

The Texas Commission on Environmental Quality (commission or TCEQ) adopts the amendments to §114.512 and §114.517 *without changes* to the proposed text as published in the November 25, 2005, issue of the *Texas Register* (30 TexReg 7828) and will not be republished.

The amended sections as adopted will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopts these revisions to Chapter 114, Control of Air Pollution from Motor Vehicles, and to the SIP in order to reduce ground-level ozone from fuel combustion resulting from motor vehicle idling.

The concept of an early, voluntary eight-hour air quality plan, or early action compact (EAC), was endorsed by EPA Region 6 in June 2002 then slightly modified and made available nationally in November 2002. The EACs are tailored to local needs and driven by local decisions. A key point of an EAC is the flexibility afforded areas to select emission reduction measures. Based on quality science, signatories may choose the combination of measures that meet both local needs and emission reduction targets. Each EAC recognizes that not every entity within the EAC area will implement every measure.

Chapter 114, Subchapter J, Operational Controls for Motor Vehicles, Division 2, Locally Enforced Motor Vehicle Idling Limitations rule, was proposed at the request of the local air quality planning

organization in the Austin EAC area (Bastrop, Caldwell, Hays, Travis, and Williamson Counties) for use as a control strategy in its EAC agreement to maintain attainment with the federal eight-hour ozone national ambient air quality standards. The rule package also provided local governments in other areas of the state the option of applying these rules in their areas when additional control measures were needed to achieve or maintain attainment of the federal eight-hour ozone standard in the future. The rules were adopted on November 17, 2004.

The December 18, 2002, EAC committed the commission to incorporate a Clean Air Action Plan for the Austin area into the SIP and adopt a revised SIP by December 31, 2004. The idling restriction rule was part of that attainment demonstration. While the Austin Metropolitan Statistical Area (MSA) was monitoring attainment with the eight-hour ozone standard, future monitoring could have shown nonattainment. Therefore, members of the Austin MSA worked to ratify a memorandum of agreement (MOA) with the TCEQ that would allow them to enforce the idling restriction rule in their region. The Locally Enforced Idling Restriction MOA was signed by the commission and members of the Austin EAC area on August 1, 2005. Members of the Austin EAC area signing the MOA included the counties of Bastrop, Caldwell, Hays, Travis, and Williamson and the cities of Austin, Bastrop, Elgin, Lockhart, Luling, Round Rock, and San Marcos.

In meetings with officials of the Austin EAC to develop the idling rule MOA, concerns arose regarding language in the locally enforced idling restrictions. Austin EAC members voiced concern that parts of §114.517, Exemptions, were ambiguous and needed revision. Members of the Austin EAC felt that §114.517(7) and (8) could be misinterpreted to mean that a transit vehicle could idle for a total of one

hour. There was also concern that the commission's rule conflicted with Texas Department of Transportation (TxDOT) guidelines for vehicle idling by employees. Austin EAC members brought to the commission's attention TxDOT's policy regarding idling. The guidelines advise employees to idle their vehicles to operate the air conditioner or heating system for employee health and safety while they perform an essential job function related to roadway construction or maintenance. In many instances on-road and off-road vehicles at roadway construction sites must remain in idle mode during normal operations. The commission agrees with the Austin EAC members that the locally enforced idling restrictions should be revised in light of these concerns. At the request of the Austin EAC members, the commission adopts revisions to the locally enforced motor vehicle idling rule.

The commission also adopts revisions to the idling rule to conform to legislation passed in 2005. On May 16, 2005, the 79th Legislature passed House Bill (HB) 1540, amendments to Texas Health and Safety Code, Chapter 382, Subchapter B, §382.0191, Idling of Motor Vehicle While Using Sleeper Berth. The bill, effective September 1, 2005, states that the "commission may not prohibit or limit the idling of a motor vehicle when idling is necessary to power a heater or air conditioner while a driver is using the vehicle's sleeper berth for a government-mandated rest period." In addition, the bill states that, "no driver using the vehicle's sleeper berth may idle the vehicle in a school zone or within 1,000 feet of a public school during its hours of operation," or else be subject to a fine not to exceed \$500.

This rulemaking amends the rule on idling limits for gasoline and diesel-powered engines in motor vehicles within the jurisdiction of any local government in the state that has signed an MOA with the commission to delegate enforcement to that local government. Local enforcement is crucial to the

effective implementation of rules to reduce the extended idling of gasoline and diesel-powered heavy-duty vehicles and will help to ensure the reduction in nitrogen oxides (NO_x) and volatile organic compound (VOC) emissions, which is needed by local governments to achieve or maintain attainment of the federal eight-hour ozone standard. These idling limits will lower NO_x emissions and other pollutants from fuel combustion. Because NO_x is a precursor to ground-level ozone formation, reduced emissions of NO_x will result in ground-level ozone reductions.

Currently, there are no federal regulations governing idle time for motor vehicles. Therefore, the state has the authority to control motor vehicle idling. The requirements developed by the commission for this NO_x emission reduction strategy will result in restrictions on the time allowed for motor vehicle idling.

