

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§114.2, 114.51, and 114.64; and the repeal of §114.52.

If adopted, the amendments to §114.2 and §114.51 and the repeal of §114.52 would be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP). Section 114.64 is not included in the SIP and the amendments to §114.64 will not be submitted to the EPA.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

A rulemaking adopted by the commission on October 6, 2000, revised an air pollution control strategy involving emissions inspection of vehicles to reduce nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOC) necessary for the counties included in the Dallas-Fort Worth (DFW), Houston-Galveston-Brazoria (HGB), and El Paso (ELP) ozone nonattainment areas in order to assist in the ability to demonstrate attainment with the one-hour ozone National Ambient Air Quality Standard (NAAQS). The commission adopted vehicle emissions testing analyzer specifications (TAS) and inspection requirements for acceleration simulation mode (ASM) and on-board diagnostics (OBD) inspections. The revised vehicle emissions inspection program, also known as the Inspection and Maintenance (I/M) program, began on May 1, 2002, in Collin, Dallas, Denton, and Tarrant Counties in the DFW area and Harris County in the HGB area. On May 1, 2003, the I/M program expanded to include Ellis, Johnson, Kaufman, Parker, and Rockwall Counties for the DFW area and Brazoria, Fort Bend, Galveston, and Montgomery Counties in the HGB area. Unlike the two-speed idle (TSI) vehicle emissions inspection that had been in place, the ASM inspection has the ability to detect NO<sub>x</sub> emissions, while the OBD inspection has the ability to ensure vehicle emissions control systems are functioning as designed by

verification through the vehicle's computer system. Because NO<sub>x</sub> is a precursor to ground-level ozone formation, reduced NO<sub>x</sub> and VOC emissions result in ground-level ozone reductions. In addition, the inclusion of OBD in the I/M program ensured compliance with a federal mandate requiring all 1996 and newer model-year vehicles to receive an OBD inspection.

On October 24, 2001, the commission adopted rules that implemented portions of House Bill (HB) 2134, 77th Texas Legislature, 2001. The adopted rules defined the term "low-volume emissions inspection station" and required all vehicle emissions inspection stations in the DFW and HGB areas to offer both ASM and OBD inspections to the public with the exception of low-volume emissions inspection stations. The adopted rules also revised the TAS and established the Early Participation Incentive Program (EPIP).

The low-volume emissions inspection station designation was established because the cost of ASM vehicle emissions inspection analyzers, which have the capability to inspect all vehicles required to undergo I/M inspections, is much higher than the cost of OBD-only vehicle inspection analyzers, which only have the capability to inspect 1996 and newer model-year vehicles. To ensure that an adequate number of vehicle emissions inspection stations were available to provide both ASM and OBD inspections at the start of the revised I/M program in the DFW and HGB areas, stations that voluntarily opted to be designated as a low-volume emissions inspection station by the Texas Department of Public Safety (DPS), the agency that implements the I/M program along with the TCEQ, were restricted to a maximum of 1,200 OBD inspections per calendar year.

The EPIP was established as an additional method to ensure that an adequate number of vehicle emissions

inspection stations were available to provide both ASM and OBD inspections at the start of the revised I/M program in the DFW and HGB areas. The EPIP encouraged early purchases of ASM analyzers by providing vehicle emissions inspection stations with financial assurance offered by the state if the I/M program was terminated early. The EPIP was available to the first 1,000 eligible vehicle emissions inspection stations that were certified by the DPS to offer ASM and OBD inspections to the public. Vehicle emissions inspection station owners that were accepted into the EPIP and maintained their eligibility could have received a payment of up to \$675 per month to cover the cost of the ASM analyzers if the I/M program was terminated within five years of the program start date. As the EPIP expired in all I/M program areas on May 1, 2008, vehicle emissions inspection stations owners are no longer participating in the program.

On October 26, 2005, the commission adopted revisions to §114.51, which required manufacturers of vehicle emissions inspection analyzers used in the I/M program to meet the revised requirements contained in the TCEQ's "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005, or in the TCEQ's "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005. Since October 2005, the TAS have been modified four times to improve oversight and enhance effectiveness of the I/M program. The minor modifications did not affect the vehicle emissions inspection procedure or the design and performance criteria for the vehicle emissions inspection analyzer. However, the minor modifications did include updates to accommodate new technology vehicles, enhancements to the method of collecting inspection data that is used to identify the occurrence of possible improper or fraudulent inspections, and updates to internal reference tables used to determine the applicable vehicle emissions inspection criteria. No modification would be considered a minor non-

programmatic modification if it results in additional costs to vehicle inspection station owners. Each time the TAS were modified, staff incorporated the necessary software enhancements into a draft version of the TAS, and these enhancements were implemented on all analyzers by the analyzer manufacturers participating in the I/M program. The modified TAS have not been incorporated by rule.

