes when the vehicle is not in motion during the time period April 1 through October 31.

The commission developed an ozone control strategy which limits the time allowed for the engines of heavy-duty motor vehicles to idle when not in motion. Currently, there are no federal regulations governing idle time for heavy-duty motor vehicles. Therefore, the state has the authority to control motor vehicle idling and the requirements developed by the commission for this NO_x emission reduction strategy will result in restrictions on the time allowed for motor vehicle idling.

Modeling assessing the benefits of this NO_x emission reduction strategy demonstrated that emission reductions could be achieved by limiting the idling time of heavy-duty motor vehicles. By the year 2007, the idling limits will reduce NO_x emissions in the affected area by 0.48 tpd. The commission estimates the daily cost savings benefit of this strategy to be approximately \$51,900 per ton of NO_x reduced. This figure was calculated from the estimated NO_x reductions from this strategy of 0.48 tpd,

the estimated reduction in fuel consumption per hour, and the current price per gallon of fuel sold in the affected area.

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

SECTION BY SECTION DISCUSSION

The new §114.500 contains the definitions for idle, motor vehicle, and primary propulsion engine. The commission added language to the primary propulsion engine definition to clearly state that these rules are applicable to only gasoline or diesel fueled vehicles.

The new §114.502 establishes the control requirements that limit motor vehicle idling to five consecutive minutes when the vehicle is not in motion during the time period April 1 through October 31.

The new §114.507 provides exemptions to the control requirements of §114.502 for motor vehicles that have a gross vehicle weight rating (GVWR) of 14,000 pounds or less; that are forced to remain

motionless because of traffic conditions over which the operator has no control; are being used as an emergency or law enforcement motor vehicle; when the engine of a motor vehicle is being operated for maintenance or diagnostic purposes; or when the engine of a motor vehicle is being operated solely to defrost a windshield. As a result of comments, the commission revised language in §114.507(4) to exempt vehicles being operated to provide a power source necessary for mechanical operation other than propulsion, passenger compartment heating, or air conditioning. Also, as a result of comments, the commission added language to provide the following additional exemptions: §114.507(7) where the primary propulsion engine of a motor vehicle is being operated to supply heat or air conditioning necessary for passenger comfort/safety in those vehicles intended for commercial passenger transportation or school buses, in which case idling up to a maximum of 30 minutes is allowed; §114.507(8) where the primary propulsion engine of a motor vehicle is being used for transit operations, in which case idling up to a maximum of 30 minutes is allowed; and §114.507(9) where the primary propulsion engine of a motor vehicle is being used in airport ground support equipment. The exemption for ground service equipment in §114.507(9) is intended to cover all equipment that is used to service aircraft during passenger and/or cargo loading and unloading, maintenance, and other ground-based operations. Exemptions from this category of equipment which may exist in other rules or agreements such as freezing weather equipment or leased equipment do not apply here.

The new §114.509 establishes a compliance date of April 1, 2001, and identifies the eight HGA counties covered by the motor vehicle idle control requirements of §114.502.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking action is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. “Major environmental rule” means a rule of which the specific intent 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. The new sections in Chapter 114 are intended to protect the environment and reduce risks to human health from environmental exposure to ozone, but the control requirements within these rules should not adversely affect in any 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 rules are intended to implement heavy-duty motor vehicle idle limitations as part of the strategy to reduce emissions of NO_x necessary for the counties included in the

HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. These rules are one element of the Attainment Demonstration SIP.

These rules do not exceed an express standard set by federal law, since they implement requirements of the FCAA. Under 42 USC, §7410, states are required 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. While 42 USC, §7410, does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include “enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter,” (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the FCAA does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of the FCAA. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. In order to avoid federal sanctions, states are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought

into attainment on schedule. Thus, while specific measures are not prescribed, 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 emission reductions in the HGA nonattainment area. 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 a 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. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of

SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC.

The TNRCC 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 (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.

Specifically, the motor vehicle idle requirements within these rules were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established those standards. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through a control program directed to sources of the pollutants involved. These rules are not an express requirement of state law, but were developed specifically in order to meet the air quality standards established under federal law as NAAQS. These rules are intended to help bring ozone nonattainment areas into compliance and to help keep attainment and near nonattainment areas from reaching nonattainment. These rules do not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by federal law, nor exceed a requirement of a delegation agreement. These rules were not developed solely under the general powers of the agency, but were specifically developed to meet the air quality standards established under federal law as NAAQS.

