

The Texas Natural Resource Conservation Commission (commission or agency) proposes new §114.700, Definitions; §114.701, Applicability; §114.702, Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards; §114.706, Recordkeeping Requirements; §114.707, Exemptions and Technology Review; and §114.709, Affected Counties and Compliance Schedules. The commission proposes these new sections in Chapter 114, Control of Air Pollution from Motor Vehicles; new Subchapter L, On-Road Engines; new Division 1, Heavy-Duty Diesel Engines; and corresponding revisions to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area as well as all other counties of the state. These proposed rules incorporate by reference the California “not-to-exceed” (NTE) heavy-duty diesel engine (HDDE) emission standards and corresponding test procedures to apply NTE standards to all on-road heavy-duty diesel vehicles (HDDV) in Texas.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

HGA SIP Background

The HGA ozone nonattainment area is classified as Severe-17 under the 1990 Amendments to the Federal Clean Air Act (FCAA) as codified in 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 §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 Coastal Oxidant Assessment for Southeast Texas (COAST) study. The commission 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 initiatives in particular resulted in changing deadlines and requirements. The first of these initiatives was the Ozone Transport Assessment Group (OTAG). 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 the OTAG program, and OTAG 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, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to the EPA 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 the Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

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

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

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VI(f)); identification of the level of reductions of VOC and NO_x necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or NO_x reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of NO_x reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of NO_x reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-1999 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.

The emission reduction requirements included as part of the December 2000 SIP revision represented 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.

A SIP revision for HGA was adopted by the commission on December 6, 2000 and was submitted to the EPA by December 31, 2000. The December 2000 SIP contained rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contained Post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contained 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.

In order for the HGA area to have an approvable attainment demonstration, the EPA indicated that the state must adopt those strategies modeled in the November 15, 1999 submittal and then adopt sufficient

controls to close the remaining gap in NO_x emissions. The predicted emission reductions from these rules are necessary to successfully demonstrate attainment.

The HGA ozone nonattainment area will need to ultimately reduce NO_x more than 750 tons per day (tpd) to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of statewide NTE rules would contribute to attainment and maintenance of the one-hour ozone standard in the HGA area, as well as contribute to maintenance of the one-hour ozone standard in the rest of the state.

NTE Background

The EPA has been regulating HDDEs since 1984. In 1998, the federal government and seven HDDE manufacturers entered into consent decrees after enforcement actions were brought against HDDE manufacturers that a majority of the diesel engine manufacturers had programmed their engines to defeat federal test procedures (FTP) which were established to measure compliance with the EPA-promulgated diesel emission standards in effect at the time. A so-called “defeat device” was employed because its use would provide some increase in fuel economy. However, its use would also cause the engine to produce higher NO_x emissions while the engine was running in the open-road or cruise mode. In the consent decrees, the manufacturers are required, among other things, to produce HDDEs that meet a 2.5 gram per brake horsepower-hour standard for the non-methane hydrocarbons plus NO_x emissions no later than October 1, 2002. Under the California rules, manufacturers are required to perform supplemental test procedures, in addition to the existing FTP. The two components of the supplemental tests are known as the NTE test and the Euro III European Stationary Cycle test.

The consent decrees require the manufacturers to comply with these procedures for a period of two years (2003 and 2004); however, EPA's NTE rules which would include the test requirements have been delayed until model year 2007. Thus, for two model years (2005 and 2006), there would be a gap between the expiration for the test requirements following model year 2004 and the commencement of test requirements for model year 2007 under EPA's rules. California has adopted rules to fill this gap by requiring HDDE manufacturers to comply with supplemental procedures including the NTE test. The commission recognizes the benefit of adopting the California rules because they are likely to result in major NO_x emissions reductions.

The commission is concerned that in the absence of standards during the two years, there is a chance of serious "backsliding," and that diesel exhaust emissions could increase significantly. The commission finds the possibility of excessive NO_x emissions to be unacceptable, given the gravity the air quality situation in nonattainment and near nonattainment areas throughout the state, and thus proposes to adopt these rules as one strategy in support of the HGA attainment demonstration.