Rules adopted by the commission on March 27, 2002, implemented the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP), which was designed to assist low income individuals with repairs, retrofits, or retirement of vehicles that failed emissions inspections as required by HB 2134, 77th Texas Legislature, 2001. Under the LIRAP, monetary assistance is provided for emissions-related repairs directly related to bringing the vehicle into compliance or for replacement assistance for a vehicle that has failed the required emissions inspection. Due to the requirements of Senate Bill (SB) 12, 80th Texas Legislature, 2007, the commission adopted rules on December 5, 2007, that modified the LIRAP, now commonly referred to as the Drive a Clean Machine program, by requiring funds be transferred to a participating dealer not later than five business days after the sale of a replacement vehicle is completed.

The primary reason for this proposed rulemaking is to implement portions of HB 715 and HB 1796 from the 81st Texas Legislature, 2009, relating to requiring the vehicle emissions inspection limit for low-volume emissions inspection stations to be set at no fewer than 150 OBD inspections per month and increasing the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days, respectively. This proposed rulemaking would also define the TAS as "the most recent version" resulting in a more streamlined process for minor non-programmatic modifications to the TAS and allow staff to implement minor non-programmatic modifications including

updates to accommodate new technology vehicles, enhancements to the method of collecting inspection data, and updates to internal reference tables. However, modifications to the I/M program design, performance criteria for the vehicle emissions inspection analyzer, or the vehicle emissions inspection procedure would not be implemented unless commission approval is received through the rule and SIP revision process. In addition, the proposed rulemaking would remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references to remove redundant requirements and would also repeal the EPIP.

The EPIP was established as an incentive program and is not a control strategy measure of the I/M program. In addition, the EPIP expired on May 1, 2008. Therefore, removal of the EPIP would not change the stringency or effectiveness of the I/M program.

#### SECTION BY SECTION DISCUSSION

In addition to the proposed amendments associated with the rulemaking for Chapter 114, various stylistic, non-substantive changes are included to update rule language to current Texas Register style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally are not specifically discussed in this preamble. Comments received regarding existing rule language that are not related to incorporating the proposed amendments and the proposed repeal to Chapter 114 or to the specific proposed non-substantive changes discussed in this preamble will not be considered, and no changes will be made based on such comments.

The proposed amendment to §114.2 would modify the definition of a low-volume emissions inspection

station. The current definition states that "a low-volume emissions inspection station is a vehicle emissions inspection station that performs only the OBD test and does not exceed 1,200 OBD tests per calendar year." The modified definition would state that "a low-volume inspection station is a vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety." HB 715 prevents the DPS from restricting a vehicle emissions inspection station to fewer than 150 OBD inspections per month. This proposed amendment would ensure that the definition for a low-volume emissions inspection station contained in §114.2 would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules (37 TAC §23.95) and meet the requirements of HB 715.

The proposed amendment to §114.51 would remove the dates associated with the TAS and add language requiring analyzer manufacturers to meet the requirements contained in the "most recent version" of the TAS resulting in a more streamlined process for implementing minor non-programmatic modifications to the TAS. The most recent version of the TAS would be the version available at the TCEQ's central office or at <http://www.tceq.state.tx.us/assets/public/implementation/air/ms/IM/txvehanlspecs.pdf>. In addition, the proposed amendment would remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references as the specifications for OBD-only vehicle inspection analyzers are also contained in the "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program."

The proposed repeal of §114.52 would remove all requirements relating to the EPIP, which has expired, and delete the EPIP requirements that were incorporated into the I/M SIP in the preamble of previous rulemakings adopted on October 24, 2001, October 8, 2003, and September 14, 2004.

The proposed amendment to §114.64 would increase the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days as mandated by HB 1796.

**FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT**

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rule revisions are in effect, no significant fiscal implications are anticipated for the TCEQ or other units of state or local government as a result of administration or enforcement of the proposed rule revisions.

The proposed rulemaking would implement two bills: HB 715, which changes requirements for low-volume emissions inspection stations; and HB 1796, which changes a requirement of the LIRAP. In addition, staff is proposing a revision to the rule regarding the TAS and a rule repeal regarding the EPIP.

*Low-Volume Emissions Inspection Stations*

Currently, low-volume emissions inspection stations may perform up to 1,200 OBD inspections per year. HB 715 increased this limit to a maximum established by the DPS of at least 150 OBD inspections per month effective December 31, 2010. The vehicle emissions inspection limit for stations that only offer emissions inspections on 1996 and newer model-year vehicles has been a component of the I/M program in the DFW and HGB areas since 2002. The rule was adopted in 2001 because the cost of ASM analyzers, which have the capability to inspect all vehicles required to undergo I/M inspections, is much higher than the cost of OBD-only vehicle inspection analyzers, which only have the capability to inspect 1996 and newer model-year vehicles. The rule did not limit the number of inspections conducted using

ASM analyzers in order to provide an incentive for automotive shops to purchase the more expensive ASM analyzers so that more inspection stations could accommodate older cars. The rule has been in place for eight years. With the passage of HB 715, the limit for vehicle emissions inspections at low-volume emissions inspection stations has been increased.

In order to comply with HB 715, the proposed rule revision to §114.2 is needed to replace the vehicle emissions inspection limit in the current definition with language indicating that the station must meet the criteria for obtaining a low-volume waiver from the DPS. This change would ensure that the definition of a low-volume emissions inspection station would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules.

