The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §114.512 and §114.517.

The amended sections 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 PROPOSED RULES

Chapter 114, Subchapter J, Division 2, Locally Enforced Motor Vehicle Idling Limitations, was adopted on November 17, 2004, at the request of the local air quality planning organization in the Austin Early Action Compact (EAC) area (Bastrop, Caldwell, Hays, Travis, and Williamson Counties) for use as a control strategy in its EAC agreement to maintain attainment with the 1997 eight-hour ozone National Ambient Air Quality Standards (NAAQS), as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11347). The adopted idling limitations rules provided all local governments the option of applying the rules when additional control measures are needed to achieve or maintain attainment of the federal 1997 eight-hour ozone standards.

The concept of an early, voluntary 1997 eight-hour air quality plan, also known as an EAC, was endorsed by EPA Region 6 in June 2002. It was slightly modified and made

available nationally in November 2002. A key point of an EAC was the flexibility afforded areas to select emission reduction measures, such as limiting vehicle idling. On August 1, 2005, members of the Austin EAC and the commission signed the locally enforced idling restrictions memorandum of agreement (MOA). This MOA allowed participating counties and cities to enforce the idling restriction rule in their jurisdictions. 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, Georgetown, Hutto, Lockhart, Luling, Round Rock, and San Marcos. Idling restrictions are also a commitment for the Austin-Round Rock 1997 Eight-hour Ozone Flex signed in September 2008.

An additional 24 counties and cities in the Dallas-Fort Worth (DFW) area have also signed agreements to enforce the idling restriction rule in their jurisdictions including the counties of Collin, Kaufman, and Tarrant, the cities of Arlington, Benbrook, Celina, Colleyville, Dallas, Euless, Hurst, Keene, Lake Worth, Lancaster, Mabank, McKinney, Mesquite, North Richland Hills, Pecan Hill, Richardson, Rowlett, University Park, and Venus, and the towns of Little Elm and Westlake. Idling restrictions are a commitment for the DFW Eight-hour Ozone SIP adopted May 23, 2007.

This proposed rulemaking would amend 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 of nitrogen oxides ($NO_X$) and volatile organic compound emissions, which is needed by local governments to achieve or maintain attainment of the federal ozone standards. These proposed idling restrictions will continue to 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.

The proposed rulemaking would remove the current enforcement period of April 1 through October 31 in the rule to allow local governments to enforce idling limits year-round. The enforcement dates were included when the rule was originally adopted at the request of the local air quality planning organization in the Austin EAC area for use as a control strategy in its EAC agreement to maintain attainment with the 1997 eight-hour ozone NAAQS. This same rulemaking also provided local governments in other areas of the state the option of applying these rules in their areas when additional control measures are needed to achieve or maintain attainment of the federal ozone standards in the future. When the rule was adopted in 2004, there were no federal regulations governing idle time for heavy-duty motor vehicles. Therefore, the state had the authority to control motor vehicle idling. The requirements developed by the

commission for this $NO_X$ emissions reduction strategy resulted in restrictions on the time allowed for heavy-duty motor vehicle idling. The 79th Legislature, 2005, passed House Bill (HB) 1540, establishing Texas Health and Safety Code (THSC), Chapter 382, Subchapter B, §382.0191, Idling of Motor Vehicle While Using Sleeper Berth, which prohibited the commission from restricting the idling of a motor vehicle while a driver is using the vehicle's sleeper berth for a government-mandated rest period. HB 1540 also restricted drivers using the vehicle's sleeper berth from idling in a school zone or within 1,000 feet of a public school during its hours of operation, and it defined the penalty for an offense as a fine not to exceed $500. HB 1540 did not specify an enforcement period, but it set a September 1, 2007, expiration date on the section. The commission adopted the revision on April 26, 2006, to the locally enforced motor vehicle idling rule as published in the May 12, 2006, issue of the *Texas Register* (31 TexReg 3900).

