

The Texas Commission on Environmental Quality (commission) adopts new §§115.620 - 115.622, 115.626, 115.627, and 115.629; and corresponding revisions to the state implementation plan (SIP). The commission adopts new §§115.620, 115.622, 115.626, 115.627, and 115.629 *with changes* to the proposed text as published in the June 11, 2004 issue of the *Texas Register* (29 TexReg 5747). The commission adopts new §115.621 *without change* to the proposed text and will not be republished.

The adopted new rules and revised SIP narrative will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The Houston/Galveston/Brazoria (HGB) ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act 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 by November 15, 2007. The HGB area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has developed a demonstration of attainment in accordance with 42 USC, §7410. The most relative HGB SIP revisions to date are the December 2000 one-hour ozone standard attainment demonstration, the September 2001 follow-up revision, and the December 2002 nitrogen oxides (NO_x)/highly-reactive volatile organic compound (HRVOC) revision.

This process has proven to be challenging due to the magnitude of reductions needed for attainment. The emission reduction requirements included as part of the December 2000 SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGB area to address ozone.

These coalitions, which include local governmental entities, elected officials, environmental groups, industry, consultants, and the public, worked diligently with EPA and the commission to identify and quantify control strategy measures for the HGB attainment demonstration.

December 2000

The December 2000 SIP revision contains rules and photochemical modeling analyses in support of the HGB area ozone attainment demonstration. The majority of the emissions reductions identified in this revision were from a 90% reduction in point source NO_x. The modeling analysis also indicated a shortfall in necessary NO_x emissions, such that an additional 91 tons per day (tpd) of NO_x reductions were necessary for an approvable attainment demonstration. In addition, the revision contained post-1999 rate of progress (ROP) plans for the milestone years 2002 and 2005 and for the attainment year 2007, and transportation conformity motor vehicle emission budgets (MVEBs) for NO_x and volatile organic compounds (VOC). The SIP also contained enforceable commitments to implement further measures in support of the HGB area attainment demonstration, as well as a commitment to perform and submit a midcourse review.

September 2001

The September 2001 SIP revision for the HGB ozone nonattainment area included the following elements: 1) corrections to the ROP table/budget for the years 2002, 2005, and 2007 due to a mathematical inconsistency; 2) incorporation of a change to the idling restriction control strategy clarifying that the operator of a rented or leased vehicle is responsible for compliance with the requirements in situations where the operator of a leased or rented vehicle is not employed by the owner

of the vehicle (The commission committed to making this change when the rule was adopted in December 2000.); 3) incorporation of revisions to the clean diesel fuel rules to provide greater flexibility in complying with the requirements of the rule while preserving the emission reductions necessary to demonstrate attainment in the HGB area; 4) incorporation of a stationary diesel engine rule that was developed as a result of the state's analysis of EPA's reasonably available control measures; 5) incorporation of revisions to the point source NO_x rules; 6) incorporation of revisions to the emissions cap and trade rules; 7) the removal of the construction equipment operating restriction and the accelerated purchase requirement for Tier 2/3 heavy duty equipment; 8) the replacement of the Tier 2/3 rules with the Texas Emission Reduction Plan (TERP) program; 9) the layout of the midcourse review process, which details how the state will fulfill the commitment to obtain the additional emission reductions necessary to demonstrate attainment of the one-hour ozone standard in the HGB area; and 10) replacement of 2007 ROP MVEBs to be consistent with the attainment MVEBs.

As was discussed in the December 2000 revision, the modeling resulted in a 141 parts per billion peak ozone level correlating to a shortfall calculation of 91 tpd NO_x equivalent. An additional five tpd was added to the shortfall because the state could not take credit for the NO_x reductions associated with the diesel pull-ahead strategy. The excess emissions from this strategy were not included in the original emissions inventory. The gap control measures adopted in December 2000, along with the stationary diesel engine rules included in the September revision, resulted in NO_x reductions of 40 tpd, which left a total remaining shortfall of 56 tpd. The state committed to address this shortfall through the midcourse review process.

December 2002

In January 2001, the Business Coalition for Clean Air - Appeal Group (BCCA-AG) and several regulated companies challenged the December 2000 HGB SIP and some of the associated rules. Specifically, the BCCA-AG challenged the 90% NO_x reduction requirement from stationary sources in the HGB area. In May 2001, the parties agreed to a stay in the case, and Judge Margaret Cooper, Travis County District Court, signed a Consent Order, effective June 8, 2001, requiring the commission to perform an independent, thorough analysis of the causes of rapid ozone formation events and identify potential mitigating measures not yet identified in the HGB area attainment demonstration, according to the milestones and procedures in Exhibit C (Scientific Evaluation) of the Order.