The California Air Resources Board (CARB) determined the exhaust emission standards for the engines used for heavy-duty vehicles to be technologically feasible and a cost effective strategy at \$.63 per pound (\$1,260 per ton) of NO_x for medium, heavy-duty vehicles (14,001 to 33,000 pounds gross vehicle weight rating (GVWR)); and \$.09 per pound (\$180 per ton) of NO_x removed in the case on heavy, heavy-duty vehicles (33,001 pounds and larger GVWR). The latter class constitutes a majority of the fleet affected by the proposed NTE rules. Based on current forecasts by the Texas Department of Transportation, Texas vehicle miles traveled (VMT) in 2007 by medium, heavy-duty and heavy, heavy-

duty diesel-powered, on-road vehicles, collectively known as HDDV, will be 38,326,159 miles. Of this total, 8,111,342 miles, or 21.17%, will be traveled by the HDDV class in the HGA area.

Therefore, adoption and implementation of California standards for new on-road HDDV throughout the state should reduce the amount of NO_x emissions from these sources and, therefore, help control ground-level ozone in nonattainment areas. For the HGA ozone nonattainment area, emission reductions by 2007 will be approximately 6.0 tpd based on research conducted for the commission by the Eastern Research Group, Inc.

These rules are proposed in order to control ground-level ozone in the state by restricting the sale of new on-road HDDV to only those certified under Title 13, California Code of Regulations (13 CCR), §1956.8, pertaining to Exhaust Emissions Standards and Test Procedures -- 1985 and Subsequent Model Heavy-Duty Engines and Vehicles, as revised by the CARB on December 8, 2000 and effective July 25, 2001. Section 7507 of 42 USC allows states to adopt the California rules, but under 42 USC, §7543(e)(2)(B), the rules must be identical to the California in terms of stringency. The rules are proposed to be effective throughout the State of Texas, and are necessary in order to attain and maintain the ozone standard in nonattainment areas, and to establish uniform emission standards for the state. A single set of engine standards will help to prevent incompatibility and expense which may arise from the distribution of equipment with different emission standards.

The commission solicits comment on additional flexibilities relating to implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or

emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION-BY-SECTION DISCUSSION

Proposed §114.700 contains definitions for “heavy-duty diesel engine (HDDE)”; “heavy-duty, on-road vehicle”; “ultra-small volume manufacturer”; and “urban bus.” These definitions are used, but are not specifically defined, in the California NTE rules. Because the terms are not specifically defined in the California NTE rules, they are defined in proposed §114.700 using the California definitions. The definitions for “heavy-duty, on-road vehicle” and “heavy-duty diesel engine” are found in 13 CCR, §1900 (November 21, 1996), pertaining to Definitions. The definition for “urban bus” is found in 13 CCR, §1956.2 (June 4, 2001), pertaining to Fleet Rule for Transit Agencies. The definition for “ultra-small volume manufacturer” is found in 13 CCR, §1976 (March 21, 1995), pertaining to Standards and Test Procedures for Motor Vehicle Fuel Evaporative Emissions.

Proposed §114.701 states that these proposed rules apply to all HDDE produced for sale or other use in the State of Texas beginning in model year 2005 and subsequent model years. Therefore, these proposed rules will cover the NTE gap between the EPA consent agreements and the EPA rules which are expected to be implemented for model year 2007.

Proposed §114.702 incorporates by reference the California NTE rules contained in 13 CCR, §1956.8, as revised by the CARB on December 8, 2000 and effective October 1, 2002. Under 42 USC, §7543(a), only the EPA and California can set motor vehicle standards. In 1977, Congress amended 42

USC by adding §7507 to allow other states to promulgate motor vehicle standards, provided they are identical to those issued by California. Therefore, the California standards are proposed to be adopted by reference to ensure the Texas standards are identical to the California standards.