The proposed rule revisions would be implemented by the TCEQ through updating the Texas Information Management System database, which is used to enforce this aspect of the I/M program in the DFW and HGB areas. In order to implement the proposed rule revisions, the TCEQ and the DPS would need to make minor administrative and procedural changes. No significant fiscal implications are anticipated for the TCEQ or the DPS as a result of the proposed rule revisions.

#### *LIRAP*

Section 12 of HB 1796 revised a requirement of the LIRAP, which increased the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days. The LIRAP is managed by the TCEQ but administered and implemented in the local areas by county program administrators. The TCEQ does not conduct any reimbursement activities to dealerships. Local governments and their contracted local administrators are expected to experience additional processing



and review time for payments to dealerships. The proposed rulemaking extending the time period that counties would have to reimburse participating dealerships is not expected to have significant fiscal impacts on the TCEQ or affected local governments.

### *TAS*

On October 26, 2005, the commission adopted revisions to §114.51, which required manufacturers of vehicle emissions inspection analyzers used in the I/M program to meet the requirements contained in the "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005, or in the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005, which are also referred to as the TAS. Since October 2005, the TAS has been modified four times with minor non-programmatic changes to improve the oversight and effectiveness of the I/M program. The modified TAS has not been incorporated into the rule.

The proposed rule revision would define the TAS as "the most recent version" resulting in a more streamlined process for implementing minor non-programmatic modifications to the TAS. In addition, the rule revision would remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references to remove redundant requirements.

### *EPIP*

On October 24, 2001, the commission adopted rules for the EPIP in §114.52. The EPIP was established to ensure that an adequate number of vehicle emissions inspection stations were available to provide

ASM and OBD inspections at the start of the I/M program for the DFW and HGB areas. Vehicle emissions inspection station owners that were accepted into the EPIP and maintained their eligibility could receive a payment of up to \$675 per month to cover the cost of the ASM analyzer if the I/M program was terminated within five years of the start date. However, now that the EPIP program has expired in all I/M program areas, the proposed rule revisions would repeal this provision. Because the proposed rule revisions would eliminate an expired program, the TCEQ would not experience any fiscal impacts due to this proposed rule repeal.

#### PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed rule revisions are in effect, the public benefit anticipated from the changes seen in the proposed rule revisions would be compliance with state law and more efficient operation of the state's I/M program.

No significant fiscal implications are anticipated for businesses or for individuals as a result of the implementation or enforcement of the proposed rule revisions.

The proposed changes to the definition of a low-volume emissions inspection station in §114.2 would not impact individuals but may fiscally impact vehicle emissions inspection stations. Low-volume emissions inspection stations may experience an increase in revenue due to the increase in the amount of inspections they are allowed to perform each month, while non low-volume emissions inspection stations, also known as full-service vehicle emissions inspection stations, may experience a corresponding decrease in revenue.

Predicting the magnitude of the increase or decrease experienced by each type of station is not possible as the increase or decrease would be determined by the marketplace.

The proposed rule revisions relating to extending the time period that counties would have to reimburse participating dealerships from five to 10 business days is not expected to result in significant fiscal impacts. Participation by dealerships in the LIRAP is voluntary and based on agreements with local program administrators that detail specific program requirements including payment schedules. The proposed rule revisions would provide additional processing and review time that may improve the efficiency of payments to dealerships.

Businesses and motorists would not experience any fiscal impacts due to the proposed rule revisions relating to the TAS. The proposed changes would only affect the way the TCEQ approves minor non-programmatic modifications to the TAS and eliminate redundant requirements.

The proposed changes that would repeal the EPIP would eliminate a requirement for an expired program. Therefore, businesses and motorists would not experience any fiscal impacts as a result of the proposed rule repeal.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

In general, the proposed rule revisions are not expected to adversely affect small or micro-businesses as a result of the implementation or administration of the proposed rule revisions. The proposed rule revisions would affect approximately 531 low-volume emissions inspection stations and approximately 1,011 full-service vehicle emissions inspection stations in the HGB area, and approximately 677 low-volume emissions inspection stations and approximately 1,134 full-service vehicle emissions inspection stations in the DFW area. Low-volume emissions inspection stations may experience an increase in revenue due

to the increase in the amount of inspections they are allowed to perform each month. Full-service vehicle emissions inspection stations may experience a corresponding decrease in revenue. Predicting the magnitude of the increase or decrease experienced by each type of station is not possible as the increase or decrease would be determined by the marketplace.

#### 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 rule revisions relating to low-volume emissions inspection stations and the LIRAP are necessary to comply with state law. The rest of the proposed rulemaking is procedural, and all of the proposed rule revisions are consistent with the public health, safety, environmental, and economic welfare of the state.

#### 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 rule revisions do not adversely affect a local economy in a material way for the first five years that the proposed rule revisions are 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 rule revisions do 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, state 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. Furthermore, while states generally are afforded some flexibility in adopting and implementing a SIP, vehicle I/M programs are required elements of the SIP pursuant to 42 USC, §7511(a).