In compliance with the Consent Order, the commission conducted a scientific evaluation based in large part on aircraft data collected by the Texas 2000 Air Quality Study (TexAQS). The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40 research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGB area and East Texas regions. One conclusion of the study was that the ambient concentrations of NO_x and VOC were not consistent with the industrial emissions estimates. Specifically, the ratio of NO_x to VOC did not correlate to the ambient ratio of NO_x to VOC. Because of the greater certainty associated with NO_x emissions estimates, it can be concluded that industrial VOC emissions were likely significantly understated in earlier emissions inventories.

To address these findings and to fulfill obligations in the Consent Order, the commission adopted a SIP revision in December 2002 that focused on replacing the most stringent 10% industrial NO_x reductions

with VOC controls. In light of the TexAQS study, the commission conducted further modeling analysis of ambient VOC data. The results of photochemical grid modeling and analysis indicated that it is possible to achieve the same level of air quality benefits with reductions in industrial VOC emissions, combined with an overall 80% reduction in NO_x emissions from industrial sources, as would be realized with a 90% reduction in industrial NO_x emissions. Studies have suggested that the HGB area's high ozone events can be attributed to the presence of significant reactivity in the airshed. An analysis of automated gas chromatograph data revealed that four compounds were frequently responsible for high reactivity days: ethylene, propylene, 1,3-butadiene, and butenes, as such these compounds were selected as the best candidates for the first round of HRVOC emission controls.

The commission adopted revisions to the industrial source control requirements, one of the control strategies within the existing federally approved SIP. The December 2002 SIP revision contains new rules that will better quantify and reduce emissions of HRVOCs from four key industrial sources: fugitives, flares, process vents, and cooling towers. The adopted rules target HRVOC emissions while maintaining the integrity of the SIP. Analysis showed that limiting emissions of ethylene, propylene, 1,3-butadiene, and butenes in conjunction with an 80% reduction in NO_x is equivalent to or better in terms of air quality benefit to that resulting from a 90% point source NO_x reduction requirement alone. As such, the HRVOC rules are performance-based, emphasizing monitoring, recordkeeping, reporting, and enforcement rather than establishing individual unit emission rates.

The technical support documentation accompanying the SIP revision contains the supporting analysis from ongoing analysis examining whether reductions in HRVOC emissions could replace the last 10%

of industrial NO_x controls, while ensuring that the air quality specified in the approved December 2000 HGB area SIP is met.

Current Revision

As mentioned previously, the commission committed to perform a midcourse review to ensure attainment of the one-hour ozone standard. The midcourse review process provides the ability to update emissions inventory data, utilize current modeling tools, such as MOBILE6, and enhance the photochemical grid modeling. The data gathered from the TexAQS continues to improve photochemical modeling of the HGB area. The collection of these technical improvements gives a more comprehensive understanding of the ozone challenge in Houston, which is necessary for developing a plan to reach attainment. In early 2003, the commission was preparing to move forward with the midcourse review, and EPA announced its plans to begin implementation of the eight-hour ozone standard. The EPA published rules for implementation of the eight-hour ozone standard in the June 2, 2003 issue of the *Federal Register* (68 FR 32802). In the same time frame, EPA also formalized its intentions to designate areas for the eight-hour ozone standard by April 15, 2004, meaning states would need to reassess their efforts and control strategies to address this new standard by 2007. Recognizing that existing one-hour nonattainment areas would soon be subject to the eight-hour ozone standard, and in an effort to efficiently manage the state's limited resources, the commission developed an approach that addresses the outstanding obligations under the one-hour ozone standard while beginning to analyze eight-hour ozone issues.

The commission's one-hour ozone SIP commitments include: 1) completing a one-hour ozone MCR; 2) performing modeling; 3) adopting measures sufficient to fill the NO_x shortfall; 4) adopting measures sufficient to demonstrate attainment; and 5) revising the MVEB using MOBILE6.

Results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure in reducing ozone in the HGB area. The commission proposed to reduce HRVOC emissions to reach attainment of the one-hour ozone standard. The photochemical modeling of the August - September 2000 episode coupled with a weight-of-evidence argument demonstrates attainment of the one-hour ozone standard. To achieve the necessary HRVOC reductions, the commission proposed a two-pronged approach that would address short-term emission events through a not-to-exceed limit, and would address steady state and routine emissions through an annual cap. The annual HRVOC cap is reduced from the existing HRVOC cap in order to support the attainment demonstration modeling.

The HGB SIP no longer relies solely on NO_x based strategies. A combination of point source HRVOC controls and NO_x reductions appears to be the most effective means of reducing ozone in the HGB area and there is no longer a NO_x shortfall in the HGB SIP. As a result, the commission also evaluated a number of the existing control strategies that were put in place in the December 2000 revision. The photochemical modeling shows that some of these strategies are no longer necessary to attain the one-hour ozone standard. This SIP revision included the repeal of the commercial lawn and garden equipment restrictions, the repeal of the heavy-duty vehicle idling restrictions, and the removal of the motor vehicle inspection and maintenance program requirements from Chambers, Liberty, and Waller

Counties. In addition, this SIP proposal included revisions to the environmental speed limit strategy. In September 2002, the commission revised the existing speed limit strategy to suspend the 55 mile per hour (mph) speed limit until May 1, 2005, and, where posted speeds were 65 mph or higher before May 1, 2002, to increase speeds to five mph below what was posted. The 78th Legislature, 2003, removed the commission's authority to determine speed limits for environmental purposes; therefore, this rulemaking removes the reinstatement of the 55 mph speed limit on May 1, 2005, and maintains the currently posted speed limits at five mph below the posted limit before May 1, 2002. Also, as part of this SIP revision, the commission adopts new statewide portable fuel container rules. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies, and these changes embody that philosophy.

Through this revision, the commission is fulfilling its outstanding one-hour ozone SIP obligations and beginning to plan for the upcoming eight-hour ozone standard. This rulemaking demonstrates attainment of the one-hour ozone standard in the HGB area in 2007 and provides a preliminary analysis of the HGB area in terms of the eight-hour ozone standard in 2007 and 2010. EPA's proposed eight-hour implementation rules provide flexibility to the states in transitioning from the one-hour to the eight-hour ozone standard, and the commission believes that the steps taken in this rulemaking and the technical work performed to date will be invaluable through the transition period. Upon EPA's finalization of the eight-hour implementation and the transportation conformity rules, the commission expects to begin developing eight-hour ozone SIPs.

Adopted new Division 2 establishes new requirements relating to the design criteria for portable fuel containers and portable fuel container spouts. The adoption is in response to an October 31, 2001 petition for rulemaking from Fluoro-Seal and to the directive from the commission on December 5, 2001, to initiate rulemaking on these issues. The new rules establish design criteria for “no-spill” portable gas cans based in large part on the California Air Resources Board (CARB) standards. The most significant difference with the CARB standards is that these regulations do not require the control of permeations rates through the walls of portable fuel containers. This provision is not included in the Texas regulations because the cost of compliance is expected to be large and the reduction in emissions small, relative to other provisions.

Effective December 31, 2005, these new rules will limit the type of portable fuel containers and portable fuel container spouts sold, offered for sale, manufactured, and/or distributed in the State of Texas. Fuel released into the environment leads to the contamination of both the state’s air and water. These rules ensure that portable fuel containers manufactured under these standards will release fewer amounts of fuel as the result of spillage and evaporation. According to the most conservative estimates by commission staff, the reduction in spills and evaporation will reduce emissions from portable fuel containers by 45%. Staff estimates that the reductions statewide will amount to at least 12.5 tpd. The great majority of these reductions are to air emissions, but contamination of surface water and groundwater will also be reduced. Staff does not have adequate studies to estimate the reduction of water contamination. Factors such as distance from surface water in which spills occur and the time after a spill before rain occurs would impact the spread of contamination of surface water. One situation that will directly reduce releases to surface water will be the reduction of spills when refueling

powered water craft with portable fuel containers. Contamination reaching groundwater would be affected by the type of surface or soil on which a spill occurs, the depth to groundwater, and annual average rainfall amounts in the area. The small size of spills that could occur from a portable fuel container would generally lead to greater evaporation of the fuel rather than transport to water.

SECTION BY SECTION DISCUSSION

Adopted new §115.620, Definitions, establishes the meaning of the terms “Nominal capacity,” “Portable fuel container,” “Portable fuel container spout,” and “Target fuel tank.” At adoption, the definition of portable fuel container is amended to remove a citation to federal Consumer Product Safety Commission regulations to make the rule easier to read. The citation was added to exclude containers that are sold to consumers already filled with fuel and that are not intended for reuse. This issue is addressed by adding a new exclusion at adoption.

Adopted new §115.621, Applicability, establishes the persons that this rule applies to. That is, unless exempted under §115.627, anyone who sells, offers for sale, supplies, distributes, or manufactures portable fuel containers and portable fuel container spouts in Texas is subject to these rules.