Proposed §114.706 requires that any person who sells or offers for sale diesel engines to which these rules apply, must maintain copies of the CARB certification documents for those engines for a period of two years, as well as provide those documents to the agency upon request. This proposed section provides a tool for the agency to determine the degree of compliance with these rules and to take enforcement action as necessary.

Proposed §114.707 incorporates the same exemptions from the rules as allowed by the California NTE rules.

Proposed §114.709 specifies that the control requirements apply to all counties within the state, and also specifies the compliance schedule for HDDE manufacturers. A compliance date of January 1, 2005 was selected because beginning with the model year 2005, there would be a gap between the expiration for the test requirements following model year 2004 and the commencement of test requirements for model year 2007 under the EPA rules.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the two-year period the proposed new rules are in effect there will be no significant fiscal implications for

any single unit of state and local government as a result of administration or enforcement of the proposed new rules unless that unit of government purchases a significant number of new on-road HDDV. The proposed rules would require units of state and local government throughout the state that own or operate new on-road HDDV produced on or after January 1, 2005 to use CARB-certified engines.

The proposed rules would adopt CARB NTE HDDE emission certification standards by reference. Consent decrees between several diesel engine manufacturers and the EPA along with the United States Department of Justice (DOJ) in part requires the diesel makers to achieve model year 2004 emission levels for a continuous term of 24 months beginning in the fall of 2002. The CARB rules the commission proposes to adopt by reference will extend the standards effective for model year 2002 to all engine manufacturers for the 2005 and 2006 model years until 2007, when the next iteration of federal EPA standards for HDDE will be implemented.

The diesel engines affected by the proposed rules are used to power on-road diesel vehicles with a GVWR over 14,000 pounds. Affected units of state and local government will not be required to replace any existing diesel engines to comply with these new rules. However, if any HDDE are replaced, or new vehicles with affected engines produced after January 1, 2005, are purchased, the new engines will be required to meet the proposed standards.

The cost of the technology needed to reduce emissions from these engines to comply with the standards is projected by CARB to be approximately \$830 per engine. Based on model year 2000 fleet data, the

commission estimates that approximately 14,700 model year 2005 HDDVs affected by the proposed rules will be purchased statewide, and an additional 15,000 model year 2006 HDDVs will be purchased statewide. The total cost from the anticipated new vehicle purchases will be approximately \$12.2 million for model year 2005 and \$12.5 million for model year 2006.

A breakdown of the total number of engines bought by owner (i.e., state and local governments, individuals, or businesses) is not available at this time. However, the costs are not anticipated to be significant to any single unit of state or local government, unless that unit of government replaces more than 100 of these engines annually.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year the proposed NTE rules are in effect, the public benefit anticipated from enforcement of and compliance with these proposed rules will be the potential reduction of NO_x and VOC emissions, potentially improved air quality, and contribution toward demonstration of attainment with the ozone NAAQS.

The proposed rules would adopt CARB NTE HDDE emission certification standards by reference. Consent decrees between several diesel engine manufacturers and the EPA along with the DOJ in part requires the diesel makers to achieve model year 2004 emission levels for a continuous term of 24 months beginning in the fall of 2002. The CARB rules the commission proposes to adopt by reference will extend the standards effective for model year 2002 to all engine manufacturers for the 2005 and 2006 model years until model year 2007, when the next iteration of federal EPA standards for HDDE

will be implemented. Affected individuals and businesses will not be required to replace any existing diesel engines to comply with these proposed new rules. However, if any HDDE are replaced, or new vehicles with affected engines produced after January 1, 2005 are purchased, the new engines will be required to meet the proposed standards.

A breakdown of the total number of engines bought by owner (i.e., state and local governments, individuals, or businesses) is not available at this time. However, the costs are not anticipated to be significant to any individual or business, unless that entity replaces more than 100 of these engines annually. The commission estimates a total of 14,700 model year 2005 HDDVs affected by these proposed rules will be purchased statewide, and an additional 15,000 model year 2006 HDDVs will be purchased statewide. The cost of the technology needed to reduce emissions from these engines to comply with the standards is projected by CARB to be approximately \$830 per engine. The incremental costs will be \$12.2 million for model year 2005 and \$12.5 million for model year 2006.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There potentially will be adverse fiscal implications, which are anticipated to be significant, for small and micro-businesses as a result of implementing the proposed rules. The proposed rules would adopt CARB NTE HDDE emission certification standards by reference.