In the same rulemaking, the commission adopted revisions to the idling rule to conform to legislation passed in 2005. To be consistent with HB 1540, §114.512 and §114.517 were amended to include §114.512(b) and §114.517(12) with a September 1, 2007, expiration date. In May 2007, the 80th Legislature, 2007, passed Senate Bill (SB) 12, which in part amended THSC, §382.0191 to extend the prohibition on the commission from adopting rules restricting certain idling activities from September 1, 2007, to September 1, 2009, as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1345). Local governments can enforce idling restrictions on drivers who

were previously exempt under §114.517(12), because the exemption expired on September 1, 2009. This proposed rulemaking would remove the September 1, 2009, expiration date from the relevant portions of §114.517 to continue the exemption. As of September 1, 2009, the prohibition in §114.512(b) of certain vehicles from idling within 1,000 feet of a school or hospital has expired. Therefore, this subsection is proposed to be removed.

During the rulemaking in 2007 to implement the requirements of SB 12, the commission adopted §114.517(2), the intent of which was to provide an exemption for all vehicles with gross vehicle weight rating of 14,000 pounds or less until September 1, 2009, and thereafter only to such vehicles that do not have a sleeper berth. This proposed rulemaking would amend §114.517(2) to remove the duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, after September 1, 2009.

The National Armored Car Association submitted a petition for rulemaking on May 22, 2008, requesting that armored vehicles be added to the current list of idling restriction exemptions under §114.517. Staff received approval from the commission on July 9, 2008, to move forward with initiating rulemaking regarding the armored vehicle petition; however, following a stakeholder meeting held on October 6, 2008, action on a rulemaking proposal to implement the petition was deferred in anticipation of potential

legislative changes from the 81st Legislature, 2009. This proposed rulemaking will address the armored vehicle petition by adding armored vehicles to the current list of idling restriction exemptions under §114.517 to be consistent with the EPA's Model State Idling Law guidance. According to the EPA's guidance, armored vehicles are exempt when a person remains inside the vehicle to guard the contents or while the vehicle is being loaded or unloaded.

On April 9, 2010, the EPA published its approval of revisions to the SIP regarding the idling rule that the TCEQ submitted on February 28, 2008 (75 *Federal Register* 18061). In that approval, the EPA did not address the previous revisions to §114.512(b) prohibiting idling of a vehicle within a school zone or within 1,000 feet of a public school during operating hours and §114.517(12) exempting the idling of the primary propulsion engine of a vehicle to provide air conditioning and heating for the vehicle's sleeper berth for a government-mandated rest period, because these provisions of the rule had already expired.

*Federal Clean Air Act, §110L Demonstration*

Some increases in emissions may be expected due to the addition of an idling exemption for armored vehicles. However, the exemption will not interfere with attainment or reasonable further progress in the SIP, because the proposed year-round enforcement will offset these relatively small increases. Extending the enforcement period to year-

round enforcement should provide more emissions reductions in the months that are currently not subject to enforcement. Thus, any potential increases resulting from an exemption for armored vehicles should be offset by these reductions. Additionally, by authorizing the enforcement to year-round, the state hopes to increase enforcement in the current ozone period by eliminating any drop off in enforcement that may occur due to the seasonal nature of the ozone enforcement period. An exemption for armored vehicles is necessary for the health and safety of the drivers and the public and outweighs dangers posed by any potential small increases in emissions.

SECTION BY SECTION DISCUSSION

*§114.512, Control Requirements for Motor Vehicle Idling*

The proposal would amend §114.512 to remove the enforcement period of April 1 through October 31 of each calendar year in subsection (a) to allow enforcement year-round. The proposal would also amend §114.512 to remove the prohibition for drivers using sleeper berths to idle in residential areas, school zones, and near hospitals and the expiration date in subsection (b) because it has expired. Additionally, the commission proposes to remove the designation (a) for subsection (a) to conform to the *Texas Register* formatting requirements.

*§114.517, Exemptions*

The proposal would amend §114.517 to remove the exemption in paragraph (2) for a

motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, for consistency with other revisions in the section and to add a new exemption in paragraph (2) for armored vehicles to implement the petition approved by the commission on July 9, 2008. The proposal would also amend §114.517(12) to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or conditioning, which expired on September 1, 2009.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rulemaking is in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rulemaking.

