The Texas Commission on Environmental Quality (commission) proposes new §§115.620 - 115.622, 115.626, 115.627, and 115.629; and corresponding revisions to the state implementation plan (SIP).

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Houston/Galveston (HGA) ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act Amendments of 1990 (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 (125 parts per billion) by November 15, 2007. The HGA area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. The most relevant HGA 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 extremely 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 HGA area, in partnership with the commission, to address ozone. These coalitions include local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as EPA

and the commission. Each of these groups has worked diligently to identify and quantify control strategy measures for the HGA attainment demonstration.

December 2000

The December 2000 SIP revision contained rules and photochemical modeling analyses in support of the HGA 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 emissions budgets (MVEB) for NO_x and volatile organic compound (VOC) emissions. The SIP also contained enforceable commitments to implement further measures in support of the HGA attainment demonstration, as well as a commitment to perform and submit a midcourse review.

September 2001

The September 2001 SIP revision for the HGA 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 to clarify 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 for compliance with the requirements of the rule while preserving the emission reductions necessary to demonstrate attainment in the HGA 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 these rules with the Texas Emission Reduction Plan 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 HGA 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 which correlated 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 2001 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 HGA SIP and some of the associated rules. Specifically, the BCCA-AG challenged the 90% NO_x reduction requirement from stationary sources in the HGA. 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 HGA 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 HGA and east Texas regions. The study revealed that while industrial source NO_x emissions were generally correctly accounted for, industrial source VOC emissions were likely significantly understated in earlier emissions inventories. The study also showed that surface monitors were insufficient to capture the phenomenon of ozone plumes downwind of industrial facilities. On four separate days, aircraft instruments recorded ozone levels exceeding 125 parts per billion that were missed by surface monitoring equipment. The findings from the study are constantly evolving and have raised questions about the formation of high ozone levels in the HGA.

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, the commission conducted further modeling analysis of ambient VOC data. The results of photochemical grid modeling and analysis indicated that the same level of air quality benefits achieved with a 90% industrial NO_x emissions reduction could be achieved with an overall 80% industrial NO_x emissions reduction when combined with an industrial VOC emissions reduction. This conclusion was based on results from several studies, including photochemical grid modeling of the August-September 2000 episode using a top-down emissions inventory adjustment to point source HRVOC emissions, and analyses of ambient HRVOC measurements made by commission automated gas chromatographs and airborne canisters using the maximum incremental reactivity and hydroxyl reactivity scales. Four HRVOCs (ethylene, propylene, 1,3-butadiene, and butenes) clearly play important roles in the HGA ozone formation, and these four seemed to be the best candidates for the first round of HRVOC controls.

In order to address these scientific findings, the commission adopted revisions to the industrial source control requirements, one of the control strategies within the existing federally approved SIP. The December 2002 revision contains new rules to reduce HRVOC emissions from four key industrial sources: fugitives, flares, process vents, and cooling towers. The adopted rules target HRVOCs 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 in terms of air quality benefit to that resulting from a 90% point source NO_x reduction requirement. 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 revision contains the supporting analysis for early results from ongoing analysis examining whether reductions in HRVOC emissions could replace the last 10% of industrial NO_x controls with a reduction of approximately 36% in industrial HRVOC emissions, while ensuring that the air quality specified in the approved December 2000 HGA SIP is met.

Current SIP 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 HGA area. The collection of these technical improvements give a more comprehensive understanding of the ozone challenge in the HGA that is necessary to develop an attainment plan. In the early part of 2003, the commission was preparing to move forward with the midcourse review; however, during the same time period EPA announced its plans to begin implementation of the eight-hour ozone standard. The EPA published proposed 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 decided to develop 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 midcourse review, 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 HGA area. The commission is proposing 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 is proposing 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 would be reduced from the existing HRVOC cap in order to support the attainment demonstration modeling.

The HGA SIP no longer relies solely on NO_x based strategies. A combination of point source HRVOC controls and NO_x reductions appear to be the most effective means of reducing ozone in the HGA area and there is no longer a NO_x shortfall in the HGA 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 is proposing 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 includes 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 proposal would remove the reinstatement of the 55 mph speed limit on May 1, 2005, and would maintain 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 is proposing new statewide portable fuel container rules. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies, and these proposed 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 proposal demonstrates attainment of the one-hour ozone standard in HGA in 2007 and provides a preliminary analysis of the HGA 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 the steps taken in this proposal 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.

Proposed new Division 2 establishes new requirements relating to the design criteria for portable fuel containers and portable fuel container spouts. The proposal is made in response to an October 13, 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 proposed new rules will 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 January 1, 2006, 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 will 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 would be to air emissions, but contamination of surface water and

groundwater is also expected to be reduced. Staff does not have adequate studies to estimate the reduction to 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

Proposed new §115.620, Definitions, establishes the meaning of the terms “Nominal capacity,” “Portable fuel container,” “Portable fuel container spout,” and “Target fuel tank.”

Proposed 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.