Adopted new §115.622, Performance Standards and Testing Requirements, establishes that, notwithstanding the exemptions provided in §115.627, no person shall sell, supply, offer for sale, distribute, or manufacture in Texas any portable fuel container or portable fuel container spout that was manufactured on or after December 31, 2005, unless it complies with the standards described in this

section. Based on public comment, the compliance date was changed at adoption from January 1, 2006, to December 31, 2005, as discussed in the RESPONSE TO COMMENTS section of this preamble.

Adopted new §115.622(1) explains that each portable fuel container may only have one hole in the vessel. This standard has been included in the rule as a means of reducing emissions that occur when vent holes (a small second hole in the vessel that is used to expedite the flow of fuel out of the portable fuel container) are left open, leading to evaporative emissions and possibly spillage of fuel.

Adopted new §115.622(2) describes the standards required for portable fuel container spouts. Each portable fuel container spout will be required to have an automatic shutoff device to prevent over filling in accordance with CARB Test Method 510; automatically close and seal when removed from the fuel tank in accordance with CARB Test Method 511; seal without leakage when affixed to the portable fuel container vessel; and meet fuel flow rate and cut off level standards. The portable fuel container spout must provide a fuel flow rate in accordance with CARB Test Method 512, which specifies a flow rate of not less than 1/2 gallon per minute when attached to a portable fuel container that holds 1.5 gallons or less; one gallon per minute when attached to a portable fuel container that holds more than 1.5 gallons but less than or equal to 2.5 gallons; or two gallons per minute when attached to a portable fuel container that holds more than 2.5 gallons. Cut off fuel flow levels are set so as to eliminate the overfilling of a target fuel tank. Cut off fuel flow levels are one inch from the top of the target fuel tank for tanks that have a nominal capacity of 1.5 gallons or less. If the target fuel tank can hold more than 1.5 gallons, the cut-off level is 1.25 inches from the top of the fuel tank.

Adopted new §115.626, Labeling, states that portable fuel containers and portable fuel container spouts subject to this rule must display a label indicating that the system was designed in accordance with the rule as specified. Labels must also list the date when the device was manufactured and show prominently the word “spill-proof.” Finally, the label must specify with which portable fuel containers the portable fuel container spout must be used. This final requirement will ensure that consumers match the proper spout to their vessel (or vice versa) in those cases when the devices are purchased separately. At adoption, a sentence is added to this section to state that other state and federal labeling requirements for portable fuel containers also apply. The addition of this sentence is intended to make it clear that there are other labeling requirements outside the scope of this rulemaking that pertain to portable fuel containers and that these rules do not affect those requirements.

Adopted new §115.627, Exemptions, states that all portable fuel containers and portable fuel container spouts manufactured prior to December 31, 2005, and all portable fuel containers with a nominal capacity of less than or equal to one quart, or greater than ten gallons are exempted from the requirements of this new rule. Based on public comment, the commission changed at adoption the compliance date from January 1, 2006, to December 31, 2005, as discussed in the RESPONSE TO COMMENTS section. The exemption allowing persons to sell, supply, offer for sale, or distribute portable fuel containers and portable fuel container spouts manufactured prior to December 31, 2005, allows companies to liquidize any stock of noncompliant portable fuel containers that otherwise would have become unsaleable in the state after the implementation date of this new rule. This section exempts from the rule any portable fuel container or portable fuel container spout that is sold, supplied, or offered for sale outside of Texas. This section also exempts portable fuel containers and portable

fuel container spouts used in officially sanctioned racing competitions if the spill-proof spouts would cause problems with the race by increasing time needed to refuel during the race and if the spout and receiving tank are equipped with a spill-proof mechanism. Based on public comment, the commission adds at adoption an exemption for safety cans when their use is required by the federal Occupational Safety and Health Administration under 29 Code of Federal Regulations Part §1926.155(l), as discussed in the RESPONSE TO COMMENTS section. Also based on public comment, the commission adds an exemption for containers that are filled with fuel by the manufacturer prior to sale to consumers and that are not intended for reuse as portable fuel containers, as discussed in the RESPONSE TO COMMENTS section.

Adopted new §115.629, Affected Counties and Compliance Schedules, states that all affected persons in all counties within the State of Texas must comply with this rulemaking action as soon as practicable, but not later than December 31, 2005. Based on public comment, the commission changed at adoption the compliance date from January 1, 2006 to December 31, 2005, as discussed in the RESPONSE TO COMMENTS section.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does not meet the definition of a “major environmental rule” as defined in that statute. A “major environmental rule” is 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking and revisions to the SIP will reduce emissions of VOCs throughout Texas by regulating the type of portable fuel containers that can be manufactured or imported for sale in Texas on or after December 31, 2005. Specifically, the new rules will require that new portable fuel containers have devices to prevent spills and overfilling of the receiving tanks. The new rules are not expected to 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.