EPA methodology assessing the benefits of this NO_x emission reduction strategy demonstrated that by the year 2007 the idling limits will reduce NO_x emissions in the Austin EAC area by 0.67 tons per day. The commission believes that these amendments to the rule will not reduce the amount of reductions demonstrated.

SECTION BY SECTION DISCUSSION

The amendment to §114.512, Control Requirements for Motor Vehicle Idling, amends the existing paragraph as subsection (a). The amendment to §114.512 also adds subsection (b), which establishes that, “no driver of a motor vehicle may use the vehicle’s sleeper berth for a government-mandated rest period if the vehicle is within a school zone or within 1,000 feet of a public school during its hours of

operation.” Any offense under subsection (b) is punishable by a fine not to exceed \$500. The requirements under subsection (b) expire on September 1, 2007, just as in HB 1540.

Adopted §114.517(1) provides an exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, but only if before September 1, 2007, it does not contain a sleeping berth. That is to say, after September 1, 2007, any vehicle that has a gross vehicle weight rating of 14,000 pounds or less will be exempt from any idling restriction. Until then, these vehicles that contain a sleeper berth are subject to the rule. The amendment to §114.517(4) replaces the phrase, “not including” with “other than.” The amendment to §114.517(7) replaces the phrase, “comfort/safety” with “comfort and safety.” The amendment to §114.517(4) also adds the phrase, “or public.” This change is necessary to combine the exemptions in §114.517(7) and (8), thereby clarifying the intent of the rule. The amendment to §114.517(8) eliminates language exempting idling up to 30 minutes for, “the primary propulsion engine of a motor vehicle used for transit operations.” The amendment to §114.517(8) adds a new exemption for, “the primary propulsion engine of a motor vehicle being used to operate the air conditioning or heating system for employee health or safety when the employee is using the vehicle to perform an essential job function related to roadway construction or maintenance.” One reason this exemption has been added is because in most types of construction equipment (e.g., dump trucks, etc.) the operator must remain in the vehicle throughout the workday for both operational and safety reasons. Furthermore, most heavy-duty, on-road vehicles such as dump trucks, asphalt maintenance units, and aerial devices have power takeoff units that operate ancillary equipment attached to the vehicle and that are powered by the primary propulsion engine. Therefore, the primary propulsion engine must remain in an idling mode. Adopted §114.517(11) allows for the exemption of,

“the primary propulsion engine of a motor vehicle when it is necessary for the driver to power a heater or air conditioner while he/she is using the vehicle’s sleeper berth for a government-mandated rest period.” Section 114.517(11) expires on September 1, 2007. This language has been added in order to ensure that the rule is compliant with the requirements set forth in HB 1540.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules are not subject to §2001.0225 because although the rulemaking meets the definition of a “major environmental rule” as defined in the statute, it does not meet any of the four applicability requirements listed in §2001.0225(a). The regulatory analysis requirements of Texas Government Code, §2001.0225 only apply 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. Specifically, this rulemaking amends the rules that limit heavy-duty motor vehicle idling within the jurisdiction of any local government in the state that has signed an MOA with the commission to delegate enforcement to that local government. The amendments clarify current rule requirements and implement the new requirements of HB 1540. Currently, there are no federal regulations governing idle time for motor vehicles. This rulemaking action therefore does not exceed a standard set by federal law. The amendments are needed to implement state law, and the rulemaking

therefore does not exceed an express requirement of state law. The amendments do involve a compact, which is an agreement or contract between the state and an agency or representative of federal government to implement a state and federal program, however, the amendments do not exceed the requirements of that compact. This rulemaking helps the Austin EAC area continue to meet the milestones of the compact and demonstrate continuing attainment of the eight-hour ozone standard. Finally, this rulemaking was not developed solely under the general powers of the agency. Because this rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225 does not apply, and a regulatory impact analysis is not required.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), “taking” means: 1) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or 2) a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a taking impact analysis for this rulemaking action. Promulgation and enforcement of the rules do not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adopted rules are not a government action that affects private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the adopted rules do not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

The commission determined that under 31 TAC §505.22, this 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(l)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of this rulemaking action. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This

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

PUBLIC COMMENT

The commission held a hearing on this proposal on January 10, 2006, at 10:00 a.m. at the Texas Commission on Environmental Quality, 12100 North I-35, Building E, Room 201S, in Austin, Texas, but no oral comments were received. The public comment period closed at 5:00 p.m. on January 17, 2006. Written comments were received from the Capital Area Council of Governments (Capital Area COG), Houston Regional Group of Sierra Clubs (Sierra Club-Houston), and EPA.

RESPONSE TO COMMENTS

Capital Area COG and Sierra Club-Houston commented that they support the proposed amendments and corresponding revisions to the SIP. Capital Area COG commented that the rules clarified language in the current exemptions and addressed concerns related to TxDOT's employee idling policy.