The commission solicited public comment on the draft regulatory impact analysis and received four comments. These comments 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 establish motor vehicle idle limits which will act as an air pollution control strategy to reduce NO_x emissions necessary for the eight-county HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Promulgation and enforcement of these rules should not burden private, real property because this rulemaking action should not result in any increased costs. 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 these rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and advance the health and safety purpose. In addition, §2007.003(b)(4) provides that Chapter 2007 does not apply to these adopted rules since it is reasonably taken to fulfill an obligation mandated by federal law. The purpose of the rules is to implement motor vehicle idle limits which are necessary for the HGA ozone nonattainment area to meet the air quality standards established under federal law as NAAQS. 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. 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 do not require additional analysis.

The commission received three comments on the TIA which 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, concerning Consistency with the CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking

action is to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and NO_x air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

The commission solicited comments on the consistency of the proposed rules with the CMP during the public comment period. The commission received no comments on the CMP.

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.

The following commenters provided oral testimony and/or submitted written testimony: Dow Chemical Company (Dow); Houston Metropolitan Transit Authority (Metro); Harris County Judge, Robert

Eckels (Harris County); Sierra Club Houston Regional Group (Sierra-Houston); Port of Houston Authority (PHA); Texas Chemical Council (TCC); Pony Pack, Inc. (Pony Pack); ExxonMobil Corporation (ExxonMobil); Phillips 66 Company (Phillips 66); Rhodia, Inc. (Rhodia); Reliant Energy, Inc. (REI); Public Citizen; Baker Botts; Enterprise Products Operating L.P. (Enterprise); Business Coalition for Clean Air (BCCA); Paso del Norte Clean Cities Coalition and Clean Air Partnership (Paso del Norte); Mothers for Clean Air (MCA); League of Women Voters of Texas (LWV-TX); Texas Natural Resource Conservation Commission - Public Interest Counsel (PIC); City of Missouri City (Missouri City); City of Spring Valley (Spring Valley); RMT, Inc. on behalf of Montgomery County (Montgomery Co.); Lloyd, Gosselink, Blevins, Rochelle, Baldwin, and Townsend, P.C. on behalf of BFI Waste Systems of North America, Inc. (BFI); Waste Management (WM); BP Petrochemical Companies of Texas (BP); Texas Taxpayer Rebellion (TTR); Texas Citizens for a Sound Economy (CSE); and 44 individuals.

The following commenters generally supported the proposal: Dow, PIC, MCA, LWV-TX, Paso del Norte, PHA, Enterprise, Pony Pack, Sierra-Houston, Public Citizen, Baker Botts, BCCA, ExxonMobil, Phillips 66, TCC, Rhodia, REI, Missouri City, Spring Valley, Harris County, Metro, BP, and 32 individuals.

The following commenters generally opposed the proposal: Montgomery Co., BFI, WM, TTR, CSE, and 12 individuals.

The following commenters suggested changes to the proposal as stated in the ANALYSIS OF TESTIMONY section of this preamble: Dow, PIC, MCA, Sierra-Houston, Public Citizen, PHA, TCC, Paso del Norte, BCCA, Enterprise, Pony Pack, ExxonMobil, Phillips 66, Rhodia, REI, Metro, Missouri City, Spring Valley, Montgomery Co., BFI, WM, and 24 individuals.

ANALYSIS OF TESTIMONY

Legal Action

TTR stated that they intend to take legal action to stop the implementation of the plan if the idling restriction strategy is adopted.

The SIP and SIP rules were proposed and will be adopted in full compliance with all requirements of the TCAA and the APA. These rules implement measures necessary to reach attainment of the one-hour ozone standard in the HGA area, as required under 42 USC, §7409.

Enforcement

BFI, MCA, Rhodia, TCC, Spring Valley, and ten individuals inquired about who would enforce these rules, and commented that enforcement of the rules would be difficult, impossible, and/or expensive. Sierra-Houston inquired as to how the commission would ensure enforcement of those from another area or state ticketed for violating the idling restrictions.

The commission will work with local officials to ensure enforcement of the SIP and SIP rules. The commission has existing relationships with pollution control authorities in the City of Houston,

Harris County, and Galveston County for enforcement of other commission rules. The commission will continue enforcement relationships with these entities and develop relationships with other local officials as needed to create effective enforcement mechanisms for the SIP and SIP rules. Local governments are not required to enforce commission rules, but may sign cooperative agreements with the commission to enforce the rules under TCAA, §382.115, Cooperative Agreements. Local programs can also enforce commission rules without signing a cooperative agreement. The authority of local governments to enforce air pollution requirements is specified in detail in TCAA, §§382.111 - 382.115, and local governments can institute civil actions in the same manner as the commission under Texas Water Code (TWC), §7.351.

