The Texas Commission on Environmental Quality (commission) proposes new §§114.520, 114.522, 114.526, and 114.529 and corresponding revisions to the state implementation plan (SIP).

The proposed new sections and a 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 PROPOSED RULES

The Federal Clean Air Act (FCAA) Amendments of 1990 as codified in 42 United States Code (USC), §§7401 *et seq.* require EPA to set national ambient air quality standards (NAAQS) to ensure public health, and to designate areas as either in attainment or nonattainment with the NAAQS, or as unclassifiable. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Each state is required to submit a SIP to the EPA which provides for attainment and maintenance of the NAAQS.

The Dallas/Fort Worth area, consisting of four counties (Collin, Dallas, Denton, and Tarrant) was designated nonattainment and classified as moderate, in accordance with the 1990 FCAA Amendments, and was required to attain the one-hour ozone NAAQS by November 15, 1996. A SIP was submitted based on a volatile organic compound (VOC) reduction strategy, but the Dallas/Fort Worth area did not attain the NAAQS by the mandated deadline. Consequently, in 1998 the EPA reclassified the Dallas/Fort Worth area from "moderate" to "serious," resulting in a requirement to submit a new SIP demonstrating attainment by the new deadline of November 15, 1999.

The Dallas/Fort Worth area also failed to reach attainment by the November 1999 deadline. In the attainment demonstration SIP adopted by the commission in April 2000, the importance of local nitrogen oxides (NO_x) reductions as well as the transport of ozone and its precursors from the Houston/Galveston/Brazoria ozone nonattainment area (HGB area) were considered. Based on photochemical modeling demonstrating transport from the HGB area, the agency requested an extension of the Dallas/Fort Worth area attainment date to November 15, 2007, the same attainment date as for the HGB area, in accordance with an EPA policy allowing extension of attainment dates due to transport of pollutants from other areas.

The EPA transport policy was overturned by federal courts, which ruled that EPA does not have authority to extend an area's attainment date based on transport. Although the Dallas/Fort Worth area was not the specific subject of any of these suits, the Dallas/Fort Worth one-hour ozone attainment demonstration SIP including an extended attainment date was not approvable by EPA. Thus, the Dallas/Fort Worth area does not currently have an approved attainment demonstration SIP for the one-hour ozone NAAQS.

On July 18, 1997, EPA promulgated a revised ozone standard (the eight-hour ozone NAAQS), and on April 30, 2004, promulgated the first phase implementation rule for the eight-hour ozone NAAQS (Phase I Implementation Rule) (69 FR 23951). Also on April 30, 2004, the Dallas/Fort Worth area was designated as nonattainment and classified as moderate for the eight-hour ozone NAAQS. Five additional counties (Ellis, Johnson, Kaufman, Parker, and Rockwall) were added to the Dallas/Fort Worth eight-hour ozone nonattainment area (DFW area). The DFW area consists of nine counties

(Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant) effective June 15, 2004, for the eight-hour ozone NAAQS. The DFW area must attain the eight-hour ozone NAAQS by June 15, 2010.

EPA's Phase I guidance provided three options for eight-hour ozone nonattainment areas that do not have an approved one-hour ozone attainment SIP: 1) submit a one-hour ozone attainment demonstration no later than one year after the effective date of the designation (by June 15, 2005); 2) submit an eight-hour ozone plan no later than one year after the effective date of the designation (by June 15, 2005) that provides a 5% increment of reductions from the area's 2002 emissions baseline that is in addition to federal measures and state measures already approved by EPA, and to achieve these reductions by June 15, 2007; or 3) submit an eight-hour ozone attainment demonstration by June 15, 2005. Based on poor model performance the commission, in coordination with EPA, determined that option two is the most expeditious approach to beginning to achieve the reductions ultimately needed to: 1) meet the June 15, 2005 transportation conformity deadline; and 2) attain the eight-hour ozone NAAQS by June 15, 2010. In order for the DFW area to comply with the requirement to submit a 5% increment of progress plan that provides a 5% emission reduction from the 2002 emissions baseline, additional emission reduction strategies are necessary.

The proposed rules are part of the strategy for the DFW area to come into compliance with the federal ozone standards. The proposed changes are needed to meet the 5% increment of progress requirements. The proposed rulemaking would limit idling behavior of switchyard locomotives to no

more than 15 consecutive minutes within switchyards or other confined areas in the nine-county DFW area.

