

The Texas Commission on Environmental Quality (TCEQ or commission) adopts an amendment to §111.147.

Section 111.147 is adopted *with* change to the proposed text as published in the September 2, 2011, issue of the *Texas Register* (36 *TexReg* 5640) and the text will be republished.

The adopted amendment to §111.147 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rule

Under the 1990 Federal Clean Air Act (FCAA) Amendments, the City of El Paso (El Paso area) was designated nonattainment under FCAA, §107(d)(4)(B) for particulate matter (PM) with an aerodynamic diameter less than or equal to a nominal ten micrometers (PM₁₀) National Ambient Air Quality Standard (NAAQS) and subsequently classified as a moderate PM₁₀ nonattainment area. In November 1991, the Texas Air Control Board (TACB), a predecessor agency of the TCEQ, submitted the El Paso PM₁₀ Attainment Demonstration SIP revision. The SIP revision included PM control measures in §111.147. The control measures adopted in §111.147 required paving as a method of dust control in the El Paso area for specified roads and added a requirement that alleys be paved at the

rate of 15 miles per year. Section 111.147 also set frequencies for street sweeping in designated sections of the El Paso area.

In 1991, a Memorandum of Understanding (MOU) between the City of El Paso (the City) and the TACB was approved to outline the responsibilities and regulatory requirements for both parties. This MOU was replaced with a Memorandum of Agreement (MOA) with the City in 2001 with the same requirements.

On November 21, 2003, the El Paso Metropolitan Planning Organization submitted a letter requesting that the TCEQ develop a PM₁₀ redesignation request and maintenance plan. On December 28, 2009, the TCEQ requested information from the City to ascertain what efforts the City has taken to support a request for redesignation. In a response letter dated January 29, 2010, the City indicated the following: the City has programs funded annually in the City's capital improvement budget and in the Street Department operations budget in an effort to comply with environmental regulations; the City has committed to an alley paving program at a level in alignment with its own internal budgetary capacities, not at the rate of 15 miles per year as required under §111.147; the City maintains an inventory of street and alley paving efforts to document the current status and projections for future paving activities; and the City's Air Quality Program conducts surveillance and investigations to ensure compliance with, and enforcement of, the Chapter 111 rules.

For the site reporting Federal Reference Method (FRM) PM₁₀ data for all three years from 2007 through 2009 (Socorro AQS ID 481410057), there were no exceedances of the PM₁₀ 24-hour NAAQS. Subsequent data from the City indicates that from 1991 through 2010, the percentage of unpaved alleys has significantly decreased from 66% to 16% of the total alleys in the El Paso area, with approximately 23 miles of unpaved alleys remaining. Any new alleys must be paved by developers in accordance with a city ordinance. Furthermore, the City discontinued garbage collection in alleys in 1997, so the traffic in alleys has been dramatically reduced, and reclaimed asphalt pavement (RAP) has been used to cover some unpaved alleys, which has proven to be as effective as paving. In addition, the City has also been performing PM control measures that are not required by §111.147 or the MOA. For the site reporting FRM PM₁₀ data for all three years from 2007 through 2009 (Socorro AQS ID 481410057), there were no exceedances of the PM₁₀ 24-hour NAAQS, and with the minimal amount of unpaved alleys remaining in the El Paso area, the paving rate requirement in §111.147 should no longer be considered necessary for attainment of the 1997 PM₁₀ NAAQS. The adopted rulemaking will revise §111.147 to provide the City with alternative methods of PM control consistent with maintenance of the standard. The adopted rulemaking also revises §111.147 to allow the City to sweep streets at reduced frequencies, since the progress made by the City's alley and road paving programs has reduced the overall amount of fugitive dust in the El Paso area. Finally, the City indicated that it will continue to include street and alley

paving and sweeping in its annual budget for maintenance of the standard. Based on these substitute and supplemental actions, compliance with the anti-backsliding provisions in FCAA, §110(l) is demonstrated.

Consistent with the amendments to §111.147 in this adoption package, revisions to the 2001 MOA are proposed for adoption concurrent with this rulemaking adoption.

Demonstrating Noninterference Under FCAA, §110(l)

The commission provides the following information to clarify why the amendment to §111.147(1)(E) and (2) will not negatively impact the status of the state's attainment with the PM₁₀ NAAQS.

The requirement for reasonable notice and public hearing was satisfied through a public hearing held on September 27, 2011. The public comment period began on September 2, 2011, and ended October 3, 2011. According to the EPA draft guidance issued on June 8, 2005, *Demonstrating Noninterference Under Section 110(l) of the Clean Air Act When Revising a State Implementation Plan*, areas have two options available to demonstrate noninterference for affected pollutant(s). This preamble provides details of the identified existing measures that the commission will use to establish compliance with option one of the EPA's draft guidance: substitution of one measure by another with equivalent or greater emissions reduction/air quality benefits.