The new rules do not meet any of the four applicability criteria of a “major environmental rule” as defined in the Texas Government Code. Texas Government Code, §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 rules implement requirements of 42 USC. 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. While 42 USC, §7410 does not require specific programs,

methods, or reductions in order to meet the standard, SIPs must include “enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter,” (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, such as 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 ozone standard. 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 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. 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.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. 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 commission in the past, it is not anticipated that the bill would not 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 rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQs for ozone; thus, states must develop programs for each nonattainment area to ensure that each area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule included 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 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 Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

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 the HGB area. The rules will reduce VOC emissions statewide, including in the HGB area. The control of VOCs in the HGB area will assist with achieving attainment of the NAAQS for ozone for that area. Therefore, the new rules are necessary components of and consistent with the ozone attainment demonstration SIP for the HGB area, required by 42 USC, §7410.

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. The commission presumes 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); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App.–Austin 2000); *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).

As discussed earlier in this preamble, this rulemaking implements requirements of 42 USC. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking action. Therefore, the new rules do not exceed a standard set by federal law, exceed an express requirement of

state law, exceed a requirement of a delegation agreement, or are adopted solely under the general powers of the agency. In addition, the rules are adopted under Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the rulemaking action under Texas Government Code, §2007.043. The specific purpose of these new rules is to reduce the emissions of VOCs caused by leaks and spills from portable fuel containers.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this rulemaking action, because it is reasonably taken to fulfill an obligation mandated by federal law. The control requirements within this rulemaking action 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 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 the applicable ozone standard through control programs directed to sources of the ozone. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law, identifiable as the NAAQS. Any VOC reductions resulting from the current rulemaking are no greater than what 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.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the new 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 significantly advance the health and safety purpose. This action is taken in response to the finding that the HGB area exceeds the federal ozone standard, and may consequently affect public health in an adverse manner, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ozone levels in the HGB nonattainment area. Consequently, these rules meet the exemption in Texas Government Code, §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the new rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking action and found that the proposal is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §505.11, and therefore will require that applicable goals and policies of the Coastal Management Program be considered during the rulemaking process.

The commission prepared a consistency determination for the rules under 31 TAC §505.22 and found that the rulemaking 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 ozone levels will be reduced as a result of these new rules.

The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)).

This rulemaking action complies with 40 CFR. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122; therefore, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 115 requirements for each emission unit affected by the revisions to Chapter 115 at their sites.

PUBLIC COMMENT

Public hearings were held in Houston on August 2, 2004, in Beaumont on August 3, 2004, and in Austin on August 5, 2004, but no oral comments were received concerning the portable fuel container rules. The public comment period ended at 5:00 p.m. on August 9, 2004. Written comments were submitted by the Central Texas EAC Task Force (EAC); Ms. Joni Brown, Air Quality Program Coordinator, representing the City of Victoria (Victoria); Environmental Defense; the Galveston-Houston Association for Smog Prevention (GHASP), sending two letters; the Houston-Galveston Area Council (HGAC); the Sierra Club, Houston Regional Group (Sierra Club); the commission's Office of

Public Interest Counsel (OPIC); the Honorable Bill White, Mayor, City of Houston, and the Honorable Robert Eckels, County Judge, Harris County, providing joint comments (Houston/Harris County); the Greater Houston Partnership (GAP); and the Transportation Policy Council (TPC). GHASP, Victoria, OPIC, HGAC, EAC, Sierra Club, Houston/Harris County, GAP, and TPC indicated that they supported the rulemaking. Environmental Defense did not indicate whether it is for or against the adoption of the rules but provided specific comments on the rules.

RESPONSE TO COMMENTS

Comment

OPIC, GHASP, Sierra Club, Victoria, TPC, EAC, Houston/Harris County, GAP, and HGAC issued their support of the proposed portable fuel container rulemaking.

Response

The commission acknowledges the comments and appreciates the support of the rules.

Comment

OPIC commented that the proposed fuel container rule does not adopt the exact language used in the CARB rule and adds conditions that limit its applicability.