The emission reduction requirements that will result from this proposed rulemaking, if adopted, will result in reductions in ozone formation in the DFW area, and help bring the DFW area into compliance with the eight-hour ozone NAAQS. These emission reductions are one component of the Dallas/Fort Worth SIP that the state is required to submit to EPA to assure attainment and maintenance of the eight-hour ozone NAAQS. Attainment of the eight-hour ozone standard may require further reductions in NO_x emissions as well as VOC emissions. This rulemaking is one step toward meeting the state's obligations under the FCAA. EPA has not yet issued Phase II of its eight-hour implementation rule (Phase II guidance) for states to use in developing eight-hour ozone attainment demonstrations. Phase II guidance is expected to be promulgated by EPA in the fall of 2004, which will provide additional information relating to eight-hour ozone attainment demonstrations. The commission is continuing to prepare for the required eight-hour ozone attainment demonstration SIP.

SECTION BY SECTION DISCUSSION

The commission proposes new Division 3, Switchyard Locomotive Idling Limitations, to Subchapter J, Operational Controls for Motor Vehicles. Proposed new §114.520 adds new definitions for the terms "Switchyard Locomotive" and "Idle" applicable to new Division 3. Proposed new §114.522 establishes control requirements that no person shall cause, allow, or permit a switchyard locomotive to idle for more than 15 consecutive minutes when used in a switchyard or other confined area. Proposed new §115.526 provides requirements for recordkeeping, maintaining the records, and making the

records available for inspection. Proposed new §114.529 specifies a program start date of April 1, 2007, and the counties to which this rulemaking applies: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the commission and that no fiscal implications are anticipated for other units of state or local government. Fiscal implications are anticipated for railroad companies and other entities with switchyard locomotives operating in the DFW area.

The proposed rules would limit the idling of switchyard locomotives to no more than 15 consecutive minutes when used in a switchyard or other confined area within the nine-county DFW area. The proposed rules are necessary to reduce emissions to meet the EPA's 5% increment of progress requirement in the DFW area.

The proposed rules may result in the need for the agency to conduct additional compliance inspections in the DFW area, though any increase in workload is anticipated to be absorbed using existing resources.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes resulting from the proposed rules will be reductions in pollutants that contribute to the formation of ozone by limiting switchyard locomotive idling.

Fiscal implications are anticipated for companies operating switchyard locomotives in the DFW area. Owners and operators of switchyard locomotives are expected to experience increased operational costs and costs for additional control technologies and for recordkeeping. In addition, owners and operators of switchyard locomotives could be ineligible to apply for idle-stop devices currently covered by the Texas Emission Reduction Plan grant funding if the rules are adopted.

The proposed rules would require by April 1, 2007, the use of idle reduction control technologies, such as auxiliary power units, or shutting off engines if idling would exceed 15 consecutive minutes. There are an estimated 151 switchyard locomotives in the DFW area. Idling reduction technologies are estimated to cost between $7,500 - $40,000 per unit depending upon the requirements of the switchyard locomotive. The total fiscal impact to the owners and operators of switchyard locomotives is estimated to be between $1,132,500 - $6,040,000.

Although initial expenses would be incurred by the owners and operators of switchyard locomotives to implement this rulemaking, long-term benefits from decreased operational and maintenance costs and from potentially longer engine life might be achieved if idle reduction technologies are used. Affected

railroad companies include the Burlington Northern Santa Fe Railroad; Dallas, Garland & Northeastern Railroad; Fort Worth Western Railroad; Kansas City Southern Railroad; Union Pacific Railroad; and others. Non-railroad companies that may be affected include contractors at the airport intermodal facility and others. Owners and operators of switchyard locomotives would need to perform associated monitoring and recordkeeping, but these costs are not anticipated to be significant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Switchyard locomotives are not expected to be owned by small or micro-businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed 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 proposed rules do not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may

adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. While this rulemaking is intended to protect the environment by reducing emissions from certain engines, the commission does not find that locomotives comprise a sector of the economy, or that the rules will adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety in the DFW area.