Affected small or micro-businesses will not be required to retrofit or purchase new engines for their existing inventory. However, if any HDDEs are replaced, or new vehicles with affected engines produced after January 1, 2005 are purchased, the new engines must meet the proposed standards.

A breakdown of the total number of engines bought by owner (i.e., state and local governments, individuals, or businesses) is not available at this time. However, the costs are not anticipated to be significant to any small and micro-business, unless that entity replaces more than 100 of these engines annually. The cost of the technology needed to reduce emissions from these engines to comply with the standards is projected by CARB to be approximately \$830 per engine. The overall costs to small and micro-businesses will depend less on the relative size of the company, and more on the number of new on-road HDDV affected by the proposed rules that they own and operate.

The following is an analysis of the cost per employee for small or micro-businesses affected by the proposed rules. The CARB estimated that it will cost small or micro-businesses up to approximately \$830 per affected engine replaced per year to comply with the proposed rules. Small and micro-business are defined as having fewer than 100 or 20 employees respectively. A small business with 100 vehicles would incur average costs of approximately \$83,000 per year or \$830 per employee. A micro-business with 20 vehicles would incur average costs of approximately \$16,600 per year or \$830 per employee. The overall cost per employee will vary depending on the number of vehicles or engines purchased, and the number of persons employed by an affected business.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking in light of the impact on local employment and determined that there are no HDDE manufacturers within the state. Therefore, a local employment impact statement is not required, because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years the proposed rules would be in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a “major environmental rule” as defined in that statute. A “major environmental rule” means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The new sections to Chapter 114 are one element of the HGA attainment SIP. While the proposed new rules are intended to protect the environment, based on the analysis provided in the preamble, including the discussion in the PUBLIC BENEFITS AND COSTS section of this preamble, the commission does not believe the rules will adversely affect, in a material way, the sale or use of new on-road HDDV. The commission does not believe these entities comprise a sector of the economy, or that these proposed rules will adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Provisions of 42 USC, §7410 require states to adopt a SIP which provides for “implementation, maintenance, and enforcement” of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include “enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the

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

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded “based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application.” The commission also noted

that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. 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 the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The proposed addition to Chapter 114 is intended to protect the environment or reduce risks to human health from environmental exposure to ozone but are not anticipated to 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 proposed new rules would require units of

state and local government, businesses, and individuals statewide that own or operate new on-road HDDV produced on or after January 1, 2005, to use CARB-certified engines. The increased cost of \$674 to \$824 per engine would not cause material impact given the high total cost of this type of equipment. This air pollution control program is part of the strategy to reduce emissions of NO_x necessary for the counties included in the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The commission is required to submit a new SIP revision by the end of 2000 which will bring the HGA nonattainment area into attainment by 2007. These proposed rules comprise one element of the control strategy in the HGA ozone attainment demonstration SIP. The proposed rules are necessary for the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS.

The commission invites public comment on the draft RIA determination.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to establish emission requirements on model year 2005 and subsequent HDDV that use such engines by requiring these engines to be certified under 13 CCR, §1965.8 throughout the state. This proposed rulemaking will act as an air pollution control strategy to reduce NO_x emissions in the ozone nonattainment areas so that they may demonstrate attainment with the ozone NAAQS and maintain air quality in near nonattainment areas across the state. Promulgation and enforcement of the proposed rules will not burden private, real property. Although the proposed rules

do not directly prevent a nuisance or prevent an immediate threat to life or property, the rules do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emissions limitations within this proposal were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement cleaner HDDV necessary for the entire state to meet air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a taking under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined

that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and NO_x air emissions will be reduced as a result of these proposed 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.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on November 12, 2001, 2:00 p.m., Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Building F, Room 2210. The hearing is structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur

during the hearing; however, agency staff members will be available to discuss the proposal 30 minutes before the hearing, and will answer questions before and after the hearing.