The proposed rulemaking would amend Chapter 114 to make the idling enforcement period year-round; to remove the exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less; and to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or conditioning, which expired on September 1, 2009. In response to a petition filed by the National Armored Car Association, the proposed rulemaking would also exempt

armored vehicles from motor vehicle idling requirements.

Participation in the idling program is voluntary and currently only the Central Texas Area (CTA) and the North Central Texas Area (NCTA) have signed agreements to implement vehicle idling rules. The CTA includes the counties of Bastrop, Caldwell, Hays, Travis, and Williamson and the cities of Austin, Bastrop, Georgetown, Hutto, Lockhart, Luling, Round Rock, and San Marcos. The NCTA includes the counties of Collin, Kaufman, and Tarrant, the cities of Arlington, Benbrook, Celina, Colleyville, Dallas, Euless, Hurst, Keene, Lake Worth, Lancaster, Mabank, McKinney, Mesquite, North Richland Hills, Pecan Hill, Rowlett, University Park, and Venue, and towns of Little Elm and Westlake. Participation in the vehicle idling program provides local governments with additional options to reduce emissions and maintain attainment with the federal ozone standards.

The proposed rulemaking is not expected to have a fiscal impact on local governments since participation in the vehicle idling program is voluntary. Currently, only local governments in counties included in the CTA and NCTA would be able to limit certain vehicle idling year-round under the proposed rules, as a tool in limiting emissions to meet the ozone standards. The proposed rulemaking would also exempt armored vehicles from the vehicle idling restrictions.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rulemaking will be in compliance with state law and the continued flexibility and options for local governments to enforce vehicle idling requirements as a method of reducing emissions in order to maintain attainment with the eight-hour ozone standards.

The proposed rulemaking is not expected to have a fiscal impact on individuals. The proposed rulemaking provides continued flexibility for local governments that have signed agreements with the agency concerning vehicle idling. The proposed rulemaking also exempts armored vehicles from vehicle idling restrictions.

Armored vehicle companies are typically large businesses, and the proposed rulemaking is not expected to have a significant fiscal impact on those companies. However, armored vehicles would be exempt from vehicle idling restrictions in areas that have signed an agreement with the agency, and exemption from those restrictions would provide extra security for armored vehicles and protect the health and safety of employees.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. The proposed rulemaking would provide continued flexibility for local governments that have signed agreements with the agency concerning vehicle idling. The proposed rulemaking would also exempt armored vehicles from vehicle idling restrictions.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required, because the proposed rulemaking is protective of human health and the environment and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rulemaking is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking does not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that 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, 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." Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule which, "(1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law."

The proposed rulemaking implements requirements of the Federal Clean Air Act

(FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally 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 42 USC, Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA 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 the FCAA 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. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. Participation in the idling program is voluntary, and currently only the local governments in the CTA and the NCTA have signed agreements to implement vehicle idling rules. The affected idling limitations rules provide all local governments the

option of applying the rules when additional control measures are needed to achieve or maintain attainment of the federal ozone standards.

The specific intent of the proposed rulemaking is to make the idling enforcement period year-round; to remove the existing duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less; to exempt armored vehicles from motor vehicle idling requirements; and to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or conditioning, which expired on September 1, 2009.

The proposed rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because while the specific intent of the proposed rulemaking is to protect the environment or reduce risks to human health from environmental exposure, as discussed previously in the FISCAL NOTE, PUBLIC BENEFITS AND COSTS, SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS, and the LOCAL EMPLOYMENT IMPACT STATEMENT sections of this preamble, the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would the proposed rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. The idling restrictions are effective only in certain areas of

the state where an MOA between the TCEQ and the local government is in effect and only in certain defined areas within those limited areas. The proposed rulemaking is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225 because it is not a major environmental rule.