Response

The proposed rule, as written, is limited in applicability only to the extent that it imposes standards upon portable fuel containers and spouts which are sold, supplied, offered for sale, or

distributed in the State of Texas. As noted, the proposed rule is not written with the exact language of the CARB rule. For example, unlike the CARB rule, the proposed rule does not include a permeation standard for portable fuel containers because very few emission reductions would be achieved via this strategy, and the cost for manufacturers to include impermeable coatings to portable fuel containers would be high. Furthermore, according to the CARB's portable fuel container Web page it was, and still is, in the process of amending its portable fuel container rule. No changes were made in response to this comment.

Comment

OPIC recommended adding a definition of "motor fuel" to the rule.

Response

OPIC's recommended definition of "motor fuel" is not included in the proposed rule because it would unnecessarily limit the portable fuel container rule. The definitions of "motor fuel" cited by OPIC do not capture the entire universe of fuels that could be contained in these types of containers and used for the operation of internal combustion engines and/or motors. No changes were made in response to this comment.

Comment

OPIC recommended that the definition of "Portable fuel container" be revised so as to delete the language "for use in internal combustion engines, and that is subject to 16 CFR §1500.83(a)(14)" and

insert an applicability requirement that the container be designed to be used “in a manner that does not involve permanent attachment to any motorized equipment or vehicle.”

Response

The definition of portable fuel containers was not revised as OPIC suggested. The phrase “for use in internal combustion engines” is necessary in order to specify the use for the universe of fuels that could be contained in regulated containers. The reference to 16 CFR §1500.83(a)(14) was used in the proposed rule to differentiate portable fuel containers, which are sold empty, from containers of fuels that are sold full, if the containers are not intended to be reused as portable fuel containers. The citation is to the Federal Consumer Product Safety Commission regulation concerning the labeling required for portable fuel containers. However, based on this comment which demonstrated that the reference was not clear, the commission is amending at adoption the definition by removing the citation and adding at adoption a new exclusion to exempt these types of containers from the rule. If this differentiation is lost, containers of emergency fuels would have to comply with the rules even though those containers are sealed until used and are not intended for reuse. These cans are designed to be carried in a vehicle for filling automobile gas tanks in emergency situations where a motorist runs out of gas. Additionally, the language OPIC suggested would apply to all fuel containers like those on motor boats that have gas tanks which are not permanently attached to the engine but can be disconnected to be refilled or stored. The substitution language is not needed because the definitions of “Portable fuel container” and “Portable fuel container spout” limit applicability of the rules to containers used to fill tanks that are attached to internal combustion engines, rather than to the receiving tanks also.

Comment

OPIC recommended an exemption be added to the portable fuel container rule to exempt “safety cans” as defined in 29 CFR §1926.155(l).

Response

The federal Occupational Safety and Health Administration (OSHA) regulation requires the use of safety cans in certain areas. These cans do not conform with the portable fuel container rules because the safety cans are designed to avoid fire hazards rather than curb air emissions. Since the OSHA regulations preempt the commission’s rules in areas under OSHA’s jurisdiction, the suggested change adds clarity to the rule. Therefore, the commission has amended the rule by adding at adoption the exemption as §115.627(5).

Comment

EAC commented that the commission should change the implementation date of the proposed rule from January 1, 2006 to December 31, 2005 because this change will comply with the terms of the Early Action Compact agreement and avoid unnecessary risk to the Clean Air Action Plan (CAAP).

Response

To comply with the rule as proposed, manufacturers must implement the rule through modification of their production processes prior to January 1, 2006. However, the date change requested should not present an unreasonable burden. The emission reductions from the proposed rules are needed to ensure a successful CAAP for the EAC region, as well as to fulfill

nonattainment emission reduction commitments. The terms of the early action compact agreement stipulate that all emission reduction measures must be implemented no later than December 31, 2005. Therefore, the commission is amending §§115.622, 115.627(1), and 115.629 to make the cut-off date for manufacturing noncompliant portable fuel containers December 31, 2005, rather than January 1, 2006.

Comment

Environmental Defense commented that the proposed fuel container rule significantly underestimates emissions reductions.

Response

The commission utilized the 2002a version of the NONROAD model for 2007 to calculate realistic and conservative statewide emission reductions. Although the use of evidence from other studies/models might show greater potential emission reductions, the commission would not be able to demonstrate to EPA that the portable fuel container rule would achieve emission reductions greater than the amount presently asserted. No changes were made in response to this comment.

Comment

Environmental Defense commented that modest cost increases associated with the proposed fuel container rule will be significantly offset with fuel savings resulting from consumers losing less fuel over the lifetime of the proposed fuel containers.