Background

In accordance with the FCAA and EPA guidance, the TACB was required to demonstrate either attainment of the standard by December 31, 1994, or demonstrate that attainment by that date was impracticable. FCAA, §179B provided that moderate nonattainment areas would not be redesignated as serious if the state could demonstrate that such areas would achieve attainment by the deadline if it were not for air quality impacts caused by another country. In response to the FCAA §179B provision, the TACB demonstrated attainment of the PM₁₀ NAAQS through dispersion modeling of United States emissions alone. Furthermore, the EPA guidance contained in the *PM₁₀ Moderate Area SIP Guidance: Final Staff Work Product*, April 2, 1991, prescribed that SIPs for moderate PM₁₀ nonattainment areas contain quantitative milestones to be achieved every three years, and that the SIP revisions demonstrate reasonable further progress (RFP) towards attainment. However, the TACB submitted information establishing that an RFP demonstration was not strictly applicable. Specifically, based on the international impacts provision in FCAA, §179B, the TACB demonstrated that the El Paso nonattainment area would attain the PM₁₀ NAAQS both at the time of the SIP revision in 1991 and at the time compliance would be required under the SIP in 1994, based on modeling of United States emissions alone. Therefore, there are currently no more requirements for a demonstration of reductions to United States emissions.

However, to help minimize PM₁₀ impacts from El Paso sources, the TACB adopted several new or enhanced control measures in its 1991 SIP revision. These measures included revisions to §§111.111, 111.141, 111.145, and 111.147.

The control measures adopted in §111.147 required paving as a method of dust control in the El Paso area for specified roads and added a requirement that alleys be paved at the rate of 15 miles per year. Section 111.147 also set frequencies for street sweeping in designated sections of the El Paso area. The EPA-approved 1991 El Paso PM₁₀ Attainment Demonstration SIP revision includes the PM control measures in Chapter 111.

Conclusion

The City has decreased the percentage of unpaved alleys from 66% to 16% between 1991 and 2010. Also, for the monitoring site reporting FRM PM₁₀ data for all three years from 2007 through 2009 (Socorro AQS ID 481410057), there were no exceedances of the PM₁₀ 24-hour NAAQS.

The City also put in place provisions that the unpaved alley inventory will not increase because a city ordinance requires developers to pave any new alleys. Furthermore, the City discontinued garbage collection in alleys in 1997, so the traffic in alleys has been dramatically reduced. City action to reduce airborne PM₁₀ has also reduced the need to

sweep streets at the frequencies specified under the current rule, and RAP, which has been proven to be as effective as paving, has been used to cover some unpaved alleys. In addition, the City also continues to include alley paving and maintenance in its annual budget. Because the El Paso area is monitoring attainment of the PM₁₀ NAAQS based on the monitoring site reporting FRM PM₁₀ data for all three years from 2007 through 2009 (Socorro AQS ID 481410057), with the City's current practices in place, revising §111.147 to reflect these current practices would not interfere with the El Paso area's ability to attain and maintain the PM₁₀ NAAQS.

Section Discussion

The adoption amends §111.147(1)(E) to remove the requirement to pave alleys at the rate of 15 miles per year and replace it with the following requirements: 1) all new alleys must be paved; 2) unpaved alleys may not be used for residential garbage and recycling collection; and 3) RAP may be used as an alternate means of PM control for alleys. Based on comments received, the commission revised §111.147(1)(E) by adding the terms "unpaved" and "residential" to clarify that some commercial trash collection routes may still occur in paved alleys, and future growth may require trash receptacles to be located in paved alleys for newly developed residential areas. The adoption also amends §111.147(2) to change the sweeping frequency requirement from four times per year to three times per year in the city limits and from six times per week to four times per week in the central business district.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a major environmental rule as defined in that statute. A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking is not a major environmental rule because the revisions to Chapter 111 will allow more flexibility for the City to continue to comply with the 1997 PM₁₀ NAAQS. For the monitoring site reporting FRM PM₁₀ data for all three years from 2007 through 2009 (Socorro AQS ID 481410057), there were no exceedances of the PM₁₀ 24-hour NAAQS. The adopted rule revision will remove specific requirements for the number of miles of alleys to be paved per year, will allow the use of RAP as an alternate means of PM control for preexisting unpaved alleys, and will decrease the number of times that soil is to be removed from public thoroughfares from four to three times per year for those previously specified areas within the city limits, and from six to four times per week within the central business district. The public benefit anticipated from the changes in the adopted rule will be continued attainment with PM₁₀ NAAQS, and

continued protection of public health and safety in El Paso. For the monitoring site reporting FRM PM₁₀ data for all three years from 2007 through 2009 (Socorro AQS ID 481410057), there were no exceedances of the PM₁₀ 24-hour NAAQS.