While the proposed rulemaking does not constitute a major environmental law, even if it did, it would not be subject to a regulatory impact analysis under Texas Government Code, §2001.0225. The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis 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 TCEQ. 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 rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and 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 revision to the SIP would require the full regulatory impact analysis 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. Since 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 regulatory impact analysis for rules that are extraordinary in nature. While the rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

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. 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, 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).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law - the NAAQS. The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Envtl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the proposed rulemaking is to make the current idling enforcement period year-round; to remove the existing duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less and does not have a sleeper; to exempt armored vehicles from motor vehicle idling requirements; and to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or conditioning, which expired on September 1, 2009. This proposal, therefore, does not exceed an express requirement of federal law. The amendments are needed to implement state law but do not exceed those new requirements. The

proposed rulemaking does involve a compact (in particular, the Austin EAC), which is an agreement between the state and federal government to implement a state and federal program; however, the proposed amendments do not exceed the requirements of that compact. Finally, this proposed rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §382.012 and §382.019. Because this proposed rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply, and a regulatory impact analysis is not required.

This proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), for the following reasons. The proposed rulemaking is not a major environmental law because, while the specific intent of the proposed rules are to protect the environment or reduce risks to human health from environmental exposure, the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would it adversely affect in a material way the environment or the public health and safety of the state or a sector of the state. Furthermore, even if the proposed rulemaking was a major environmental rule, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2)

parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this proposed rulemaking; and 4) the proposed rulemaking is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) 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 Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) 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 (ii) 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."

Promulgation and enforcement of the proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. These proposed rules are not burdensome, restrictive, or limiting of rights to private real property because the proposed rulemaking regulates vehicle idling in certain limited areas. Furthermore, the proposed rulemaking would benefit the public by providing all local governments the option of applying the idling rules when additional control measures are needed to achieve or maintain attainment of the federal ozone standards. The proposed rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these proposed rules would

not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code §§33.201 *et seq*., and therefore, must be consistent with all applicable CMP goals and policies. The commission reviewed this proposed rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed rulemaking will not affect any coastal natural resource areas. The CMP goals applicable to the proposed rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. No new sources of air contaminants would be authorized in those affected counties and it is possible that ozone levels would be reduced as a result of the proposed rulemaking. The CMP policy applicable to this proposed rulemaking action is the policy that commission rules comply with regulations in the Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal area (40 CFR §501.32). This rulemaking proposal would not have a detrimental effect on SIP emissions reduction obligations relating to maintenance of the ozone NAAQS. This proposed rulemaking action complies with the CFR. Therefore, in compliance with 40 CFR §505.22(e), this proposed rulemaking action is consistent with CMP goals and

policies. Promulgation and enforcement of these proposed rules would not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rulemaking is consistent with these CMP goals and policies, and because these proposed rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 1, 2011, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle, and in Fort Worth on March 3, 2011, at 2:00 p.m. in the Public Meeting Room, at the DFW TCEQ Region 4 Office located at 2309 Gravel Road. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are

planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-054-114-EN. The comment period closes March 11, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Nina Castillo, Air Quality Planning Section, (512) 239-4415.

## SUBCHAPTER J: OPERATIONAL CONTROLS FOR MOTOR VEHICLES

## DIVISION 2: LOCALLY ENFORCED MOTOR VEHICLE IDLING LIMITATIONS

## §114.512 and §114.517

STATUTORY AUTHORITY

These amendments are proposed under the authority of Texas Government Code, §2001.021, Petition for the Adoption of Rules, which authorizes an interested person to petition a state agency for the adoption of a rule. The amendments are proposed under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rulemaking necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendments are also proposed under THSC, §382.002, Policy

and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; and THSC, §382.208, Attainment Program, 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 proposed amendments implement THSC, §§382.011, 382.012, 382.019, and 382.208.

**§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 residential area as defined by Local Government Code, §244.001, in a school zone, within 1,000 feet of a hospital, 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, 2009.]

**§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 does not have a sleeper berth];

(2) the primary propulsion engine of a motor vehicle being used to provide air conditioning or heating necessary for employee health or safety in an armored vehicle while the employee remains inside the vehicle to guard the contents or while the

vehicle is being loaded or unloaded; [a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, after September 1, 2009;]

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

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

(5) 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;

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

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

(8) 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;

(9) 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;

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

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

(12) 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 and is not within two miles of a facility offering external heating and air conditioning connections at a time when those connections are available. [This subsection expires September 1, 2009.]