Response

Upon implementation of the proposed fuel container rule, the commission realizes that less fuel will be lost to spillage and evaporation. However, the commission is not able to precisely quantify those savings to factor fuel cost savings into the cost benefit estimation. To the degree possible, the commission adequately calculated the estimated cost of compliance. No changes were made in response to this comment.

Comment

Environmental Defense commented that the commission should consider the need for additional labeling if containers are not suitable for refueling on-road motor vehicles.

Response

The commission did not include a labeling requirement stating whether or not a portable fuel container is suitable for refueling on-road motor vehicles. California did require such labeling in its no-spill portable fuel container rule since very few portable fuel containers that were “spill-proof” could service an on-road vehicle. However, today most manufacturers of portable fuel containers are now producing cans that can service on-road motor vehicles. Therefore, the commission believes that market forces should dictate this aspect of labeling rather than regulation. No changes were made in response to this comment.

Comment

Environmental Defense commented that the commission should review California's portable fuel rule experience with respect to consumer issues.

Response

The CARB is amending its no-spill portable fuel container rule to address consumer issues and to change its requisite test methods. In order for Texas to meet the deadlines for the midcourse review of the SIP, the commission could not wait for the CARB rules to be adopted. In the future the commission may amend its portable fuel container rule to correspond to the CARB rule, to align the commission's test methods with those presently under CARB's consideration. No changes were made in response to this comment.

Comment

Environmental Defense commented that the commission should reconsider whether it is sensible to include California's permeability standards.

Response

Unlike CARB, the commission did not include a permeation standard for portable fuel containers. First, the commission found that very few emissions resulted from permeation. Second, the cost for manufacturers to include impermeable coatings to portable fuel containers was considerable. Third, CARB, by virtue of the size of the California market, and other states that have adopted no-spill gas can rules have created a de facto national standard for impermeable no-spill portable fuel containers. Therefore, it is expected that most manufacturers of no-spill portable fuel

containers will comply with the more stringent CARB standards when selling to retailers in Texas rather than have a separate product line for the Texas market. Fourth, the coating that renders plastic portable fuel containers impermeable fades with time and eventually becomes useless after only a few months. Since these reasons indicate that there would be few additional emission reductions from this factor, the commission chose not to adopt the permeability standards. No changes were made in response to this comment.

Comment

Environmental Defense commented that the commission should consider the overall cost effectiveness of the proposed fuel container rule rather than the incremental cost of any individual element of the regulation.

Response

The overall cost effectiveness of this rule has been calculated accurately. Best estimates of variables such as costs to consumers and the expected savings from reduced fuel loss were factored into the final cost analysis. The commission does not anticipate significant fiscal implications for manufacturers of portable fuel containers due to implementation of the proposed new rules.

There are no known manufacturers in Texas that will be directly affected by the new requirements. CARB estimated that any manufacturing costs required to produce the upgraded portable fuel containers would likely be passed along to consumers buying and businesses selling the new portable fuel containers. Retailers who sell portable fuel containers may be impacted if the potential increase in costs of the products reduces demand; however, the commission does not

anticipate this will occur. The price increase, estimated between \$6.00 and \$11 per portable fuel container, is not anticipated to drastically alter consumer/business purchases of these products.

The cost rulemaking elements were considered in developing the proposed fuel container rule.

The commission considered the permeation limits of the CARB rule in drafting its rule, but determined it was the least cost-effective reduction that could be achieved and it did not achieve the maximum reductions possible. The CARB rule permeation standard allows approximately ten times the permeation rate that is found in metal fuel containers, but to achieve the prescribed rate, manufacturers of plastic containers must use proprietary processes that are under the control of a limited number of manufacturers. In order to avoid giving preference to a limited number of manufacturers, the commission did not include the permeation standard. However, since most manufacturers produce fuel containers for a national market and because it is unlikely that they will develop a separate product line for the Texas market, it is not expected that this omission will have a significant impact on the emission reductions. No changes were made in response to this comment.

Comment

Environmental Defense commented that the commission should consider outreach and incentive programs to accelerate the turnover of the state's gas cans.

Response

The commission believes that the turnover rate for portable fuel containers is rapid enough that emission reductions will result soon after implementation of the rule. There will be an announcement about the upcoming standards on the commission's Web site. The commission does not immediately plan to create an incentive and outreach program to accelerate turnover rate; however, it is also possible that other agencies at the state and local levels will offer such programs. No changes were made in response to this comment.