Proposed 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 after January 1, 2006, unless it complies with the standards described in this section.

Proposed 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.

Proposed 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.

Proposed 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 specified herein. 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.

Proposed new §115.627, Exemptions, states that all portable fuel containers and portable fuel container spouts manufactured prior to January 1, 2006, 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 proposed new rule. The exemption allowing persons to sell, supply, offer for sale, or distribute portable fuel containers and portable fuel container spouts manufactured prior to January 1, 2006 has been added so as to allow 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 proposed new rule. This proposed 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 proposed 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.

Proposed 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 January 1, 2006.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Analyst, Strategic Planning and Appropriations Section, determined that for the first five-year period that the proposed new rules are in effect, there will be no significant fiscal implications for the commission or other units of state and local government as a result of administration or enforcement of the proposed new rules. Units of government that purchase portable fuel containers and portable fuel container spouts after January 1, 2006 will likely pay between $6.00 and $11 more per container and $2.00 to $4.00 more per individual spout due to implementation of the proposed new rules.

This rulemaking would establish new requirements relating to the design criteria for all portable fuel containers sold, offered for sale, manufactured, and/or distributed throughout Texas. Effective January 1, 2006, except as exempted in §115.627, all portable fuel containers bought by units of state and local government will have to meet the updated design criteria proposed by this rulemaking. Portable fuel containers with a nominal capacity of less than or equal to one quart, or greater than ten gallons would be exempted from the new requirements. Additionally, the new requirements would not affect portable fuel containers manufactured prior to January 1, 2006. This was included in the rules to allow companies to liquidize any stock of noncompliant portable fuel containers. A third exemption specifies that noncompliant portable fuel containers and portable fuel container spouts which were intended for transport and use outside of Texas are not subject to the requirements of the proposed rulemaking. The overall fiscal impact to units of state and local government would depend on the number of new portable fuel containers purchased after the effective date of the proposed new rules. The commission does not anticipate significant fiscal implications due to implementation of the proposed new rules.

PUBLIC BENEFITS AND COSTS

Mr. Davis determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the enforcement of and compliance with the proposed new rules would be a reduction in evaporative emissions from poorly sealed gas cans and/or spillage during refueling operations, resulting in a decrease in VOCs released into the air. Reductions in VOCs will help to reduce smog, increase air quality, and help the nonattainment areas meet federal clean air requirements. Water quality will also likely improve by the reduction of fuel spillage during refueling.

This rulemaking would establish new requirements relating to the design criteria for all portable fuel containers sold, offered for sale, manufactured, and/or distributed in Texas. Effective January 1, 2006, except as exempted by §115.627, all portable fuel containers bought by individuals and businesses will have to meet the updated design criteria proposed by this rulemaking. Individuals and businesses would not have to immediately replace existing portable fuel containers following the effective date of this rulemaking action. This fiscal note assumes replacement of existing portable fuel containers due to attrition based on an average useful life of five years for each portable fuel container.

The analysis in this fiscal note is based on a CARB report (CARB, Hearing Notice and Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider the Adoption of Portable Fuel Container Spillage Control Regulations, August 6, 1999). Additionally, data was taken from a report developed by ERG, Inc. (Emissions from Portable Gasoline Containers in Texas, Draft Final Report, August 30, 2002).

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 would 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 at between $6.00 to $11 per portable fuel container, is not anticipated to drastically alter consumer/business purchases of these products.

The total fiscal impact to consumers and businesses in Texas that purchase affected portable fuel containers after January 1, 2006 is based on the model developed by CARB in 1999. The study estimated that 94% of portable fuel containers purchased annually were bought by individuals for residential use. The commission estimates the remaining 6% are purchased for commercial use by businesses, such as lawn and garden, tree-trimming, agricultural, forestry, construction, automotive service, and gasoline service stations. According to the Texas State Data Center, there were 7,392,054 households in Texas in 2000. Based on surveys conducted for ERG, Inc., 72% of households in Texas have at least one portable fuel container, with the average being 1.35 gas cans per household. Based on the CARB model, the commission estimates there are approximately 7.1 million portable fuel containers (Residential/94%) owned by individuals, and an additional 460,000 portable fuel containers (Commercial/6%) owned by businesses. The total portable fuel container population in Texas is

estimated at approximately 7.6 million. Assuming an average useful life of five years for each portable fuel container, the commission estimates that approximately 1.5 million containers will be replaced annually following the January 1, 2006 effective date of the new regulations.

Table 1 provides the estimated cost of compliance for both individuals and businesses that purchase portable fuel containers after January 1, 2006. The total annual incremental compliance cost increase is estimated at $12.8 million statewide. A 2% annual rate of inflation was applied to estimated compliance costs for 2004 to arrive at the 2006 compliance costs listed in Table 1. Based on staff's conservative estimate of a reduction of 12.5 tpd, the annual reduction is estimated to be at least 4,500 tons per year. Therefore, the cost of each ton per year of emission reductions will be approximately $2,800.

