The Texas Commission on Environmental Quality (commission) adopts the repeal of §114.452 and §114.459. Sections 114.452 and 114.459 are adopted *without changes* as published in the June 11, 2004 issue of the *Texas Register* (29 TexReg 5736).

Repealed §114.452 and §114.459 and the corresponding revisions to the state implementation plan (SIP) will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS

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 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 HGB SIP no longer relies as heavily 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. 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 repeals the commercial lawn and garden equipment operating restrictions, the heavy-duty vehicle idling restrictions, and removes the motor vehicle inspection and maintenance (I/M) program requirements from Chambers, Liberty, and Waller Counties. In addition, this SIP revision includes changes 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 adoption 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 speed limit before May 1, 2002. Also, as part of this SIP revision, the commission is adopting 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 proposal 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 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 adoption and the technical work performed to date will be invaluable through the transition period. Upon EPA's finalization of the eight-hour implementation rules, the commission expects to begin developing eight-hour ozone SIPs.

Sections 114.452 and 114.459 were originally adopted on December 6, 2000, as part of the SIP control strategy for the HGB ozone nonattainment area to achieve attainment with the NAAQS for ozone. The purpose of the rules was to establish a restriction on the use of commercial lawn and garden equipment (non-road, spark-ignition equipment rated at 25 horsepower (hp) and less) as an air pollution control strategy to delay the emissions of NO_x, a key ozone precursor, until later in the day, thus limiting ozone formation. By delaying the hours of operation during the effective time period, the NO_x emissions will not mix in the atmosphere with other ozone-causing compounds until later in the day. The critical time for the mixing (chemical reactions) of NO_x and VOCs is early in the day; thus, higher ozone levels occur most frequently on hot summer afternoons. By delaying the operation of the affected equipment, the NO_x emissions are less likely to mix in the atmosphere with other ozone-forming compounds until after the critical mixing time has passed. Therefore, production of ozone will be stalled until later in the day when optimum ozone formation conditions no longer exist, ultimately minimizing the peak level of ozone produced.

Historically, the commission expressed a preference to implement technology-based strategies over behavior-altering strategies such as the lawn and garden equipment operating restrictions. The commission delayed the implementation of these rules until 2005 in order to research other methods of achieving the same amount of NO_x and VOC reductions. The commission reevaluated a number of the existing control strategies, including lawn and garden equipment operating restrictions, that were put in place in the December 2000 revision. 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 and that this strategy is no longer necessary to attain the one-hour ozone standard. Therefore, the commission is adopting the repeal of Chapter 114, Subchapter I, Division 6. The proposal for this rulemaking inadvertently listed the repeals in Subchapter I, Division 2, rather than Division 6. The repeals are adopted in Subchapter I, Division 6.

SECTION BY SECTION DISCUSSION

Sections 114.452 and 114.459 are repealed because the commission determined that this strategy is no longer necessary to attain the one-hour ozone standard.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 adopted revisions to Chapter 114 and the SIP repeal operating restrictions on commercial lawn and garden equipment operators. The repeals 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 repeals 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 repeals implement requirements of 42 USC. Under 42 USC, §§7410, *et seq.*, 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, *et seq.*, 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 I/M program, but those programs are the

exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §§7410, *et seq*. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §§7410, *et seq.*, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th legislative session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC does not require specific programs, methods, or reductions

in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that the area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC. 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 §7511(a)(d) requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as the HGB area. The adopted repeal will remove operating restrictions on commercial lawn and garden equipment operators in the Houston nonattainment area. Historically, the commission expressed a preference to implement technology-based strategies over behavior-altering strategies and the adopted repeals embody that philosophy. The commission also evaluated a number of the existing control strategies, including lawn and garden equipment operating restrictions, that were put in place in the December 2000 revision. The photochemical modeling shows that this strategy is no longer necessary

to attain the one-hour ozone standard and therefore, the commission is adopting the repeal of Chapter 114, Subchapter I, Division 6. Therefore, the adopted repeal is consistent with the ozone attainment demonstration SIP for the HGB area, required by 42 USC, §§7410, *et seq.*

The commission consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App.–Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App.–Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884 (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 the requirements of 42 USC. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Therefore, the adopted repeals do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor are the repeals adopted solely under the general powers of the agency. In addition, the repeals are adopted under Texas Health and Safety Code (also known as the Texas Clean Air Act), §§382.011, 382.012, 382.017, and 382.019. The commission invited public comment on this determination; no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the rulemaking action under Texas Government Code, §2007.043. The specific purpose of these revisions is to repeal operating restrictions on commercial lawn and garden equipment operators.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this adopted rulemaking action, because it is reasonably taken to fulfill an obligation mandated by federal law. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §§7410, *et seq.*, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. The commercial lawn and garden operating restriction was submitted in the HGB December 2000 SIP revision as a control strategy to reduce NO_x in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. However, the commission adopts the repeal of commercial lawn and garden operating restrictions because photochemical modeling shows that this strategy is no longer necessary to attain the one-hour ozone standard and the combination of point source HRVOC controls and NO_x reductions appears to be the most effective means of reducing ozone in the HGB area. Therefore, the overall goal of this rulemaking action is to meet the air quality standards established under federal law as NAAQS.