SUBCHAPTER G: CONSUMER-RELATED SOURCES

DIVISION 2: PORTABLE FUEL CONTAINERS

§§115.620 - 115.622, 115.626, 115.627, 115.629

STATUTORY AUTHORITY

The new rules are adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; §26.003, concerning Policy; §26.011, concerning In General, which provide the commission with the authority to maintain and control the quality of water in the state; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act). The new rules are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The new rules are adopted under federal mandates contained in 42 USC, §7410, that requires states to introduce pollution control measures in order to reach specific air quality standards in particular areas of the state.

§115.620. Definitions.

The following words and terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §§3.2, 101.1, and 115.10 of this title (relating to Definitions).

- (1) **Nominal capacity** - The volume indicated by a portable fuel container manufacturer that represents the maximum recommended filling level.

- (2) **Portable fuel container** - Any vessel that is designed to be used in combination with a portable fuel container spout and that is designed or used primarily to receive, transport, store, or dispense fuel for use in internal combustion engines.

- (3) **Portable fuel container spout** - Any device that is designed or manufactured to be attached to a portable fuel container for the purpose of dispensing fuel into a target fuel tank leading to an internal combustion engine.

- (4) **Target fuel tank** - Any receptacle that receives fuel from a portable fuel container.

§115.621. Applicability.

Except as provided in §115.627 of this title (relating to Exemptions), this division shall apply to any person who sells, offers for sale, supplies, distributes, or manufactures portable fuel containers and portable fuel container spouts in the State of Texas.

§115.622. Performance Standards and Testing Requirements.

Except as provided in §115.627 of this title (relating to Exemptions), no person shall sell, supply, offer for sale, distribute, or manufacture any portable fuel container or portable fuel container spout which was manufactured on or after December 31, 2005, that does not comply with the following performance standards.

(1) Portable fuel containers must have only one opening in the vessel.

(2) Portable fuel container spouts must:

(A) contain an automatic shutoff device that stops the flow of fuel before the target fuel tank overflows, in accordance with California Air Resources Board (CARB) Test Method 510 (July 6, 2000);

(B) automatically close and seal when removed from the target fuel tank, and remain completely closed when not dispensing fuel, in accordance with CARB Test Method 511 (July 6, 2000);

(C) seal without leakage to the portable fuel container to which it is affixed;

(D) provide a fuel flow rate, in accordance with CARB Test Method 512 (July 6, 2000), of not less than:

(i) 1/2 gallon per minute when attached to a portable fuel container with a nominal capacity of 1.5 gallons or less;

(ii) one gallon per minute when attached to a portable fuel container with a nominal capacity greater than 1.5 gallons but less than or equal to 2.5 gallons; or

(iii) two gallons per minute when attached to a portable fuel container with a nominal capacity of greater than 2.5 gallons; and

(E) cut off fuel flow when the fuel level in the target fuel tank reaches:

(i) one inch from the top of a target fuel tank with a nominal capacity of 1.5 gallons or less; or

(ii) 1.25 inches from the top of a target fuel tank with a nominal capacity greater than 1.5 gallons.

§115.626. Labeling.

Portable fuel containers and portable fuel container spouts subject to the requirements of §115.622 of this title (relating to Performance Standards and Testing Requirements) must be labeled so as to indicate compliance with the requirements of §115.622 of this title. The label must also list the date the device was manufactured and must prominently include the word “spill-proof.” The label must also specify with which portable fuel containers the portable fuel container spout must be used. These labeling requirements are in addition to any other federal or state labeling requirements that apply to portable fuel containers.

§115.627. Exemptions.

This division (relating to Portable Fuel Containers) does not apply to:

(1) portable fuel containers or portable fuel container spouts manufactured prior to December 31, 2005;

(2) portable fuel containers with a nominal capacity less than or equal to one quart, or greater than ten gallons;

(3) portable fuel containers or portable fuel container spouts that are sold, supplied, or offered for sale outside of Texas;

(4) portable fuel containers and portable fuel container spouts used in officially sanctioned racing competitions when the minimum flow rates provided in §115.622(2)(D) of this title (relating to Performance Standards and Testing Requirements) would interfere with the competition by requiring too long to refuel vehicles during the race, if both the portable fuel container spout and the receiving tank have compatible spill-proof mechanisms to avoid spills when transferring fuel;

(5) safety cans when their use is required by the federal Occupational Safety and Health Administration under 29 Code of Federal Regulations §1926.155(l); and

(6) containers that are filled with fuel by the manufacturer prior to sale to consumers and that are not intended for reuse as portable fuel containers.

§115.629. Affected Counties and Compliance Schedules.

All affected persons in all counties within the State of Texas shall be in compliance with the provisions of this division as soon as practicable, but no later than December 31, 2005.