The specific intent of the proposed rulemaking is to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions. To further this specific intent, this rulemaking incorporates the following proposed amendments to the I/M program. The current definition of a low-volume emissions inspection station in §114.2 states that "a low-volume emissions inspection station is a vehicle emissions inspection station that performs only the OBD test and does not exceed 1,200 OBD tests per calendar year." The proposed amendment to §114.2 would modify the current definition to state that "a low-volume emissions inspection station is a vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety." HB 715 prevents the DPS from restricting a vehicle emissions inspection station to fewer than 150 OBD inspections per month. The proposed amendment would ensure that the definition for a low-volume emissions inspection station contained in §114.2 would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules (37 TAC §23.95) and meet the requirements of HB 715. The proposed amendment to §114.64 would increase the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days as mandated by HB 1796. The proposed amendment to §114.51 would remove the dates associated with the TAS and add language

requiring analyzer manufacturers to meet the requirements contained in the "most recent version" of the TAS and remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references. The proposed amendment would improve the efficiency of the process used by the commission for implementing minor non-programmatic modifications to the TAS and remove redundant requirements. The proposed repeal of §114.52 would repeal all requirements relating to the EPIP, which has expired.

The proposed rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because: 1) the specific intent of the proposed rule revision is not to protect the environment or reduce risks to human health from environmental exposure, but rather to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions; and 2) as discussed 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 rule revisions adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking actually clarifies, improves upon, and increases consistency within the I/M program and the LIRAP. Because the proposed rulemaking is not a major environmental rule, it is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225.

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 Texas 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 and rules was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP and rules 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 SIP and 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," 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 rule revisions do 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. In addition, the adoption and maintenance of the I/M program is directly required by federal law pursuant to 42 USC, §7511(a). 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 Env'tl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, *no writ*). In addition, portions of this rulemaking are directly required by HB 715 and HB 1796. Furthermore, no contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the TCEQ but is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, and 382.017.

This 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: 1) the specific intent of the proposed rulemaking is not to protect the environment or reduce

risks to human health from environmental exposure, but rather to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions; and 2) 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, because the proposed rulemaking actually clarifies, improves upon, and increases consistency within the I/M program and the LIRAP. 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 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 TWC, 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 rule revisions and performed an analysis of whether the proposed rule revisions constitute 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."

The specific purpose of the proposed rulemaking is to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions. Therefore, the proposed rulemaking would substantially advance this stated purpose by: modifying the current definition of a low-volume emissions inspection station to state that "a low-volume emissions inspection station is a vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety"; ensuring that the definition for a low-volume emissions inspection station contained in §114.2 would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules (37 TAC §23.95) and meet the requirements of HB 715; increasing the maximum time that counties

would have to reimburse dealerships participating in the LIRAP from five to 10 business days as mandated by HB 1796; removing the dates associated with the TAS and adding language requiring analyzer manufacturers to meet the requirements contained in the "most recent version" of the TAS and removing the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references; streamlining the process used by the commission for implementing minor non-programmatic modifications to the TAS; removing redundant requirements; and deleting all requirements relating to the EPIP, which has expired.

Promulgation and enforcement of the proposed rule revisions would be neither a statutory nor a constitutional taking of private real property. These proposed rule revisions are not burdensome, restrictive, or limiting of rights to private real property because the proposed rule revisions simply clarify, improve upon, and increase consistency within the existing I/M program and the LIRAP. Furthermore, the proposed rule revisions would benefit the public by improving upon the I/M program and the LIRAP, making them more accessible to the public and subsequently improving their effectiveness. The proposed rule revisions do 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 rule revisions 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 conducted a consistency determination for the proposed rule revisions in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goals applicable to the proposed rulemaking are 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 and ozone levels would be reduced as a result of the proposed rulemaking. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in the Code of Federal Regulations to protect and enhance air quality in the coastal area (31 TAC §501.32). This rulemaking proposal would not have a detrimental effect on SIP emissions reduction obligations relating to maintenance of the ozone NAAQS by continuing to implement the existing OBD, ASM, and TSI vehicle inspections as a part of the I/M program. This rulemaking action complies with the Code of Federal Regulations. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies. Promulgation and enforcement of these proposed rule revisions would not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule revisions are consistent with these CMP goals and policies and because these proposed rule revisions do not create or have a direct or significant adverse effect on any coastal natural resource areas.

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

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal in Fort Worth on July 20, 2010, at 2:00 p.m. at the TCEQ, Region 4 Office, DFW Public Meeting Room, 2309 Gravel Road, Fort Worth, TX 76118; in Austin on July 21, 2010, at 10:00 a.m. at the TCEQ, Building E, Room 201S, 12100 Park 35 Circle, Austin, TX 78753; and in Houston on July 22, 2010, at 3:00 p.m. at the Houston-Galveston Area Council, Conference Room A, 3555 Timmons Lane, Houston, TX 77027. The hearings are 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 hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. 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 2009-027-114-EN. The comment period closes July 26, 2010. 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](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Edgar J. Gilmore, Jr., Air Quality Planning Section, (512) 239-2069.