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

SUBMITTAL OF COMMENTS

Written comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-007a-114-AI. Comments must be received by 5:00 p.m., November 12, 2001. For further information, please contact Bruce Uphaus at (512) 239-4528, or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.103, Rules, 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, Rules, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019,

Methods Used to Control and Reduce Emissions From Land Vehicles, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §§382.002, Policy and Purpose; 382.011; 382.012; 382.019; and 382.039.

CHAPTER 114: CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

SUBCHAPTER L: ON-ROAD ENGINES

DIVISION 1: HEAVY-DUTY DIESEL ENGINES

§§114.700, 114.701, 114.702, 114.706, 114.707, 114.709

§114.700. Definitions.

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meaning commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Heavy-duty diesel engine (HDDE) - A diesel engine that is used to propel a heavy-duty vehicle.

(2) Heavy-duty, on-road vehicle - Any vehicle, except a passenger vehicle, which can be legally operated on the public roads in the State of Texas and having a manufacturer's gross vehicle weight rating of 14,001 pounds or greater.

(3) Ultra-small volume manufacturer - Any manufacturer with California sales less than or equal to 300 new passenger cars, light-duty trucks, medium-duty vehicles, heavy-duty vehicles,

and heavy-duty engines per model year based on the average number of vehicles and engines sold by the manufacturer in the previous three consecutive model years.

(4) Urban bus - A passenger-carrying vehicle powered by a heavy-duty diesel engine (HDDE), or of a type normally powered by a HDDE, with a load capacity of 15 or more passengers and intended primarily for intra-city operation, i.e., within the confines of a city or greater metropolitan area. Urban buses would normally have equipment installed for the collection of fares, and are typically characterized by the absence of equipment and facilities for long distance travel.

§114.701. Applicability.

The rules in this division apply to all heavy-duty diesel engines produced for sale or other use in the State of Texas for the model year 2005 and subsequent model years.

§114.702. Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards.

The emission standards and associated performance test procedures for new model year 2005 and thereafter heavy-duty diesel engines; as certified for use in California in accordance with Title 13, California Code of Regulations, §1956.8, pertaining to Exhaust Emissions Standards and Test Procedures - 1985 and Subsequent Model Heavy-Duty Engines and Vehicles, as revised by the

California Air Resources Board on December 8, 2000 and effective on July 25, 2001; are hereby incorporated by reference.

§114.706. Recordkeeping Requirements.

All persons who sell, or offer for sale, diesel engines which meet the applicability requirements of §114.701 of this title (relating to Applicability) must maintain, for a minimum of two years, documentation that each applicable engine complies with the requirements of §114.702 of this title (relating to Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards), and provide those certification documents upon request by the agency.

§114.707. Exemptions and Technology Review.

The following engines are exempt from the requirements of §114.702 of this title (relating to Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards):

(1) any model year 2005 or 2006 heavy-duty diesel engine (HDDE) manufactured by an ultra-small volume manufacturer or intended for use in an urban bus;

(2) any engine if, followed by a technology review, the California Air Resources Board determines that it is inappropriate to require compliance for HDDE of that particular model year;

(3) any vehicle acquired by a resident of this state for the purpose of replacing a vehicle registered to that resident which was damaged, became inoperative beyond reasonable repair, or which was stolen while out of this state; provided the replacement vehicle is acquired out of the state at the same time the previously-owned vehicle was either damaged, became inoperative, or was stolen; and

(4) any vehicle transferred by inheritance, or by a decree of divorce, dissolution, or legal separation entered by a court of competent jurisdiction.

§114.709. Affected Counties and Compliance Schedules.

Beginning with model year 2005, but no later than January 1, 2005, all sales and offers of sale of new heavy-duty diesel-powered, on-road vehicles in the State of Texas shall comply with §§114.701, 114.702, and 114.706 of this title (relating to Applicability; Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards; and Recordkeeping Requirements).