The adopted revisions will not 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. The adopted rule revision will not have a fiscal impact on individuals or large businesses in El Paso since it gives the City more flexibility than current rules and reflects current practices in El Paso for PM₁₀ control on roads, streets, and alleys. The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed an analysis of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to provide more flexibility for the City to continue to comply with the 1997 PM₁₀ NAAQS. This rulemaking does not affect private 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. Promulgation and enforcement of this adopted rulemaking is neither a statutory nor a constitutional taking because it does not

affect private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in real property because this rulemaking does not burden (constitutionally); nor restrict or limit the landowner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in absence of the regulations. Therefore, this rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (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 is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during

the public comment period. No comments were received concerning the Texas CMP.

Effect on Sites Subject to the Federal Operating Permits Program

The commission has reviewed this adopted rulemaking and determined that, although §111.147 is an applicable requirement of 30 TAC Chapter 122, the adopted changes would only affect paving and street sweeping requirements for the City, not individual emission units at sites. Therefore, the adopted changes do not affect sites subject to the Federal Operating Permits Program.

Public Comment

A public hearing was offered on September 27, 2011. The hearing was not officially opened because no party indicated a desire to give comment. The public comment period opened on September 2, 2011, and closed on October 3, 2011. Two written comments were received from the City.

Response to Comments

Comment

The City recommended adding the terms "unpaved" and "residential" to proposed §111.147(1)(E)(ii) because some trash pick-up routes do occur in alleys. In addition, future incorporation of Smart Growth Community Development will require trash

receptacles to be located in alleys for newly developed residential areas.

Response

The commission agrees with the City's addition of language to §111.147(1)(E) and has made the suggested changes. The additional terms clarify the commission's intent that garbage collection be conducted in paved alleys. Furthermore, the terms give the City flexibility to continue to allow for smart growth in residential areas and maintain compliance with the PM₁₀ standard.

Comment

The City also recommended adding the phrase "which are under the jurisdiction of the City of El Paso and which have been designated as public thoroughfares" to §111.147(1)(F).

Response

The City's suggested change to §111.147(1)(F) is beyond the scope of this rulemaking. No change has been made to the rule based on this comment.

SUBCHAPTER A: VISIBLE EMISSIONS AND PARTICULATE MATTER

**DIVISION 4: MATERIALS HANDLING, CONSTRUCTION, ROADS,
STREETS, ALLEYS, AND PARKING LOTS**

§111.147

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The amendment is also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.002, concerning 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, concerning General Power and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.0172, concerning international border areas; and THSC, §382.0173 concerning Adoption of Rules Regarding Certain State Implementation Plan Requirements and Standards of Performance for Certain Sources.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.0172, and 382.0173.

§111.147. Roads, Streets, and Alleys.

No person may cause, suffer, allow, or permit any public, industrial, commercial, or private road, street, or alley to be used without taking at least the following precautions to achieve control of dust emissions:

(1) application of asphalt, water, or suitable oil or chemicals on the following unpaved surfaces, except in the City of El Paso and the Fort Bliss Military Reservation, except as noted in §111.141 of this title (relating to Geographic Areas of Application and Date of Compliance), where the use of paving materials is the only acceptable method of dust control, unless otherwise specified:

(A) industrial facility roadways--all major in-plant roads and all truck or other heavy-duty vehicle pathways. Major in-plant roads shall be defined as those which are designed to accommodate two-way traffic and are at least 30 feet wide at at least one point, measuring the distance from the edge of the undisturbed earth on either side of the established roadway. The executive director, with the concurrence of the United States Environmental Protection Agency, may grant a waiver from the

requirement to pave an industrial facility roadway if the owner of the roadway demonstrates that the cost of paving is economically unreasonable compared to other methods of dust control specified in this paragraph;

(B) public thoroughfares--all roads and streets to which the public has general access;

(C) commercial roads--all roads that serve as access for more than 50 employees or as access to more than 10 heavy-duty truck parking spaces;

(D) residential roads--all roads that serve as access for more than 20 residence and/or apartment units;

(E) alleys--in the City of El Paso, alleys must meet the following requirements:

(i) all new alleys must be paved;

(ii) unpaved alleys may not be used for residential garbage and recycling collection; and

(iii) reclaimed asphalt pavement (RAP) may be used as an alternate means of particulate matter control for alleys; and

(F) levee roads--in the City of El Paso, all levee roads and access to such roads must be controlled with the application of asphalt, or suitable oil or chemicals;

(2) removal from public thoroughfares, as necessary, of soil or other materials, except for sand applied for the specific purpose of snow or ice control. In the City of El Paso, removal of soil must be by mechanical sweepers or their equivalent at the rate of three times per year for all public thoroughfares within the city limits and four times per week or as necessary for public thoroughfares within the central business district. For the purpose of this section, the central business district is defined as that area bordered by Loop 375 to the south, Santa Fe Street to the west, Missouri Street to the north, and Kansas Street to the east. The City of El Paso shall spot clean dirty roadways, and shall maintain street sweeping records for two years. Sand applied for the specific purpose of snow or ice control must be removed as soon as such control is no longer necessary.