## **SUBCHAPTER A: DEFINITIONS**

### **§114.2**

#### **STATUTORY AUTHORITY**

The amendment is 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 rules 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 amendment is 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 amendment is 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; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*; and



THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The amendment is proposed pursuant to Texas Transportation Code, §548.3075, which was amended by House Bill 715 from the 81st Texas Legislature, 2009.

The proposed amendment implements Texas Transportation Code, §548.3075.

**§114.2. Inspection and Maintenance Definitions.**

Unless specifically defined in Texas Health and Safety Code, Chapter 382, also known as the Texas Clean Air Act (TCAA), or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following words and terms, when used in Subchapter C of this chapter (relating to Vehicle Inspection and Maintenance; Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program; and Early Action Compact Counties), have the following meanings, unless the context clearly indicates otherwise.

(1) Acceleration simulation mode (ASM-2) test--An emissions test using a dynamometer (a set of rollers on which a test vehicle's tires rest) that applies an increasing load or resistance to the drive train of a vehicle, thereby simulating actual tailpipe emissions of a vehicle as it is moving and accelerating. The ASM-2 vehicle emissions test is comprised of two phases:

(A) the 50/15 mode--in which the vehicle is tested on the dynamometer simulating the use of 50% of the vehicle available horsepower to accelerate at a rate of 3.3 miles per hour (mph) per second at a constant speed of 15 mph; and

(B) the 25/25 mode--in which the vehicle is tested on the dynamometer simulating the use of 25% of the vehicle available horsepower to accelerate at a rate 3.3 mph per second at a constant speed of 25 mph.

(2) Consumer price index--The consumer price index for any calendar year is the average of the consumer price index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of the calendar year.

(3) Controller area network (CAN)--A vehicle manufacturer's communications protocol that connects to the various electronic modules in a vehicle. CAN provides one protocol that collects information from the vehicle's electronic systems including the on-board diagnostics (OBD) emissions testing system. The United States Environmental Protection Agency requires the CAN protocol to be installed in OBD-compliant vehicles beginning with some model year 2003 vehicles and phasing in to all OBD-compliant vehicles by the 2008 model year.

(4) Low-volume emissions inspection station--A vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety. [performs on-board diagnostics (OBD) testing only and does not exceed 1,200 OBD tests per calendar year.]

(5) Motorist--A person or other entity responsible for the inspection, repair, and maintenance of a motor vehicle, which may include, but is not limited to, owners and lessees.

(6) On-board diagnostic (OBD) system--The computer system installed in a vehicle by the manufacturer that monitors the performance of the vehicle emissions control equipment, fuel metering system, and ignition system for the purpose of detecting malfunction or deterioration in performance that would be expected to cause the vehicle not to meet emissions standards. All references to OBD should be interpreted to mean the second generation of this equipment, sometimes referred to as OBD II.

(7) On-road test--Utilization of remote sensing technology to identify vehicles operating within the inspection and maintenance program areas that have a high probability of being high-emitters.

(8) Out-of-cycle test--Required emissions test not associated with vehicle safety inspection testing cycle.

(9) Primarily operated--Use of a motor vehicle greater than 60 calendar days per testing cycle in an affected county. Motorists shall comply with emissions requirements for such counties. It is presumed that a vehicle is primarily operated in the county in which it is registered.

(10) Program area--County or counties in which the Texas Department of Public Safety, in coordination with the commission, administers the vehicle emissions inspection and maintenance program contained in the Texas Inspection and Maintenance State Implementation Plan. These program areas include:

(A) the Dallas-Fort Worth program area, consisting of the following counties:

Collin, Dallas, Denton, [Collin,] and Tarrant;

(B) the El Paso program area, consisting of El Paso County;

(C) the Houston-Galveston-Brazoria program area, consisting of Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties; and

(D) the extended Dallas-Fort Worth program area, consisting of Ellis, Johnson, Kaufman, Parker, and Rockwall Counties. These counties became part of the program area as of May 1, 2003.

(11) Retests--Successive vehicle emissions inspections following the failing of an initial test by a vehicle during a single testing cycle.

(12) Testing cycle--Annual cycle commencing with the first safety inspection certificate expiration date for which a motor vehicle is subject to a vehicle emissions inspection.

(13) Two-speed idle (TSI) inspection and maintenance test--A measurement of the tailpipe exhaust emissions of a vehicle while the vehicle idles, first at a lower speed and then again at a higher speed.

(14) Uncommon part--A part that takes more than 30 days for expected delivery and installation, where a motorist can prove that a reasonable attempt made to locate necessary emission control parts by retail or wholesale part suppliers will exceed the remaining time prior to expiration of the vehicle safety inspection certificate or the 30-day period following an out-of-cycle inspection.

**SUBCHAPTER C: VEHICLE INSPECTION AND MAINTENANCE; LOW INCOME VEHICLE  
REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT  
PROGRAM; AND EARLY ACTION COMPACT COUNTIES  
DIVISION 1: VEHICLE INSPECTION AND MAINTENANCE**

**§114.51**

**STATUTORY AUTHORITY**

The amendment is 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 rules 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 amendment is 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 amendment is 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; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the

commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 *et seq.*; and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The amendment to §114.51 is proposed pursuant to THSC, §382.205.