This proposed rulemaking does 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 rulemaking implements requirements of 42 USC. Under 42 USC, §7410, states are required to adopt a SIP that 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 NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods to attain 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 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 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, §§7401 *et seq.* does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board 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 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, §§7401 *et seq.* 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(c), requires states to submit ozone attainment demonstration SIPs for serious ozone nonattainment areas such as the DFW area. The proposed rules, which will reduce ozone in the DFW

area, will be submitted to the EPA as one of several measures in the federally required SIP. By reducing emissions of NO_x and VOC, which are precursors of ozone, these controls will result in reductions in ozone formation in the DFW area and help bring the DFW area into compliance with the air quality standards established under federal law as NAAQS for ozone. Therefore, the proposed rulemaking is a necessary component of and consistent with the Dallas/Fort Worth SIP 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); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.–Austin 2000), *pet. denied*; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed earlier in this preamble, this rulemaking action implements requirements of 42 USC, §§7401 *et seq*. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed

an express requirement of state law, or exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.019, and Texas Water Code, §5.103. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements. The commission invites public comment on the draft RIA determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The specific purposes of this rulemaking are to achieve reductions of NO_x and VOC emissions to reduce ozone formation in the DFW area and help bring the DFW area into compliance with the air quality standards established under federal law as NAAQS for ozone. If adopted, certain locomotives in the DFW area will be prohibited from idling for more than 15 consecutive minutes in the switchyards or other confined areas. These rules will not place a burden on private, real property.

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

emission limitations and 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 approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. Attainment of the ozone standard will eventually require additional reductions in NO_x emissions as well as VOC emissions. 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 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 DFW area exceeding the federal ozone NAAQS. This exceedance adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ozone levels in the DFW area. Consequently, these proposed 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 proposed rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking will not affect any coastal natural resource areas because the rules only affect counties outside the CMP area and are, therefore, consistent with CMP goals and policies. Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

Public hearings on this proposal have been scheduled for the following times and locations: January 3, 2005 at 5:30 p.m., North Central Texas Council of Governments, 616 Six Flags Dr., 3rd Floor, Arlington; January 4, 2005, 10:00 a.m., Texas Commission on Environmental Quality, 12100 North I-35, Building F, Room 2210, Austin; and January 5, 2005, 2:30 p.m., Houston-Galveston Area Council, Conference Room A, 3555 Timmons Lane, Houston. The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements

when called upon in order of registration. There will be no open discussion during the hearings; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

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

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, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-006-114-AI. Comments must be received by 5:00 p.m., January 6, 2005. For further information, please contact Joe Thomas of the Policy and Regulations Division at (512) 239-4580.

SUBCHAPTER J: OPERATIONAL CONTROLS FOR MOTOR VEHICLES

DIVISION 3: SWITCHYARD LOCOMOTIVE IDLING LIMITATIONS

§§114.520, 114.522, 114.526, 114.529

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act, §382.002, which provides that the policy and purpose of the Texas Clean Air Act is to safeguard the state's air resources from pollution; §382.011, which provides the commission the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.012, which provides the commission the authority to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and §382.019, which provides the commission with the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles. The new sections are also proposed under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code.

The proposed new sections implement Texas Health and Safety Code, §382.002, relating to Policy and Purpose; §382.011, General Powers and Duties; §382.012, State Air Control Plan; §382.017, Rules; and §382.019, Methods Used to Control and Reduce Emissions from Land Vehicles. The proposed new sections also implement Texas Water Code, §5.103, Rules.

§114.520. Definitions.

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

(1) **Switchyard locomotive** - A locomotive designed or used for the purpose of propelling railroad cars a short distance within a confined area, such as a switchyard.

(2) **Idle** - Allowing the diesel engine to run on a locomotive engine while the locomotive is not engaged in forward or reverse motion.

§114.522. Control Requirements for a Switchyard Locomotive.

No person shall cause, allow, or permit a switchyard locomotive to idle for more than 15 consecutive minutes in a switchyard or other confined area in the counties listed in §114.529 of this title (relating to Affected Counties and Compliance Dates).

§114.526. Recordkeeping.

The owner or operator of any switchyard locomotive subject to the provisions of §114.522 of this title (relating to Control Requirements for a Switchyard Locomotive) shall maintain records of switchyard locomotive idle time. All records must be maintained for five years and be made available for review by the executive director and air pollution control agencies having jurisdiction. Records do not have to be stored onsite, but must be available for inspection at the site within five business days of request by the executive director or an air pollution control agency having jurisdiction.

§114.529. Affected Counties and Compliance Date.

Beginning April 1, 2007, the owners or operators of switchyard locomotives operating in the following counties shall comply with §114.522 of this title (relating to Control Requirements for a Switchyard Locomotive): Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant.