The Texas Natural Resource Conservation Commission (commission) proposes new §115.510, Concerning Definitions, and amendments to §115.512, concerning Control Requirements; §115.513, concerning Alternate Control Requirements; §115.515, concerning Testing Requirements; and §115.516, concerning Record Keeping Requirements.

The commission proposes the removal of references to "emulsified asphalt" in §§115.512(3), 115.515(1), and 115.516 and substitution of the phrase "alternative asphalt." The commission proposes that "Alternative asphalt" be defined in new §115.510, Cutback Asphalt Definitions. The commission proposes the amendment to §115.512(1) to change the total annual volume of cutback use in Nueces County from 8.0% to 7.0%, and to amend §115.512(3) to allow both use and production of alternative asphalt. In §115.513, the word "section" is changed to "division."

EXPLANATION OF PROPOSED RULES

In the 1970's, the United States Environmental Protection Agency (EPA) identified cutback mixes, commonly known as "cold mixes," as a significant source of volatile organic compounds (VOCs) and urged states to promulgate rules which limit their manufacture and use. Since EPA's 1977 report (*Control of Volatile Organic Compounds from the use of Cutback Asphalt*, EPA-450/2-77-037), significant progress has been made by state agencies and the industry to more clearly identify and define the emissions from these mixes, as well as develop new mixes with less VOC emissions (e.g., emulsified cold mixes with little or no added solvents).

Over the past decades, the industry has been developing new cold mixes to meet market demands for alternative mixes with equal or less VOC emissions but equivalent road strengths. Most recent EPA memoranda and industry correspondence show that several new alternative cold mixes have been developed which have the same, or less, VOC emissions than traditional cutback asphalt cold mixes. These alternative mixtures use heavier petroleum agents in lieu of the lighter solvents. However, the existing rule language does not allow for these materials to be used as a substitute for cutback asphaltic concrete, and no language either in the state rule or in EPA control technology guidelines adequately defines "emulsified asphalt" to be inclusive of all compliant alternative mixes.

Cutback asphalt is any asphaltic concrete that has a significant amount of light petroleum distillate (usually diesel, kerosene, or naphtha) added at either the refinery or at the asphalt concrete plant, and is used principally for patching or emergency repairs. Emulsified asphaltic concrete, also used for such repairs, contains some proportion of the light petroleum distillates combined with a non-volatile emulsifying agent (e.g., water or soap) to dilute the VOC emissions. These mixes are commonly referred to as "cold mixes" as the mix temperatures are lower than those used for standard hot mix asphalt pavements. The emissions from these cold mixes occur in equal proportion during the manufacture and storage, although over different time periods, as the VOCs flash off quickly during mixing and evaporate over time into the ambient air during storage in outdoor piles.

Cold mixes are categorized by the amount of solvents added to the liquid asphalt and include rapid-cure, medium-cure, and slow-cure cutbacks and emulsions, containing average added solvents of 20%, 14%, 16%, and 7.0%, respectively. The amount of VOC emissions from cold mixes are higher than

VOC emissions from hot mixes (up to seven pounds VOC/ton cold mix as compared to an average of 0.2 pounds VOC/ton hot mix).

Currently, Chapter 115, Subchapter F regulates the manufacture, use, and sale of cutback asphaltic mixes in the designated nonattainment areas for ozone (Dallas, Denton, Collin, Tarrant, El Paso, Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, Waller, Jefferson, Orange, Hardin Counties) and Nueces County. According to §115.512(3), no one in the nonattainment areas may use, apply, sell, or buy "cutback asphalt containing VOC solvents for paving roadways, driveways, or parking lots during the peak ozone generating period from April 16 to September 15 of any year." Section 115.512(3) allows the use of "emulsified asphalt," with certain VOC restrictions, to comply with §115.512(2). To be produced in a nonattainment area during the peak ozone generating period, the emulsified mixes must conform with American Society of Testing and Materials (ASTM) Test Method D 244 as referenced in §115.515(1).

A proposed new section, §115.510, concerning Cutback Asphalt Definitions, includes a definition of "Alternative asphalt." In addition, the commission is proposing to relocate the existing definition of "Cutback asphalt" from §115.10, concerning Definitions, to §115.510. The proposed new §115.510 includes all definitions used exclusively within the Chapter 115 cutback asphalt rules. In separate rulemaking, the commission expects to delete the definition of "Cutback asphalt" from §115.10.

The proposed revisions to §§115.512(3), 115.515(1), and 515.516 remove the reference to "emulsified asphalt" in Subchapter F and substitute the phrase "alternative asphalt." These changes will allow

companies the flexibility to use any available substitute material which meets the project's specifications, but maintains the VOC emissions compliance demonstration criteria specified in §115.515 and §115.516 involving the ASTM Test Method. These changes will give flexibility to industry, update the rule to match current scientific knowledge, and still insure VOC emission reductions in nonattainment areas.

Cutback use in nonattainment areas is limited to 7.0% of total annual volume averaged over a two-year period. Nueces County has a present limit of 8.0%, and the commission proposes to change this limit to 7.0%. As average annual use in nonattainment areas in recent years has been in the range of 3.5% to 4.0%, the proposal would not create any operational change, but would add to uniformity to have the same standard for all regulated areas. The agency is soliciting comments on this change.

The amendment to §115.512(3) regulating emulsified asphalt use is now being proposed to apply to alternative asphalts. Historically, this section has been interpreted to apply to both use and production of the applicable asphalt. The inclusion of the words "or produced" would add clarity to the existing intent.

In §115.513, concerning Alternate Control Requirements, the term "section" is replaced by the word "division" in response to revised *Texas Register* rules (23 TexReg 1289, February 13, 1998).

FISCAL NOTE

Jeffrey Grymkoski, Strategic Planning and Appropriations Division, has determined that for the first five-year period the proposed revisions are in effect there will be no significant fiscal implications for state or local government as a result of administration or enforcement of the rules.

PUBLIC BENEFIT

Mr. Grymkoski also has determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated from enforcement of and compliance with these sections will be a continued reduction in the emission of VOCs and more cost-effective implementation and enforcement of air quality standards. All asphalt concrete plant operators in the designated nonattainment areas and Nueces County will be affected by this rule change, including small businesses. The economic impact of complying with the changes most likely will be positive in that it will alleviate the need for the asphalt industry to produce excess stockpiles of asphalt and store such reserves prior to the peak ozone generation period. It also can reduce the need for transporting cutback asphalt produced and stored outside the nonattainment area. There are no additional anticipated economic costs to persons who are required to comply with the amendments as proposed, as cost estimates by the Texas Department of Transportation and the asphalt industry indicate that the new alternative options will be equal to or less than the existing emulsified asphalt option.

SMALL BUSINESS ANALYSIS

There are no additional anticipated economic costs to small businesses that are required to comply with the amendments as proposed. Cost estimates by the Texas Department of Transportation and the

asphalt industry indicate that the new alternative options will be equal to or less than the existing emulsified option. As the new alternative mixes are just another option, a small business is not precluded from continuing to use the existing emulsified mixes if there should be a cost differential in a particular location.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Code, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The substitution of the term "alternative asphalt" for the existing "emulsified asphalt" will not change the current level of protection of the environment. The proposed rule amendments continue to protect the environment and reduce risks to human health from environmental exposure, but do not meet the definition of a major environmental rule because the VOC emission obligations have already been established by federal law and state law and, thus, are not new requirements. The proposed amendments should not adversely affect the economy in a material way because the affected facilities are currently required to meet emission criteria identical to that existing. Therefore, this does not meet the definition of a "major" environmental rule.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposal under the Code, §2007.043. The specific purpose of this rulemaking is to give flexibility to industry, update the rule to reflect

current scientific knowledge, and still insure VOC emission reductions in nonattainment areas. Promulgation and enforcement of this rulemaking will not affect private real property because the rule changes being proposed do not materially change the existing test methods or emission criteria that are currently enforced.

COASTAL MANAGEMENT PLAN

The commission has determined that the proposed rulemaking concerning Chapter 115, Subchapter F relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning consistency with the Texas CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this proposed action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and has determined that the proposed action is consistent with the applicable CMP goals and policies, specifically §501.12(1), which is to protect, restore, and enhance the diversity, quality, functions, and values of coastal natural resource areas and §501.14(q), regarding compliance with 40 Code of Federal Regulations (CFR), Protection of Environment. The rule changes proposed here do not relax the VOC emission obligations established by federal and state law, thus the proposed rule complies with regulations in 40 CFR, Part 51 and therefore is consistent with this policy. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

PUBLIC HEARING

A public hearing on the proposal will be held in Austin on May 19, 1999 at 10:00 a.m. in Building F, Room 5108 of the Texas Natural Resource Conservation Commission complex, located at 12100 North IH-35, Park 35 Technology Center, Austin. 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 occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Lisa Martin, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log No. 98082-115-AI. Comments must be received by 5:00 p.m., May 24, 1999. For further information, please contact Terry Leifeste, Office of Environmental Policy, Analysis, and Assessment, (512) 239-1873.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

STATUTORY AUTHORITY

The new section and amendments are proposed 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 purpose of the TCAA. The new section and amendments also are proposed under the TCAA, §382.011, which provides the commission with the authority to control the quality of the state's air; §382.012, which provides for the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning monitoring requirements and examination of records.

The proposed new section and amendments do not implement any new state or federal requirement.

SUBCHAPTER F : MISCELLANEOUS INDUSTRIAL SOURCES

DIVISION 1: CUTBACK ASPHALT

§§115.510, 115.512, 115.513, 115.515, 115.516

§115.510. Cutback Asphalt Definitions.

The following words and terms, when used in this division (relating to Cutback Asphalt), shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §115.10 of this title (relating to Definitions), §101.1 of this title (relating to Definitions), and §3.2 of this title (relating to Definitions).

(1) Alternative asphalt - An asphaltic substance that is used in lieu of conventional cutback asphalt and that complies with the emissions criteria in American Society of Testing and Materials (ASTM) Test Method D 244 as reapproved in 1980 and recognized in subsequent ASTM publications.

(2) Cutback asphalt - Any asphaltic cement which has been liquified by blending with petroleum solvents (diluents).

§115.512. Control Requirements.

For persons in Nueces County and the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas as defined in §115.10 of this title (relating to Definitions), the following control requirements shall apply.

[(1) In Nueces County, the use of cutback asphalt containing volatile organic compound (VOC) solvents for the paving of roadways, driveways, or parking lots is restricted to no more than 8.0% of the total annual volume averaged over a two-year period of asphalt used or specified for use by any state, municipal, or county agency who uses or specifies the type of asphalt application.]

(1) [(2)] In Nueces County and in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, the use of cutback asphalt containing VOC solvents for the paving of roadways, driveways, or parking lots is restricted to no more than 7.0% of the total annual volume averaged over a two-year period of asphalt used or specified for use by any state, municipal, or county agency who uses or specifies the type of asphalt application.

(2) [(3)] In the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, no person shall allow the use, application, sale, or offering for sale of cutback asphalt containing VOC solvents for paving roadways, driveways, or parking lots during the period from April 16 to September 15 of any year.

(3) [(4)] When alternative asphalt [emulsified asphalt] is utilized or produced to comply with paragraph (2) of this section, the maximum VOC content shall not exceed 12% by weight or the following limitations, whichever is more stringent:

(A) - (D) (No change.)

§115.513. Alternate Control Requirements.

For all affected persons in Nueces County and the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division [section] may be approved by the executive director in accordance with §115.910 of this title (relating to Availability of Alternate Means of Control) if emission reductions are demonstrated to be substantially equivalent.

§115.515. Testing Requirements.

For Nueces County and the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, compliance with §115.512(4) of this title (relating to Control Requirements) shall be determined by applying the following test methods, as appropriate:

(1) American Society of Testing and Materials (ASTM) Test Method D 244 for determining volatile organic compound content of alternative asphalt [asphalt emulsions]; or

(2) (No change.)

§115.516. Recordkeeping Requirements.

For Nueces County and the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, any state, municipal, or county agency who uses or specifies the use of the type of asphalt or alternative asphalt [asphalt emulsion] affected by §115.512 of this title (relating to Control Requirements) shall maintain records sufficient to document compliance with applicable restrictions and shall make such records available upon request to representatives of the executive director [Texas Air Control Board], United States Environmental Protection Agency, or the local air pollution control agency having jurisdiction in the area.