The proposed amendment implements THSC, Subchapter G, §§382.201 - 382.220, Vehicle Emissions.

**§114.51. Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.**

(a) Any manufacturer or distributor of vehicle testing equipment may apply to the executive director of the commission or his appointee, for approval of an exhaust gas analyzer or analyzer system for use in the Texas Inspection and Maintenance (I/M) program administered by the Texas Department of Public Safety. Each manufacturer shall submit a formal certificate to the commission stating that any analyzer model sold or leased by the manufacturer or its authorized representative and any model currently in use in the I/M program will satisfy all design and performance criteria set forth in the most recent version of the "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program." [, " dated May 1, 2005, or in "Specifications for On-Board Diagnostics II for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005.] Copies of this document [these documents] are available at the commission's Central Office, located at 12100 Park 35 Circle, Austin, Texas 78753 or at <http://www.tceq.state.tx.us/assets/public/implementation/air/ms/IM/txvehanlspecs.pdf>. The manufacturer

shall also provide sufficient documentation to demonstrate conformance with these criteria including a complete description of all hardware components, the results of appropriate performance testing, and a point-by-point response to each specific requirement.

(b) All equipment must [shall] be tested by an independent test laboratory. The cost of the certification must [shall] be absorbed by the manufacturer. The conformance demonstration must [shall] include, but is not limited to:

(1) certification that equipment design and construction conform with the specifications referenced in subsection (a) of this section;

(2) documentation of successful results from appropriate performance testing;

(3) evidence of necessary changes to internal computer programming, display format, and data recording sequence;

(4) a commitment to fulfill all maintenance, repair, training, and other service requirements described in the specifications referenced in subsection (a) of this section. A copy of the minimum warranty agreement to be offered to the purchaser of an approved vehicle exhaust gas analyzer must [shall] be included in the demonstration of conformance; and

(5) documentation of communication ability using protocol provided by the commission or the commission Texas Information Management System (TIMS) contractor.



(c) If a review of the demonstration of conformance and all related support material indicates compliance with the criteria listed in subsections (a) and (b) of this section, the executive director or his appointee may issue a notice of approval to the analyzer manufacturer that endorses the use of the specified analyzer or analyzer system in the Texas I/M program.

(d) The applicant shall comply with all special provisions and conditions specified by the executive director or his appointee in the notice of approval.

(e) Any manufacturer or distributor that receives a notice of approval from the executive director or the executive director's appointee for vehicle emissions test equipment for use in the Texas I/M program may be subject to appropriate enforcement action and penalties prescribed in the Texas Clean Air Act or the rules and regulations promulgated thereunder if:

(1) any information included in the conformance demonstration as required in subsection (b) of this section is misrepresented resulting in the purchase or operation of equipment in the Texas I/M program that does not meet the specifications referenced in subsection (a) of this section; [or]

(2) the applicant fails to comply with any requirement or commitment specified in the notice of approval issued by the executive director or implied by the representations submitted by the applicant in the conformance demonstration required by subsection (b) of this section; [or]

(3) the manufacturer or distributor fails to provide on-site service response by a qualified repair technician within two business days of a request from an inspection station, excluding Sundays, national holidays (New Year's Day, Martin Luther King Jr. Day, President's Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, and Christmas Day), and other days when a purchaser's business might be closed;

(4) the manufacturer or distributor fails to fulfill, on a continuing basis, the requirements described in this section or in the specifications referenced in subsection (a) of this section; or

(5) the manufacturer fails to provide analyzer software updates within six months of request and fails to install analyzer updates within 90 days of commission written notice of acceptance.

**SUBCHAPTER C: VEHICLE INSPECTION AND MAINTENANCE; LOW INCOME VEHICLE  
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PROGRAM; AND EARLY ACTION COMPACT COUNTIES  
DIVISION 1: VEHICLE INSPECTION AND MAINTENANCE**

**[§114.52]**

**STATUTORY AUTHORITY**

The repeal is 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 rules 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 repeal is 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 repeal is 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; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the

authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 *et seq.*; and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The repeal of §114.52 is proposed pursuant to THSC, §382.216.

The proposed repeal implements THSC, Subchapter G, §§382.201 - 382.220, Vehicle Emissions.

**[§114.52. Early Participation Incentive Program.]**

[(a) Purpose. The early participation incentive program is to ensure that an adequate number of emissions inspection stations that provide acceleration simulation mode (ASM-2) testing are open to the public on the program start date.]

[(b) Eligibility. In order to be eligible to receive the incentive described in subsection (f) of this section, an emissions inspection station owner or operator must meet the following requirements.]

[(1) The emissions inspection station owner or operator must enroll and submit the information described in subsection (d) of this section by January 15, 2002.]

[(2) The emissions inspection station must be located in Dallas, Tarrant, Denton, Collin, or Harris County or in an adjacent county.]

[(3) The emissions inspection station must be open to the general public.]

[(4) The emissions inspection station must be a Texas Department of Public Safety certified official vehicle inspection station from the program start date and must continue ASM-2 emissions testing for five years following the program start date or until ASM-2 testing is terminated by the state.]

[(5) The ASM-2 testing equipment at the emissions inspection station must be operational by the program start date in order to be covered by this incentive program.]

[(6) The ASM-2 equipment must be certified for use in the Texas Inspection/Maintenance Program by the program start date in accordance with §114.51 of this title (relating to Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers).]

[(c) Program acceptance. The executive director will accept the first 1,000 eligible emissions inspection stations into the program. At the discretion of the executive director, additional stations may be accepted into the program to ensure adequate distribution of stations throughout the program area.]

[(d) Enrollment and documentation requirements. Emissions inspection station owners or operators who opt to participate in the incentive program described in this section must apply using a form designated by the executive director. The application must be received in complete form by the executive director by January 15, 2002. This form will require at a minimum the following information

and documentation:]

[(1) the emissions inspection station's name, location, mailing address, and other identifying information;]

[(2) the vendor and model of each ASM-2 piece of equipment to be used in participation in this program; and]

[(3) a copy of the signed contract with an equipment vendor for the purchase or lease of each piece of ASM-2 equipment by the program start date.]

[(e) Program areas beginning May 2003. For program areas that begin ASM-2 testing in May 2003 (Brazoria, Fort Bend, Galveston, Montgomery, Ellis, Johnson, Kaufman, Parker, and Rockwall Counties), the same incentive is offered subject to the requirements listed in this section. The enrollment period for these counties is October 15, 2002 through December 31, 2002. The executive director will accept the first 200 eligible emissions inspection stations into the program. At the discretion of the executive director, additional stations may be accepted into the program to ensure adequate distribution of stations throughout the program area.]

[(f) Incentive payment plan. Emissions inspection station owners or operators who are accepted into the program and who maintain their eligibility are eligible to receive a payment of \$675 per month to cover the remainder of the five-year period following the program start date if the ASM-2 testing requirement is terminated by state rule or statute during the first five years following the program start

date. Participating emissions inspection stations that have conducted more than 12,000 emissions tests at program termination are not eligible for payment.]

**SUBCHAPTER C: VEHICLE INSPECTION AND MAINTENANCE; LOW INCOME VEHICLE  
REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT  
PROGRAM; AND EARLY ACTION COMPACT COUNTIES  
DIVISION 2: LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND  
ACCELERATED VEHICLE RETIREMENT PROGRAM**

**§114.64**

**STATUTORY AUTHORITY**

The amendment is 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 rules 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 amendment is 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 amendment is 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; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 *et seq.*; and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The amendment is proposed pursuant to THSC, §382.210 which was amended by House Bill 1796 from the 81st Texas Legislature, 2009.

The proposed amendment implements THSC, §382.210.

**§114.64. LIRAP Requirements.**

(a) Implementation. Upon receiving a written request to implement a Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) by a county commissioners court, the executive director shall authorize the implementation of a LIRAP in the requesting county. The executive director and county shall enter into a grant contract for the implementation of the LIRAP.

(1) The grant contract must provide conditions, requirements, and projected funding allowances for the implementation of the LIRAP.

(2) A participating county may contract with an entity approved by the executive director for services necessary to implement the LIRAP. A participating county or its designated entity shall

demonstrate to the executive director that, at a minimum, the county or its designated entity has provided for appropriate measures for determining applicant eligibility and repair effectiveness and ensuring against fraud.

(3) The participating county shall remain the contracted entity even if the county contracts with another county or another entity approved by the executive director to administer the LIRAP.

(b) Repair and retrofit assistance. A LIRAP must provide for monetary or other compensatory assistance to eligible vehicle owners for repairs directly related to bringing certain vehicles that have failed a required emissions test into compliance with emissions requirements or for installing retrofit equipment on vehicles that have failed a required emissions test, if practically and economically feasible, in lieu of or in combination with repairs performed to bring a vehicle into compliance with emissions requirements. Vehicles under the LIRAP must be repaired or retrofitted at a recognized emissions repair facility. To determine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(1) the vehicle has failed a vehicle emissions test within 30 days of application submittal;

(2) the vehicle can be driven under its own power to the emissions inspection station or vehicle retirement facility;

(3) the vehicle is currently registered in and has been registered in the program county for the 12 months immediately preceding the application for assistance;

(4) the vehicle has passed the safety portion of the Texas Department of Public Safety (DPS) motor vehicle safety and emissions inspection as recorded in the Vehicle Inspection Report (VIR), or provide assurance that actions will be taken to bring the vehicle into compliance with safety requirements;

(5) the vehicle owner's net family income is at or below 300% [300 percent] of the federal poverty level; and

(6) any other requirements of the participating county or the executive director are met.

(c) Accelerated vehicle retirement. A LIRAP must provide monetary or other compensatory assistance to eligible vehicle owners to be used toward the purchase of a replacement vehicle.

(1) To determine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(A) the vehicle meets the requirements under subsection (b)(1) - (3) and (5) of this section;

(B) the vehicle has passed a DPS motor vehicle safety or safety and emissions inspection within 15 months prior to application submittal; and

(C) any other requirements of the participating county or the executive director are met.

(2) Eligible vehicle owners of pre-1996 model year vehicles that pass the required United States Environmental Protection Agency (EPA) Start-Up Acceleration Simulation Mode (ASM) standards emissions test, but would have failed the EPA Final ASM standards emissions test, or some other criteria determined by the commission, may be eligible for accelerated vehicle retirement and replacement compensation under this section.

(3) Notwithstanding the vehicle requirement provided under subsection (b)(1) of this section, an eligible vehicle owner of a vehicle that is gasoline powered and is at least 10 years old as determined from the current calendar year (i.e., 2010 [2007] minus 10 years equals 2000 [1997]) and meets the requirements under subsection (b)(2), (3), and (5) of this section, may be eligible for accelerated vehicle retirement and compensation.

(4) Replacement vehicles must:

(A) be in a class or category of vehicles that has been certified to meet federal Tier 2, Bin 5 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, *Federal Register* (65 FR [FedReg] 6698);

(B) have a gross vehicle weight rating of less than 10,000 pounds;

(C) be a vehicle, the total cost of which does not exceed \$25,000; and

(D) have passed a DPS motor vehicle safety inspection or safety and emissions inspection within the 15-month period before the application is submitted.

(d) Compensation. The participating county shall determine eligibility and approve or deny the application promptly. If the requirements of subsection (b) or (c) of this section are met and based on available funding, the county shall authorize monetary or other compensations to the eligible vehicle owner.

(1) Compensations must be:

(A) no more than \$600 and no less than \$30 per vehicle to be used for emission-related repairs or retrofits performed at recognized emissions repair facilities, including diagnostics tests performed on the vehicle; or

(B) based on vehicle type and model year of a replacement vehicle for the accelerated retirement of a vehicle meeting the requirements under this subsection. Only one retirement compensation can be used toward one replacement vehicle annually per applicant. The maximum amount toward a replacement vehicle, must not exceed:

(i) \$3,000 for a replacement car of the current model year or previous three model years, except as provided by clause (iii) of this subparagraph;

(ii) \$3,000 for a replacement truck of the current model year or the previous two model years, except as provided by clause (iii) of this subparagraph;

(iii) \$3,500 for a replacement hybrid vehicle of the current model year or the previous model year.

(2) Vehicle owners shall be responsible for paying the first \$30 of emission-related repairs or retrofit costs that may include diagnostics tests performed on the vehicle.

(3) For accelerated vehicle retirement, provided that the compensation levels in paragraph (1)(B) of this subsection are met and minimum eligibility requirements under subsection (c) of this section are met, a participating county may set a specific level of compensation or implement a level of compensation schedule that allows flexibility. The following criteria may be used for determining the amount of financial assistance:

(A) model year of the vehicle;

(B) miles registered on the vehicle's odometer;

(C) fair market value of the vehicle;

(D) estimated cost of emission-related repairs necessary to bring the vehicle into compliance with emission standards;

(E) amount of money the vehicle owner has already spent to bring the vehicle into compliance, excluding the cost of the vehicle emissions inspection; and

(F) vehicle owner's income.

(e) Reimbursement for repairs and retrofits. A participating county shall reimburse the appropriate recognized emissions repair facility for approved repairs and retrofits within 30 calendar days of receiving an invoice that meets the requirements of the county or designated entity. Repaired or retrofitted vehicles must pass a DPS safety and emissions inspection before the recognized emissions repair facility is reimbursed. In the event that the vehicle does not pass the emissions retest after diagnosed repairs are performed, the participating county has the discretion, on a case-by-case basis, to make payment for diagnosed emissions repair work performed.

(f) Reimbursements for replacements. A participating county shall ensure that funds are transferred to a participating automobile dealership no later than 10 [five] business days after the county receives proof of the sale, proof of transfer to a dismantler, and any administrative documents that meet the requirements of the county or designated entity. A list of all administrative documents must be

included in the agreements that are entered into by the county or designated entity and the participating automobile dealerships.

(1) A participating county shall provide an electronic means for distributing replacement funds to a participating automobile dealership once all program criteria have been met. The replacement funds may be used as a down payment toward the purchase of a replacement vehicle. Participating automobile dealers shall be located in the State of Texas. Participation in the LIRAP by an automobile dealer is voluntary.

(2) Participating counties shall develop a document for confirming a person's eligibility for purchasing a replacement vehicle and for tracking such purchase.

(A) The document must include at a minimum, the full name of applicant, the vehicle identification number of the retired vehicle, expiration date of the document, the program administrator's contact information, and the amount of money available to the participating vehicle owner.

(B) The document must be presented to a participating dealer by the person seeking to purchase a replacement vehicle before entering into negotiations for a replacement vehicle.

(C) A participating dealer who relies on the document issued by the participating county has no duty to confirm the eligibility of the person purchasing a replacement vehicle in the manner provided by this section.