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 repeals 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 HGB area exceeding the federal ozone NAAQS, which adversely affects public health, primarily through irritation of the lungs. The commercial lawn and garden operating restriction was submitted as a control strategy in the HGB December 2000 SIP revision. Historically, the commission expressed a preference to implement technology-based strategies over behavior-altering strategies such as the lawn/garden operating restrictions and the adopted repeal embodies that philosophy. The commission reexamined this strategy and photochemical modeling shows that this strategy is no longer necessary to attain the one-hour ozone standard and therefore, the commission is adopting the repeal of Chapter 114, Subchapter I, Division 6. The action does not specifically advance the health and safety purpose by reducing ozone levels in the HGB nonattainment area. However, the repeal of this control strategy is part of a larger scheme to reduce ozone in the HGB area through the most effective means and strategies determined by the commission. Consequently, these adopted repeals 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 adopted repeals do not constitute a takings under Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

The commission prepared a consistency determination for the adopted repeals under 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking 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)). The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations, adopted in accordance with the Federal Clean Air Act, 42 USC, §§7401, *et seq*., to protect and enhance air quality in the coastal area so as to protect coastal natural resource areas and promote public health, safety, and welfare (31 TAC §501.14(q)). This rulemaking complies with 40 Code of Federal Regulations, adopted in accordance with the Federal Clean Air Act. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking is consistent with CMP goals and policies. The commission invited public comment on this determination; no comments were received.

PUBLIC COMMENTS

Public hearings on this proposal were held in Houston on August 2, 2004; Beaumont on August 3, 2004; and Austin on August 5, 2004. The comment period closed on August 9, 2004. Written comments were submitted by EPA; Environmental Defense; Galveston-Houston Association for Smog Prevention (GHASP); Sierra Club, Houston Regional Group (Sierra Club); Houston-Galveston Area Council (HGAC); the Honorable Bill White, Mayor, City of Houston, the Honorable Robert Eckels, County Judge, Harris County, provided joint comments (Houston/Harris County); and three individuals. Environmental Defense, GHASP, Sierra Club, HGAC, Houston/Harris County, and one individual generally supported the repeal of these rules. Two individuals and EPA neither supported nor opposed the rules, but commented on the rules. EPA requested that the commission provide a detailed, substantive analysis of how these measures will advance attainment.

RESPONSE TO COMMENTS

Environmental Defense, GHASP, Houston/Harris County, HGAC, Sierra Club, and one individual commented that they approved of the repeal of the lawn and garden restrictions.

The commission appreciates the support of the repeal of these rules.

One individual commented that gasoline-powered leaf blowers should be permanently banned.

The commission responds that it does not have plans at this time to ban all gasoline-powered leaf blowers. However, the EPA is in the process of phasing in more stringent emission standards for small spark-ignition engines like the ones used in leaf blowers, mowers, and trimmers. New technology should dramatically reduce emissions from this type of engine.

One individual commented that the fumes and noise from lawn equipment are disturbing. The commenter also asked why this rule was adopted and is now being repealed.

The commission responds that existing engines used in lawn and garden operations may emit large amounts of emissions, particularly when not maintained properly. However, new standards by the EPA will ensure that new engines purchased in the future will be cleaner than older models. Noise is outside the commission's jurisdiction and is not addressed in this rulemaking. The reason this rule was adopted and is now being repealed is because the commission has discovered more effective and less burdensome means of reducing harmful emissions in the HGB ozone nonattainment area.

EPA commented that "necessary to attain" is not the reasonably available control measures (RACM) standard; instead it is whether the rules would advance the attainment date. EPA asked that the commission provide a RACM analysis that includes "a detailed, substantive consideration of whether these measures {are} reasonable and would advance attainment."

The commission recognizes that a RACM analysis is a SIP requirement and will document SIP requirements in the accompanying one-hour attainment demonstration scheduled for consideration on December 1, 2004. The commercial lawn and garden time restrictions would reduce NO_x by approximately 4.6 tpd. On June 23, 2004, the commission proposed a one-hour ozone midcourse review attainment demonstration for the HGB area. The recently proposed SIP addresses emissions of both NO_x and HRVOCs. The current proposal models six of ten days below 125 ppb, using a weight-of-evidence analysis. Additional enhancements to the modeling since the SIP was proposed in June replicate peak ozone at or below 125 ppb on eight of ten days. The inclusion of the commercial lawn and garden time restriction rule does not significantly impact modeled peak ozone concentrations.

Given the minimal emission reductions and the development of a more robust attainment demonstration, this measure will not advance the one-hour ozone attainment date of the HGB area, and therefore, is not RACM. No changes were made to the rules in response to this comment.

SUBCHAPTER I: NON-ROAD ENGINES

DIVISION 6: LAWN SERVICE EQUIPMENT OPERATING RESTRICTIONS

§114.452, §114.459

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These repeals are also adopted under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles.

§114.452. Control Requirements.

§114.459. Affected Counties and Compliance Dates.