The commission appreciates the support for the locally enforced motor vehicle idling limitations and the proposed amendments. The commission agrees that the amendments will clarify idling requirements and provide for consistency with employee safety idling policies and regulations.

EPA commented that the revision to §114.517(1), which amended the exemption to include vehicles that do not have sleeper berths and the addition of paragraph (11) which exempts a motor vehicle when

idling is necessary to power a heater or air conditioner while a driver is using the vehicle's sleeper berth for a government-mandated rest period will weaken the SIP rules that it approved in 2005.

EPA commented that it will not be able to approve these adopted amendments into the SIP unless the commission can provide substitute reductions or modeling to show that attainment can be met without the credits affected by these changes. EPA comments further that programs in an approved SIP must still be enforced unless EPA approves a SIP revision.

The commission disagrees with the comment that these amendments weaken the idling requirements and thus the SIP. The commission is committed to implementing idling restrictions contained in the EPA-approved SIP. The purpose of the adopted amendments is to clarify idling restrictions for affected vehicle owners and operators and provide local jurisdictions with clearer and more consistent enforcement responsibilities, and not to weaken the idling requirements.

The amendments and new exemption also ensure that the rulemaking is consistent with statute provisions found in HB 1540, 79th Legislature, 2005, and will expire September 1, 2007.

To date, the commission has only taken credit for idling restrictions in the Austin EAC SIP. The commission has made a commitment in the Austin EAC SIP to make up reduction shortfalls from idling restriction rules through Texas Emission Reduction Program project reductions, if needed.

However, a shortfall is not anticipated. In the SIP, the commission used EPA's *Guidance for Qualifying and Using Long Duration Truck Idling Emission Reductions in State Implementation Plans and Transportation Conformity* to determine that the maximum benefit from idling

restrictions placed on diesel-powered “18-wheeler” vehicles would be a 0.67 tons per day reduction of NO_x for the five-county Austin EAC area.

Based upon the fact that the Austin EAC includes the Texas Emission Reduction Program as a backup measure for any idling reduction shortfall, and the expiration date of September 1, 2007, for the amendments added from HB 1540, the commission disagrees that new substitute reductions or modeling need to be developed to monitor continued attainment as a result of this rulemaking. This is especially the case for the Austin EAC area since the five-county area is currently designated an attainment area, and if monitored nonattainment in the future could not be designated nonattainment until December 31, 2007, at the earliest. The commission did not revise the rule in response to this comment.

SUBCHAPTER J: OPERATIONAL CONTROLS FOR MOTOR VEHICLES

DIVISION 2: LOCALLY ENFORCED MOTOR VEHICLE IDLING LIMITATIONS

§114.512, §114.517

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The amendments are also adopted under TCAA, §382.011, which authorizes the commission 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; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.0191, which authorizes use of a sleeping berth for a government-mandated rest period; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The adopted amendments implement TCAA, §§382.002, 382.011, 382.012, 382.019, 382.0191, and 382.039.

§114.512. Control Requirements for Motor Vehicle Idling.

(a) No person shall cause, suffer, allow, or permit the primary propulsion engine of a motor vehicle to idle for more than five consecutive minutes when the motor vehicle, as defined in §114.510 of this title (relating to Definitions), is not in motion during the period of April 1 through October 31 of each calendar year.

(b) No driver using the vehicle's sleeper berth may idle the vehicle in a school zone or within 1,000 feet of a public school during its hours of operation. An offense under this subsection may be punishable by a fine not to exceed \$500. This subsection expires September 1, 2007.

§114.517. Exemptions.

The provisions of §114.512 of this title (relating to Control Requirements for Motor Vehicle Idling) do not apply to:

(1) a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, and if before September 1, 2007, does not have a sleeper berth;

(2) a motor vehicle forced to remain motionless because of traffic conditions over which the operator has no control;

(3) a motor vehicle being used by the United States military, national guard, or reserve forces, or as an emergency or law enforcement motor vehicle;

(4) the primary propulsion engine of a motor vehicle providing a power source necessary for mechanical operation, other than propulsion, and/or passenger compartment heating, or air conditioning;

(5) the primary propulsion engine of a motor vehicle being operated for maintenance or diagnostic purposes;

(6) the primary propulsion engine of a motor vehicle being operated solely to defrost a windshield;

(7) the primary propulsion engine of a motor vehicle that is being used to supply heat or air conditioning necessary for passenger comfort and safety in vehicles intended for commercial or public passenger transportation, or passenger transit operations, in which case idling up to a maximum of 30 minutes is allowed;

(8) the primary propulsion engine of a motor vehicle being used to provide air conditioning or heating necessary for employee health or safety while the employee is using the vehicle to perform an essential job function related to roadway construction or maintenance;

(9) the primary propulsion engine of a motor vehicle being used as airport ground support equipment;

(10) the owner of a motor vehicle rented or leased to a person that operates the vehicle and is not employed by the owner; or

(11) a motor vehicle when idling is necessary to power a heater or air conditioner while a driver is using the vehicle's sleeper berth for a government-mandated rest period. This subsection expires September 1, 2007.