Costs for Training Employees & Modifying Existing Equipment

Missouri City commented that compliance with the idling restrictions would cost the city to train their employees and modify existing equipment.

The commission anticipates little or no costs to train a company's employees to comply with the idling restrictions. Compliance with the idling restrictions does not require equipment modification. The commission made no changes to the rule language in response to this comment.

Funding for Alternative Cooling/Heating Infrastructure

Public Citizen commented that funding for an alternative cooling and heating infrastructure will have to be put in place.

The commission is unaware of any alternative cooling and heating infrastructure that would be necessary to comply with the idling restrictions. The commission made no changes to the rule language in response to this comment.

Railroad Crossings

Two individuals commented that they felt the idling restrictions should not be enforced if a vehicle was stopped due to a train crossing the roadway which typically takes longer than five minutes.

The commission agrees. A vehicle stopped due to a train crossing the roadway would not be subject to the idling restrictions, and would be covered by the exemptions provided in the rules in §114.507(2). The commission made no changes to the rule language in response to this comment.

Nights and Rainy Days

One individual commented it would be illogical to apply the idling restrictions at night, on rainy days, and on sunny days which are preceded by lower ozone readings.

The commission disagrees with this comment. Applying the idling restrictions only during certain hours of the day or during certain weather conditions would make it difficult for those affected to know when the restrictions would apply. The rules do limit, in §114.502, the idling restrictions to the ozone season for the HGA nonattainment area. The commission made no changes to the rule language in response to this comment.

Apply Idle Restrictions Statewide or to All Vehicles

Five individuals commented that they would like to see idling restrictions in place for all motor vehicles. Sierra-Houston, Paso del Norte and one individual stated they think the idling restrictions should apply statewide. Spring Valley and one individual suggested that the idling restrictions should apply to vehicles with a gross vehicle weight rating (GVWR) greater than 10,000 pounds, while Sierra-Houston suggested the idling restrictions should apply to vehicles with a GVWR greater than 8,000 pounds.

These rules are targeted at vehicles with a GVWR greater than 14,000 pounds, which are typically diesel and have less stringent emission standard requirements than light-duty vehicles. This allows the rules to achieve the greatest amount of emissions reductions while affecting the fewest number of vehicles. As noted in the preamble, the purpose of these rules is to establish an idling restriction control strategy to reduce NO_x emissions necessary for the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS.

The commission appreciates the support for state-wide applicability of the rules. The commission notes, however, that it is not obligated to adopt all rules statewide in order to satisfy its commitments under the SIP, nor is the commission required to do so under 42 USC. Three of the measures contained emissions reduction strategies that have been proposed for state-wide applicability: California large-spark ignition engines; emissions banking and trading program (that portion of the rules which relates to the trading of emission reduction credits and discrete

emission reduction credits); and low emission diesel fuel (that portion of the rules which relates to on-road fuel).

In evaluating whether to implement all of the rules statewide, the commission took into account many concerns, including but not limited to: the need for the marketplace to be able to respond to regulation, the possible impacts on transport and distribution systems, the possibility of increased costs and financial burdens on regulated entities, and regional needs and issues associated with statewide mandates. The commission analyzed where emissions reduction measures are most needed and where emissions reduction measures will be most effective in order to demonstrate attainment. The commission made no changes to the rule language in response to this comment.

Drive-Thru Lanes

Sierra-Houston and six individuals commented that the idling restrictions should also apply to vehicles at drive-thru lanes, such as restaurants, banks, cleaners, and pharmacies.

The commission agrees with this comment. The idling restrictions apply in drive-thru lanes to any vehicle with a GVWR greater than 14,000 pounds. The commission made no changes to the rule language in response to this comment.

High Ozone Season, Daylight Savings Time, Year-Round

One individual commented the idling restrictions should only apply during the HGA area's high ozone season, mid-August through mid-September. If not during this high ozone season, the same individual and Spring Valley stated the idling restrictions should coincide with the construction equipment operating restrictions period which only applies during Daylight Savings Time, which is the first weekend in April through the last weekend in October of each year. Pony Pack commented the idling restrictions should be effective year-round instead of April 1 through October 31.

Historically, the proper weather conditions (light winds, heat, and sunshine) that can produce high ozone level of in the HGA nonattainment area occur mainly during the months of April through October. As a note, the commission changed the effective period for the construction equipment operating restrictions rules from Daylight Savings Time to the time period April 1 through October 31 in order to be consistent with the other rules. The commission made no changes to this rule language in response to this comment.

Out-of-State Vehicles

Pony Pack commented the idling restrictions should be clarified to indicate that they apply to out-of-state vehicles which park and idle overnight in the area.

The commission believes that §114.502 clearly states that the idling restrictions apply to all affected vehicles operated in the nonattainment counties listed in §114.507. This includes long-

haul trucks and any other affected vehicles that may be simply passing through the nonattainment area. The commission made no changes to the rule language in response to this comment.

“Restarting Motor” and “In Gear” Loophole

BFI and PHA commented there was a loophole in the idling restriction rules that would simply allow a driver to idle for five minutes, shut off the motor, then immediately restart the motor triggering a new five-minute idle period. Sierra-Houston commented there was a loophole in the idling restriction rules that would simply allow a driver to keep the vehicle in gear to avoid violating the rules.

Although these situations could occur, the commission anticipates that most drivers/organizations will comply with the rules to realize the potential cost savings and emissions reductions from unnecessary idling. The commission made no changes to the rule language in response to this comment.

Idling for Heat or Air Conditioning

BFI, TCC, Rhodia, Enterprise, and four individuals commented that drivers need to idle their vehicle to operate the heating and air conditioning systems in order to stay comfortable in the extreme temperatures of Texas. TCC, Dow, and Rhodia commented that this was required for trucks in line at their gates or in staging areas for loading or unloading materials, or to weigh-out when leaving the plant. TCC and Dow further commented that the commission should clarify that vehicles idling for this reason meet the intent of exemption §114.507(2). One individual commented that school district buses

that transport special education students are required by federal law to keep the bus cool to prevent possible seizures.

The commission anticipates that idling restrictions will encourage innovative solutions to excessive idling, such as revised queing procedures or the addition of auxiliary power units (APUs) to power passenger compartment heating, air conditioning, and auxiliary systems. If a situation occurs that involves idling longer than five minutes, and the situation is not covered by an exemption, then the commission believes the engine should not be idled. The intent of exemption §114.507(2) was to cover the typical roadway traffic situations, such as congestion and traffic lights. The commission made no changes to the rule language in response to this comment. In the case of school district buses transporting special education students, the commission added rule language in §114.507(7) that includes a maximum 30-minute idling period for school bus operations.

Idling Necessary for On-board Pumps and Auxiliary Systems

Enterprise commented that idling a vehicle is necessary to operate on-board pumps and to circulate coolant through coils in the product trailer to keep the product within the appropriate temperature range.

The commission anticipates that idling restrictions will encourage innovative solutions to excessive idling, such as the addition of APUs to power passenger compartment heating, air conditioning, and auxiliary systems. The commission understands, however, that an APU cannot always be used to provide the necessary power required for all situations requiring product heating or

cooling. Therefore, the commission rewrote the exemption language in §114.507(4) to cover possible situations in which the primary propulsion motor is used to power mechanical operations other than propulsion and passenger compartment heating/air conditioning.

Idling to Cool Motor

One individual commented that certain types of heavy-duty vehicles would need to idle longer than a five-minute period in order to properly cool the motor after being under extreme load.

The commission anticipates that for most situations a maximum five-minute idling time is sufficient for heavy-duty engines to cool to a reasonable temperature after operating at extreme loads, and then be shut down without causing engine damage. The commission made no changes to the rule language in response to this comment.

Case-by-Case Review

TCC commented that a case-by-case review for the idling restrictions should be added.

The commission anticipates that idling restrictions will encourage innovative solutions to excessive idling, such as the addition of APUs to power passenger compartment heating, air conditioning, and auxiliary systems. If a situation occurs that involves idling longer than five minutes, and the situation is not covered by an exemption, then the commission believes the engine should not be idled. The commission believes it is more appropriate for the individual or business to review their own procedures to resolve any possible excessive idling situations that contribute to

unnecessary pollutants and wasted fuel. The commission made no changes to the rule language in response to this comment.

Possible Conflict with Tailpipe Test

One individual commented that the idling rule may be in conflict with the proposed tailpipe testing procedure which may take longer than five minutes.

The commission disagrees with the comment. The current two-speed idle test consists of an average idle time of two minutes, and idling is not required during the acceleration simulation mode test. Additionally, the exemption in §114.507(5) applies to “the primary propulsion engine of a motor vehicle being operated for maintenance or diagnostic purposes.” The commission made no changes to the rule language in response to this comment.

Exemption of Waste Facilities and Maritime Terminals

WM commented that collection vehicles idle frequently during loading and unloading at residences, businesses, transfer stations, and landfills. BFI commented that municipal solid waste facilities should be exempt from the idling restrictions. PHA suggested an exemption for vehicles in line to enter a maritime terminal, loading or unloading facility, or in queue on the terminal awaiting service. As an alternative to an exemption, PHA suggested the five-minute idling period be lengthened to ten minutes. TCC commented that the commission should specifically add vacuum trucks to exemption §114.507(4) to clarify that these trucks must idle to provide power takeoff for the vehicle’s designed use.

The commission anticipates that idling restrictions will encourage innovative solutions to excessive idling, such as revised queing procedures or the addition of APUs to power passenger compartment heating/air conditioning and auxiliary systems. If a situation occurs that involves idling longer than five minutes, and the situation is not covered by an exemption, then the commission believes the engine should not be idled. However, the commission rewrote the exemption language in §114.507(4) to cover possible situations in which the primary propulsion motor is being used to power mechanical operations other than propulsion or passenger compartment heating/air conditioning.

Violation of the TCAA

BFI commented that the proposed idling restrictions violated the TCAA by not determining the public health and general welfare impacts of the idling rule as required by Texas Health and Safety Code, TCAA, §382.011 and §382.002.

The commission disagrees with the commenter and has made no change in response to these comments. The proposed rules contained an analysis of information available to the commission regarding the costs and benefits of the proposed rules. This information met the statutory requirements of the TCAA and the APA because the information provided in the proposed rules was sufficient for commenters to submit alternative assessments of the costs and benefits.

Adequate notice is essential for fairness as well as a meaningful opportunity to comment on a proposed rules. *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 commission received intelligent comments, which were substantial in both number and in scope, regarding the costs of the proposed rules and the technical practicability of compliance. Therefore, the commission believes this goal has been achieved and that the notice includes sufficient information to constitute adequate notice.

The purpose of the comment period is for the public to provide the commission with information to say why they agree or disagree. To simply state that the proposal did not meet the statute or that compliance with the proposed rules is not technically or economically feasible does not provide the commission with sufficient information to propose changes or alternative strategies. There is no requirement that the commission determine the probable economic cost of the unique aspects of every facility or source that must comply, nor give the probable economic cost of every possible method of control. Rather, the notice must include the cost of a reasonable method of compliance. Mere disagreement with cost or technical feasibility estimates does not render notice inadequate.

The commenter 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.

Lack of Adequate Notice, RIA, TIA, Small and Micro-Business Assessment (SMBA), Local Employment Impact Statement (LEIS)

ExxonMobil, PHA, and WM commented that the commission failed to provide interested parties with sufficient information to constitute adequate notice. BFI commented the commission should defer imposing the idling restrictions until the net benefit of the rules can be determined on ozone reduction, and a demonstration of compliance with the RIA requirements and the economic reasonableness test. PHA, WM, and ExxonMobil commented on their belief that the idling rule qualifies as a “major environmental rule,” which requires an RIA, TIA, SMBA, and LEIS.

The commission disagrees with the commenters and has made no change in response to these comments. Texas Government Code, §2001.024 requires the notice of a proposed rule to 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.

The purpose of the comment period is for the public to provide the commission with information to say why they agree or disagree. There is no requirement that the commission determine the probable economic cost of the unique aspects of every facility or source that must comply, nor give the probable economic cost of every possible method of control. Rather, the notice must include the cost of a reasonable method of compliance.

The commenters' statements that the costs were "dramatically underestimated" did not state how that conclusion was reached. Similarly, the comments which state there are critical gaps did not identify what those gaps are or how that results in inadequate notice. Mere disagreement with cost estimates does not render notice inadequate.

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 was insufficient, merely that it was insufficient.

Nevertheless, the commission has reviewed the notice and has determined it was adequate. The commission is unaware of any requests for additional information to which it was not completely responsive.

The commission disagrees with ExxonMobil, PHA, and WM that the proposed rules meet the definition of a major environmental rule. 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 of Texas Government Code, §2001.035.

These rules do not exceed an express standard set by federal law because the idling restrictions were specifically developed to meet the ozone NAAQS set by the EPA under 42 USC, §7409. 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. While 42 USC, §7410 does not specifically prescribe programs, methods, or reductions to meet the federal standard, state SIPs must include “enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter” (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, such as an inspection and maintenance program, but those programs are the

exception, not the rule, in the federal SIP structure. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. In order to avoid federal sanctions, states are not free to ignore the requirements of §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule. Failure to develop control strategies to demonstrate attainment can result in federal sanctions. Thus, while specific measures are not prescribed, 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 42 USC. The EPA has provided the criteria for both the submission and evaluation of attainment demonstrations developed by states to comply with 42 USC. 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 action is intended to achieve reductions in ozone precursor emissions in the HGA nonattainment area. 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 42 USC.

These federal requirements are incorporated in the TCAA, §§382.011, 382.012, 382.017, 382.019, 382.037(g), and 382.039; and therefore, the proposed rules do not exceed state requirements, and

are not adopted solely under the general powers of the agency. The fourth requirement, pertaining to exceeding a delegation agreement or contract between the state and the federal government does not apply. Under this analysis, even if the SIP rules may be considered major environmental rules, they fall under the exceptions of Texas Government Code, §2001.0225(a). Thus, the commission is not required to conduct a regulatory analysis as provided in §2001.0225(b) and (c).

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 an 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. Because 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 42 USC. 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). 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 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.

This rulemaking action is intended to obtain reductions in ozone formation in the HGA, Beaumont/Port Arthur, and Dallas/Fort Worth ozone nonattainment areas, and the 95-county central and eastern Texas region, and help bring HGA into compliance with the air quality standards established under federal law. Therefore, under Texas Government Code, §2001.0225, an RIA is not required.

The primary reason the commission determined that this rulemaking action did not constitute a takings under Texas Government Code, Chapter 2007, is that it will not burden private real property. These rules apply to non-road equipment which is not real property or appurtenance thereto.

In its analysis, the commission also found that these rules are exempt from Texas Government Code, Chapter 2007, under §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 federally-mandated SIP. 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. This rulemaking action therefore meets the requirements of §2007.003(b)(4). For these reasons these rules do not constitute a takings under Chapter 2007 and do not require additional analysis.

The commission agrees with the commenter that the proposed rules may affect a local economy; however, it 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.

The commission estimated, to the extent possible, the costs to small businesses and determined that there should be no significant costs as a result of this rule, but there could be cost savings as a result of reduced fuel consumption. The cost savings depend more upon the number of heavy-

duty diesel and gasoline-powered vehicles operated by the business, and are not dependent upon the number of employees, hours of labor, or amount of sales income. Some small businesses have only one heavy-duty diesel and gasoline-powered vehicle while others have large fleets. Large businesses vary in the same way, in that the size of the fleet is not dependent upon the size of the business. The commission provided the estimated savings per heavy-duty diesel and gasoline-powered vehicle and believes that this is the only meaningful way to provide sufficient notice of the cost or savings to small business. Therefore, this method of assessing the impact on small business meets the objective of Chapter 2006 of the Texas Government Code. 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.

Lack of Environmental Benefit

BFI commented that the idling restrictions will not provide measurable environmental benefit. One individual commented that the impact of the idling restrictions in the peripheral metropolitan counties would be negligible. Montgomery Co. commented that the idling rules do not derive significant NO_x reductions from Montgomery County, and that the county should be excluded from the idling restrictions.

The purpose of these rules is to establish an idling restriction control strategy to reduce NO_x emissions necessary for the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Montgomery County is classified by the EPA in 40 CFR §81.344 as a severe ozone nonattainment area, and therefore the commission is not removing Montgomery County

from the idling restrictions, which is designed to help the entire HGA nonattainment area demonstrate attainment.

The FCAA Amendments of 1990 provided new requirements for areas that had not attained the NAAQS for ozone, carbon monoxide, particulate matter, sulfur dioxide, nitrogen dioxide, and lead, and new requirements for SIPs in general. The EPA was authorized to designate areas failing to meet the NAAQS for ozone as nonattainment and to classify them according to severity. The FCAA, §107(d)(4)(A)(iv) mandated that areas designated as serious, severe, or extreme for ozone that were within a metropolitan statistical area (MSA) or CMSA must have boundaries that include the entire MSA or CMSA. This requirement is supported by the legislative history for the 1990 FCAA Amendments in Senate Report No. 101-228, page 3399, “because ozone is not a local phenomenon but is formed and transported over hundreds of miles and several days, localized control strategies will not be effective in reducing ozone levels. The bill, thus, expands the size of areas that are defined as ozone nonattainment areas to assure that controls are implemented in an area wide enough to address the problem.” The 1990 FCAA Amendments did provide the ability to exclude portions of the entire MSA or CMSA prior to designation, if the state conducted a study, to which the EPA agreed, that proved the geographic portion did not contribute significantly to violation of the NAAQS.

Redesignation has not occurred for any portion of the HGA nonattainment area, and is not currently being considered. For existing areas currently included within a nonattainment area, the specific area must be redesignated as attainment in order to be removed from a nonattainment

area. The FCAA, §107(d)(3) provides that the EPA may not redesignate a nonattainment area, or a portion of a nonattainment area, to attainment unless several criteria are met. These criteria include: a determination that the area has attained the NAAQS; there is a fully approved SIP for the area; there is a determination that the improvement in air quality is due to permanent and enforceable emissions reductions; there is an approved maintenance plan for the area; and the state has met all requirements for the area under FCAA, §110 and Part D.

However, even if a specific area within the HGA nonattainment area was redesignated by the EPA as attainment for ozone, reductions associated from all adopted ozone control strategies would still be necessary, because of the requirements of FCAA, §107(d)(3) and §175A which require maintenance plans for all redesignated areas. The maintenance plan must include the measures specified in §107(d)(3) and any additional measures that are necessary to ensure that the area continues to be in attainment with the NAAQS for ten years after the redesignation. Eight years after the redesignation, the state is required to submit an additional SIP revision to maintain the NAAQS for another ten years after the end of the first ten-year period.

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 localized 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 levels of ozone and ozone precursor 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 commission has conducted air quality modeling and upper air monitoring that found regional air pollution should be considered when studying air quality in the Texas ozone nonattainment areas. This work is supported by research conducted by the OTAG, the most comprehensive attempt ever undertaken to understand and quantify the transport of ozone. Both the commission and the OTAG study point to the need to take a regional approach to controlling air pollutants.

Pre-trip Inspection and Cold Weather Operations

Sierra-Houston commented that they oppose the exemption in §114.507(6) which allows idling for defrosting a windshield. Metro commented that more than five minutes of idling time is required to perform a pre-trip inspection to examine all operational and safety aspects of the vehicle prior to operation. Metro also commented that when extremely cold overnight temperatures occur, heavy-duty diesels require additional start-up assistance from mechanics and warm-up time to assure that engines

have reached appropriate operating temperatures and that braking, heating, and defrosting systems are functional.

The commission considers exemption §114.507(6) necessary for safety considerations. Idling of a motor vehicle that is being operated for maintenance or diagnostic purposes is allowed under the exemption in §114.507(5). If after the “pre-trip inspection” idle period the windshield is not fully defrosted, then the exemption in §114.507(6) would apply. Additionally, the commission added the exemption language in §114.507(7) that includes a maximum 30-minute idling period for transit operations and commercial passenger transportation vehicles when operating to supply heat or air conditioning for passenger comfort/safety.

Exempt Transit Service Vehicles

Metro commented that they feel the transit services industry should be exempt from the idling restrictions. Placing such strict guidelines on transit operations could negate the emissions benefits already realized by offering a viable alternative to driving a personal vehicle. Metro pointed out several situations or circumstances when a five-minute idle period is simply not sufficient: 1) cooling of suburban-route buses prior to the afternoon commute; 2) end-of-line layovers to maintain schedules when riders stay aboard; 3) transit center/park-and-ride dwell periods while loading and unloading passengers; and 4) bus breakdowns that require keeping the bus cool for stranded passengers while assistance is being coordinated.

The commission agrees that transit service is already an important part of the solution to reducing vehicle miles traveled and the accompanying traffic congestion and exhaust emissions. As such, the commission added language in §114.507(7) that includes a maximum 30-minute idling period for transit operations and commercial passenger transportation vehicles when operating to supply heat or air conditioning for passenger comfort/safety.

Calculations in Preamble

TCC questioned the numbers used to calculate the savings due to reduced fuel consumption as a result of the idling restrictions. TCC specifically questioned the preamble where it stated that two five-minute idle periods per day will result in 88 hours (and thus 88 gallons of fuel) saved during a year. Pony Pack commented that the commission mentioned in the preamble that “heavy-duty diesel and gasoline powered vehicles can consume up to one gallon of fuel per hour while idling.” Pony Pack stated that this number should be between one and two gallons per hour.

The modeling for the idling restrictions was estimated by first determining the estimated baseline idle time for all affected vehicles in the HGA nonattainment area. Then the two assumed five-minute idle periods were subtracted from the baseline to determine with the estimated excess idle time that would be eliminated by the idling restriction rules. This “eliminated idle time” was converted to total hours per day for all affected vehicles. The commission used a national estimate (*Fleet Owner* - August 1998 and *Caterpillar Truck Engine News* - February 1993) of one gallon per hour fuel use to arrive at the total gallons of fuel saved per year. The calculations are

explained in more detail in Appendix J of the HGA Post-1999 ROP/Attainment Demonstration

SIP. The commission made no changes to the rule language in response to this comment.

Texas Transportation Code (TTC) Cited in Definitions §114.500(2)

TCC commented they preferred that the commission include the text of provisions found in TTC, §502.002 and §502.006(c), instead of simply citing the provisions.

The commission disagrees that it is more clear to include the full text of TTC, §502.002 and §502.006(c) in the preamble or rule. These statutory provisions are readily available on the internet. The commission website and other general state government websites provide general access to state directories which include all state statutes and rules.

100% Compliance

Sierra-Houston and PIC commented that the rules' emissions reductions and cost savings used an unrealistic 100% compliance rate.

The commission agrees with this comment. The emissions reductions were remodeled using an 80% compliance rate, which is a rate normally used by the EPA for rulemakings. The preamble was corrected to reflect the new emissions reductions and cost savings figures.

Provide Flexibility by Including a Provision to Allow Submission of Alternative Reduction Plan

Metro, PHA, BCCA, Phillips 66, REI, and WM commented that a provision to submit an alternative reduction plan be included in the rule allowing those affected by the idling restrictions some flexibility.

The commission anticipates that due to the complexity and diversity of the community affected by the idling restrictions, allowing the submission of alternative reduction plans would result in unreasonable workloads for agency staff to track and evaluate the program, and would make enforcement against individual vehicles difficult. The commission made no changes to the rule language in response to this comment.

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the Texas Health and Safety Code, TCAA, §382.017, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also adopted under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

SUBCHAPTER J: OPERATIONAL CONTROLS FOR MOTOR VEHICLES

DIVISION 1: MOTOR VEHICLE IDLING LIMITATIONS

§§114.500, 114.502, 114.507, 114.509

§114.500. Definitions.

Unless specifically defined in the TCAA or in the rules of the commission, the terms used in this subchapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, §3.2 of this title (relating to Definitions); §101.1 of this title (relating to Definitions); and §114.1 of this title (relating to Definitions), the following words and terms, when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Idle - The operation of an engine in the operating mode where the engine is not engaged in gear, where the engine operates at a speed at the revolutions per minute specified by the engine or vehicle manufacturer for when the accelerator is fully released, and there is no load on the engine.

(2) Motor vehicle - Any self-propelled device powered by an internal combustion engine and designed to operate with four or more wheels in contact with the ground, in or by which a person or property is or may be transported, and is required to be registered under Texas Transportation Code (TTC), §502.002, excluding vehicles registered under TTC, §502.006(c).

(3) Primary propulsion engine - A gasoline or diesel-fueled internal combustion engine attached to a motor vehicle that provides the power to propel the motor vehicle into and maintain motion.

§114.502. Control Requirements for Motor Vehicle Idling.

No person shall cause, suffer, allow, or permit the primary propulsion engine of a motor vehicle to idle for more than five consecutive minutes in the counties listed in §114.509 of this title (relating to Affected Counties and Compliance Dates) when the vehicle is not in motion during the period of April 1 through October 31 of each calendar year.

§114.507. Exemptions.

The provisions of §114.502 of this title (relating to Control Requirements for Motor Vehicle Idling) shall not apply to:

- (1) a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less;
- (2) a motor vehicle forced to remain motionless because of traffic conditions over which the operator has no control;
- (3) a motor vehicle being used as an emergency or law enforcement motor vehicle;

(4) the primary propulsion engine of a motor vehicle providing a power source necessary for mechanical operation other than propulsion, passenger compartment heating or air conditioning;

(5) the primary propulsion engine of a motor vehicle being operated for maintenance or diagnostic purposes;

(6) the primary propulsion engine of a motor vehicle being operated solely to defrost a windshield;

(7) the primary propulsion engine of a motor vehicle that is being used to supply heat or air conditioning necessary for passenger comfort/safety in those vehicles intended for commercial passenger transportation or school buses in which case idling up to a maximum of 30 minutes is allowed;

(8) the primary propulsion engine of a motor vehicle used for transit operations in which case idling up to a maximum of 30 minutes is allowed; or

(9) the primary propulsion engine of a motor vehicle being used as airport ground support equipment.

§114.509. Affected Counties and Compliance Dates.

Beginning April 1, 2001, all affected persons in the following counties shall comply with §114.502 of this title (relating to Control Requirements): Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