Figure: 30 TAC Chapter 115-Preamble

Table 1

Estimated Annual Cost of Compliance (Residential and Commercial Combined) [1]					
Container Size (Gallons)	Annual Units Sold Statewide [1]	Average Retail Price Before Regulation [2]	Estimated Retail Price After Regulation (Rounded)	2004 Annual Cost Before Rule	2006 Annual Cost of Compliance
1 - 1.5	596,208	$2.55	$9.00	$1,520,332	$4,000,905
2 - 2.5	550,346	$3.94	$12.00	$2,168,364	$4,614,997
5 - 6	382,185	$5.58	$16.00	$2,132,592	$4,143,254
Total	1,528,740			$5,821,288	$12,759,156
Notes:					
1. CARB, Staff Report, August 6, 1999					
2. Average retail price only factors in plastic portable fuel containers with spouts sold at local retailers in Austin, TX. The average cost does not include metal containers or spouts sold separately.					

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No significant adverse fiscal implications are anticipated as a result of implementation of the proposed new rules for small or micro-businesses. The majority of businesses in Texas affected by the proposed new rules are anticipated to be small and micro-businesses, including lawn and garden, tree-trimming, agricultural, forestry, construction, automotive service, and gasoline service stations. Based on the ERG, Inc. report, larger small and micro-businesses would replace up to approximately ten portable fuel containers annually following implementation of the proposed rules on January 1, 2006. The cost to replace these portable fuel containers would be approximately $60 to $110 more per business due to

implementation of the proposed new rules. The increased cost could be higher or lower, depending on the number of portable fuel containers purchased following implementation of the proposed new rules.

The following is an analysis of the costs per employee for small and micro-businesses that replace ten portable fuel containers annually over the five-year period following implementation of the proposed new rules. Small and micro-businesses are defined as having fewer than 100 or 20 employees, respectively. A small business would have to pay up to an additional $1.10 per employee to comply with the proposed new rules. A micro-business would have to pay up to an additional $5.50 per employee to comply with the proposed new rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed new rules do not adversely affect a local economy in a material way for the first five years that the proposed new rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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.

The proposed new rules to Chapter 115 and revisions to the SIP would reduce emissions of VOCs throughout Texas by regulating the type of portable fuel containers that can be manufactured or imported for sale in Texas after January 1, 2006. Specifically, the proposed new rules will require that new portable fuel containers have devices to prevent spills and overfilling of the receiving tanks. The proposed 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 proposed new rules do not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Section 2001.0225 applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed 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 national ambient air quality standards (NAAQS) in each air quality control region of the state.

While §7410 does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, 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 §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 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 proposed 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 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 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 §7511a(d) requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as HGA. The proposed rules will reduce VOC emissions statewide, including in the HGA. The control of VOCs in the HGA will assist with achieving attainment of the NAAQS for ozone for that area. Therefore, the proposed new rules are necessary components of and consistent with the ozone attainment demonstration SIP for HGA, 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 proposed 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 proposed under Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The specific purpose of these proposed 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 proposed 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 proposed 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 HGA 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 HGA nonattainment area. Consequently, these proposed rules meet the exemption in §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 proposed new rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed 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 Coastal Coordination Act Implementation Rules, 31 TAC §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 preliminary consistency determination for the proposed rules under 31 TAC §505.22 and found that the proposed 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 proposed 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. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

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.

ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking have been scheduled for the following times: August 2, 2004, 1:30 p.m. and 5:30 p.m., City of Houston, City Council Chambers, 2nd Floor, 901 Bagby, Houston; and August 3, 2004, 10:30 a.m., John Gray Institute, 855 Florida Avenue, Beaumont; and

August 5, 2004, 9:30 a.m., Texas Commission on Environmental Quality, 12100 North I-35, Building F, Room 2210, Austin. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearings to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes before each hearing and will answer questions before and after each 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 Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-4808; or emailed to *siprules@tceq.state.tx.us*. All comments should reference Rule Project Number 2004-033-115-AI. Comments must be received by 5:00 p.m., August 9, 2004. For further information, please contact Roland Castañeda of the Environmental Planning and Implementation Division at (512) 239-0774 or Joe Thomas, of the Policy and Regulations Division, at (512) 239-4580.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the 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.

CHAPTER 115: CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

SUBCHAPTER G: CONSUMER-RELATED SOURCES

DIVISION 2: PORTABLE FUEL CONTAINERS

§§115.620 - 115.622, 115.626, 115.267, 115.629

STATUTORY AUTHORITY

The new rules are proposed 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 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 proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state 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 proposed under federal mandates contained in 42

United States Code, §7410, that requires states to introduce pollution control measures in order to reach specific air quality standards in particular areas of the state.

The proposed new rules implement Texas Health and Safety Code, §§382.002, 382.011, and 382.012.

§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, and that is subject to 16 Code of Federal Regulations, §1500.83(a)(14).

(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 after January 1, 2006, 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.

§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 January 1, 2006;

(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; and

(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.

§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 January 1, 2006.